

Avoiding the “Bermuda Triangle” – Navigating the ADA, FMLA and Workers’ Comp Void

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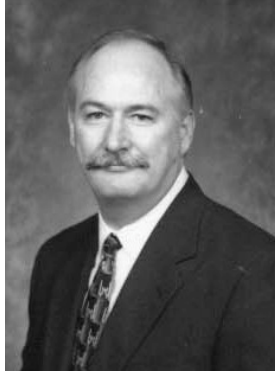
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Since literally the time of Columbus the mystery of the “Bermuda Triangle” has baffled scientists and other observers, who theorize that some unknown sinister force has been the cause of numerous disappearances and other strange phenomena in the area roughly from the Florida Keys to Bermuda to Puerto Rico. One such occurrence was the disappearance of US Navy Flight 19 off the coast of Ft. Lauderdale on December 5, 1945. Six Grumman Avenger torpedo bombers and their 27 crewmen disappeared without a trace after taking off on a routine training flight.

One theory of what happened to the ill-fated Flight 19 is that the flight leader, Lt. Charles Taylor, simply got lost, thinking he had gotten the flight east of the Florida Keys, instead of west of Ft. Lauderdale, the flight’s most likely position. Continuing east, thinking he would soon encounter the keys, Lt. Taylor, some would have it, led the flight out over the Atlantic Ocean,

where the six aircraft eventually lost communication, ran out of fuel, and went into the water.¹

A similar “lost in the fog” condition appears to occur in certain situations that befall employers and human resource managers, particularly where an employee has gone out on leave, seemingly never to return.

The “Situation” often begins with an anguished phone call from a client employer. The call may go something like this:

“Well, we have this employee who hurt himself at work – he went out on workers’ comp leave and won’t come back. He’s been gone ten months. I’m not sure what to do. I’ve been writing him letters asking him when he’s going to come back to work and he just says when he gets released by his doctor. Now I’m getting letters from his lawyer threatening me with a lawsuit if I take any action against him. I’ve had to hire a temp to fill in for him while he’s out and I need to fill that position. The job just isn’t getting done and the temp can’t cut it. I can’t fire him, can I? Isn’t that against the Workers’ Comp Act or Family Disabilities Leave Act or something?”

Employers and human resources managers in this situation are sometimes paralyzed by the fear that the employee will sue if the employer terminates the employee, or takes other adverse action to remedy the situation. Certainly no one can offer hope of being free from lawsuits, and depending on the employer’s location the fear of liability may be have more substance than in other locations. But where ever the employer is located it would appear that some navigational aids for employers to refer to as they plot a course through the legal haze might be helpful.

This paper will explore the legal issues raised by the employee who is out on leave for a workers’ compensation injury and either requests an indefinite

¹ The official history of Navy Flight 19 (the “Lost Patrol”) can be viewed at: <http://www.history.navy.mil/faqs/faq15-1.htm>.

leave or stays out on leave indefinitely. In many such cases, the employer is plunged into doubt and confusion as to how to handle such a situation, fearing a claim of retaliatory discharge under state workers' compensation laws, one example of which is the Texas Workers' Compensation Code §451 ("Section 451"),² a claim of discrimination under the Americans with Disabilities Act ("ADA")³ or interference with rights under the Family and Medical Leave Act ("FMLA").⁴ The dilemma faced by employers who are having problems with (i) absenteeism, (ii) employees on indefinite leave, (iii) employees who will not provide requested medical information supporting the leave, or (iv) employees who will not provide a projected date on which they intend to return to work, are troubling. Contributing to the employer or human resources manager's uncertainty is the fact that the ADA, the FMLA and often state workers' compensation laws appear to work in unison to protect the employee from any adverse employment action related to the leave. The purpose of this article is to set out a basic structure for approaching this quandary.

While it is true that the ADA, FMLA and workers' compensation appear to protect employees from adverse employment actions in certain circumstances, it is not true that an employer necessarily must surrender all control over employee absenteeism in every situation. The fact is that some clear thinking is in order as to exactly what situations are controlled by these laws, and which are not. By approaching the situation armed with well-designed and "neutrally applied" policies, and the proper analysis of the legal environment, an appropriate solution to the situation can often be reached.

² TEX. LAB. CODE ANN. §§ 451.001-.003 (Vernon 1996).

³ 42 U.S.C. §§ 12101-12213 (West 1995).

⁴ 29 U.S.C. §§ 2601-2654 (West 1999).

A. Untying the Knot: A Suggested Approach the Situation for Employers.

The “employee on indefinite workers’ comp leave” scenario raises issues under two Federal statutes, the ADA, FMLA and typically one State statute, the applicable State workers’ compensation act (as well as possibly others). It is therefore imperative in this situation that the employer analyze the fact situation under each of the statutes separately to determine the correct action to be taken under each one. The way to do this is to take each statute one at a time, and not to confuse issues that arise under one statute with those that arise under another. Accordingly, what follows is a brief review of the provisions of the ADA, FMLA and the applicable state workers’ compensation act that may pertain to the “indefinite leave” situation, followed by a suggested procedure by which to analyze the “indefinite leave” scenario.

(1) The First Step – Establish and Communicate a Reasonable, Uniformly Administered Nondiscriminatory Absence Control Policy. The first step in getting control of absences is to lay the foundation for dealing with them long before the situation occurs. Therefore the most important action for the employer is to carefully design, establish, communicate and uniformly administer a written, nondiscriminatory, neutral absence control policy. In essence, this step requires the employer to have a policy in place that has been communicated to employees that tells them, in essence – “You must be at work at the times appointed for you to be there or you must call your supervisor and tell him or her why you are absent and when you are going to return. If you are absent there must be some company authorized or legally mandated reason for the absence, and you must let us know what that reason is within certain time limits. The company provides leave for its employees as described elsewhere in

these policies, and a policy on Family and Medical Leave which is also described elsewhere. There is a maximum amount of leave you can take with this company for any reason; once you have used all available leave, if you are not at work during your normal working hours or shift, on a day off, vacation day, holiday or other approved paid or unpaid leave, then your employment with this company is terminated – or – you are considered to have voluntarily quit your employment with this company.” Obviously, this is not the actual language that would be used in the actual absence control policy, but this is generally the type of information that it is intended that such a policy would convey.

Any such absence control policy must incorporate two essential features: first, it must be neutral and second, it must be uniformly administered.

(a) “**Neutral**” means that the absence control policy is neutral on its face in that it applies in all situations other than leave required by law. In other words, the leave policy cannot apply only to leave due to a workers’ comp injury; in fact it is inadvisable for the absence control policy to mention any specific type of leave. The leave policy must apply equally to all employees in all situations, but should allow for leave required by statute. Thus, for example, the absence control policy must never be written so as to control only those absences caused by a workers’ compensation injury, or any other legally protected leave, such as jury duty.

(b) “**Uniformly administered**” means, in essence, that the employer makes no exceptions under the policy. This is definitely a situation where “no good deed goes unpunished.” Making an exception to

the absence control policy might later come back to haunt the employer when a subsequent employee, against whom the policy is now being strictly enforced, claims discriminatory treatment. Uniform nondiscriminatory enforcement of the neutral absence control policy is vital in order for it to be effective as a tool for controlling employee absences. For example, making exceptions to the leave policy for employees of one group or one individual while imposing strict enforcement on a second group or individual could actually result in the policy being used against the employer in a discrimination action.

(4) Types of Absence Control Policies.

- (a) **Maximum Leave Policy.** Such a policy might set forth the maximum amount of leave that will be permitted to any employee before his or her position will be terminated. For example, some employers have policies that provide that no more than a stated number of months of leave are available before an employee will be expected to return to work or face termination.
- (b) **No call, no show.** Other policies, sometimes known as “no call, no show” policies, subject an employee to termination for an absence from work for a stated number of days without calling in to explain the absence or showing up for work. The number of days of unexplained absence that will subject the employee to termination under a “no call, no show” policy is generally relatively short, normally no more than five working days, depending on the employer or industry practice. “No call, no show” provisions are often included in collective bargaining agreements.

(5) **Function of the Absence Policy.** The first and most obvious function of the absence control policy is to control employee absences, which would appear to be a desirable management goal. In the legal context however, generally, the absence control policy has a more specific role to play. Where an employer terminates or otherwise disciplines an employee under a uniformly administered nondiscriminatory absence control policy which does not otherwise interfere with legally protected leave, the employer is in a much better position to establish that the action was taken for a “legitimate nondiscriminatory business reason” that can serve as a defense to an allegation of discriminatory conduct. Note, however, that enforcement of a reasonable, neutral absence control policy may not serve as a defense to an action for retaliatory discharge under some state workers compensation laws.⁵ However, enforcement of such a policy may serve as a defense to an action under the ADA or FMLA, in appropriate circumstances.

(6) **Uniform Enforcement in the Post-Reeves Environment.** No discussion of discrimination of any type would be complete without acknowledging the effect that the Supreme Court’s decision in *Reeves v. Sanderson Plumbing Products, Inc.*⁶ Establishment and uniform enforcement of neutral employer policies has become even more important since *Reeves*, in which the Court rejected the “pretext-plus” approach in favor of “pretext only” in applying the “burden-shifting” analysis used for determining whether a plaintiff in an employment

⁵ See footnote 111, *infra* and accompanying text.

⁶ 530 U.S. 133 (2000); *see also* *Blow v. City of San Antonio*, 236 F.3d 293 (5th Cir. 2001) (Applying *Reeves*, the Court held that the jury could infer discriminatory intent from evidence that employer’s proffered reason for failure to promote employee was false), *rehearing and rehearing en banc denied*, 250 F.3d 745 (5th Cir. 2001).

discrimination lawsuit has adduced sufficient evidence to escape summary judgment and proceed to trial.⁷

The “burden-shifting analysis” serves as a backdrop for claims of discrimination under Title VII, the Age Discrimination in Employment Act of 1967 (“ADEA”), the ADA, retaliation claims under FMLA, retaliation claims under ERISA, and most other statutes under which an employee may bring a claim of discrimination. Under this analysis, when an employee alleges unlawful discrimination, the initial burden is on the employee to demonstrate a *prima facie* case that the employer violated the employee’s rights under the statute. Generally, in employment discrimination suits, the *prima facie* case is composed of three elements: (1) the plaintiff was in the protected classification, (2) the plaintiff was qualified for the position, (3) the employer subjected the employee to an adverse employment action because of the plaintiff’s protected characteristic.⁸

If the employee can show a *prima facie* case, then the burden shifts to the employer to articulate a reasonable nondiscriminatory reason for its actions. If the employer can articulate such a reason, then the burden shifts back to the employee to produce competent summary judgment evidence that the employer’s stated reason was false. If so, the court (or jury) may choose to believe that the employer’s stated reason was a pretext for discrimination, thus allowing the plaintiff to escape summary judgment. Thus, *Reeves*’ impact makes it more important than ever that employers apply their carefully designed

⁷ Often referred to as the “McDonnell Douglas burden-shifting standard,” this approach to analyzing a defendant’s motion for summary judgment in employment discrimination lawsuits originated in the case of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

⁸ For example, see *White v. York Int’l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995), for the elements of an ADA discrimination lawsuit.

employment and employee absence control policies strictly and impartially.

With the uniform nondiscriminatory absence control policy in the background, an overview of the three statutes that seem to cause much the confusion may be helpful.

B. Americans With Disabilities Act (“ADA”).

The ADA⁹ was enacted on July 29, 1990 to eliminate discrimination in employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services against “individuals with disabilities.” It is important to note that the policies underlying the ADA were intended to allow persons with disabilities to fully participate in American society, to function independently and to attain economic self-sufficiency.¹⁰ Essentially the ADA was designed to permit disabled persons to become productive members of the workforce.¹¹ Thus, the idea behind the ADA, in contrast to the FMLA, is to permit disabled persons to work, not to take time off. However, as will be seen, the ADA requires an employer to provide a “qualified individual with a disability” who requests it with accommodation as long as the requested accommodation is reasonable and will not result in undue hardship to the employer. When the requested accommodation is a leave of absence, the analysis of whether such accommodation would be reasonable or impose an undue hardship is similar to that of other ADA cases.

(1) **Employment Discrimination Under the ADA: A Primer** Subchapter I of the ADA covers employment discrimination, and is applicable to

⁹ 42 U.S.C. §§ 12101-12213 (West 1995).

¹⁰ *Id.* § 12101(8).

employers, employment agencies, labor organizations and joint labor-management committees. The ADA prohibits a covered employer from discriminating against a qualified individual with a disability because of the disability with regard to job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions and privileges of employment.¹² “Discriminate” includes not making a reasonable accommodation of the known physical or mental limitations of a disabled applicant or employee, unless the employer can demonstrate that the accommodation would impose a undue hardship on the employer’s business operations.¹³

(2) **Employers Covered:** The ADA generally applies to employers engaged in interstate commerce and who employ 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.¹⁴

(3) **Disability:** A “disability” is defined under the ADA as: (i) a physical or mental impairment that substantially limits one or more major life activities of the individual, (ii) a record of such impairment, or (iii) being regarded as having such an impairment.¹⁵

(a) **Nature of the Impairment.** The ADA is silent as to whether the impairment must be permanent, or whether a temporary impairment will qualify. Some courts have held that short-term conditions will not qualify as a disability under the ADA.¹⁶

¹¹ *Walsh v. United Parcel Service*, 201 F.3d 718, 727 (6th Cir. 2000).

¹² 42 U.S.C. § 12112(a) (West 1995).

¹³ *Id.* § 12112(b)(5)(A).

¹⁴ *Id.* §§ 12111(2), 12111(5), § 12102(2).

¹⁵ *Id.* § 12102(2). “Being regarded as having such an impairment” means that the employer mistakenly believes the employee has such an impairment.

¹⁶ *McDonald v. Pennsylvania*, 62 F.3d 92, 95 (3rd Cir. 1995).

- (1) **Mitigating measures.** The Supreme Court has held that the impact of the impairment on the individual must be considered together with the effect of all available “mitigating or corrective measures, such as glasses to control a vision impairment, or insulin to control diabetes.”¹⁷ In addition, in order to qualify as a disability under the ADA by substantially limiting the individual in the major life activity of ‘working’, the impairment must limit the individual (or the individual must be regarded as being limited by the impairment) in performing a class of jobs, not a single job or narrow range of jobs.¹⁸
- (2) **Conditions with no symptoms still covered.** On the other hand, a disease or condition such as HIV, that limits an individual in a major life activity, though not presently causing symptoms, will qualify as a “disability.”¹⁹
- (3) **Individualized inquiry.** “[W]hether a person has a disability under the ADA is an individualized inquiry.”²⁰ The courts may not generalize as to whether certain conditions or diseases automatically constitute a disability. Thus, the same condition in one person may rise to a “disability” but not in another.²¹

(b) **“Major life activity”** is defined by the DOL Regulations as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and

¹⁷ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-483 (1999); *See Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999).

¹⁸ *Sutton*, 527 U.S. at 491-492.

¹⁹ *Bragdon v. Abbott*, 524 U.S. 624, 639-640 (1998), *cert denied*, 526 U.S. 1131 (1999).

²⁰ *Sutton*, 527 U.S. at 483.

²¹ *See, e.g., Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 692 (2002) (Disability requires a condition that restricts individual from performing tasks that are of “central importance” to

working.” The Supreme Court has further defined reproduction as a “major life activity” under the ADA.²² The question of whether an individual has a disability is not determined by the mere fact that the individual has an impairment, condition or ailment. Rather, whether the condition constitutes a “disability” under the ADA is determined by an analysis of the effect of the condition on individual’s major life activities.²³ Working may be a major life activity, but only if the limitation substantially restricts with the individual’s ability to work in a classification of jobs or a broad range of jobs in a single classification, as opposed to the average person with comparable skills, training and abilities.²⁴

- (c) A “**qualified individual with a disability**” is an individual with a disability who can perform the “essential functions” of an employment position that the individual holds or desires, with or without “reasonable accommodation.”²⁵ If the individual can perform all the essential functions of the position with reasonable accommodation, then the employer who terminates the employee may be in violation of the ADA unless the employer has a reasonable nondiscriminatory business reason for the action. The “qualified individual with a disability” is the person who is protected by the ADA. The mere fact that an individual has an impairment, even if it constitutes a disability under the ADA, does not mean that the individual is protected.

daily life, not merely manual tasks related to a specific job. Carpal tunnel syndrome therefore not considered a disability *per se*; rather, individualized, case-by-case inquiry is required).

²² See *Bragdon*, 524 U.S. at 639.

²³ 29 C.F.R. § 1630; *Taylor v. Principal Fin. Group., Inc.*, 93 F.3d 155, 164 (5th Cir. 1996) (bipolar disorder is not *per se* a “disability”).

²⁴ 29 C.F.R. § 1630.2(j)(e)(i); *Olson v. General Elec. Aerospace*, 101 F.3d 947, 952 (3rd Cir. 1996).

²⁵ 42 U.S.C. § 12111(8) (West 1995).

(d) **“Essential functions”** of a position is a concept generally defined by the employer. Thus, in order for an employer to be in a position to defend against an ADA claim on the basis that the employee was not able to perform the essential functions of the position with or without “reasonable accommodation,” the employer must be able to prove up the essential functions of a that position either through existing policies and/or job descriptions. The ADA provides that the employer’s “judgment” will be given consideration as to what functions of a job are “essential” and that written job descriptions that are used by an employer for advertising or interviewing applicants will be considered as evidence of the job’s “essential functions.”²⁶

(e) **Regular, prompt attendance as an essential function:** If regular, prompt attendance is an essential function of a position, the employer should be able to point to a written employee policy or job description that makes regular, punctual attendance a job requirement of the position in order to defend an allegation of failure to make reasonable accommodation to a qualified individual who requests leave as an accommodation. In addition, the employer should be able to make a logical connection between the regular, prompt attendance requirement and performance of the substantive functions of the position. If regular, prompt attendance is not an essential function of the position, for example, if the work can be accomplished from home, or if the employee is on a “flex-time” schedule, then it may be difficult to assert that leave is not a reasonable accommodation. While some cases have

²⁶ *Id.* § 12111(8).

held that regular attendance is an “implied essential function” of most jobs,²⁷ it may be wise not to rely too heavily on these holdings in the current technological environment, when many employees can claim to be able to perform their jobs reasonably well from home.²⁸

(f) **“Reasonable accommodation”** is a concept at the very heart of the ADA. Since an employer may not discriminate against a “qualified individual with a disability” who can perform the essential functions of the position held or desired with or without “reasonable accommodation,” many cases turn on the question of whether the employee’s proposed accommodation of a disability was reasonable. The question of what is “reasonable” is basically one for the finder of fact to decide.

(1) The ADA provides that “reasonable accommodation” may include:

²⁷ *Corder v. Lucent Technologies, Inc.*, 162 F.3d 924, 928 (7th Cir. 1998) (regular attendance an essential function of an account support representative); *Nowak v. St. Rita High School*, 142 F.3d 999, 1003 (7th Cir. 1998) (same as to a school teacher); *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998) (loan officer terminated for excessive absences who was member of team and who reviewed confidential financial documents which could not be taken home was not “otherwise qualified” for the position under the ADA); *Rogers v. Int’l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996)(ability to appear for work is essential function of any government job); *Tyndall v. Nat’l Educ. Centers, Inc. of Cal.*, 31 F.3d 209, 218 (4th Cir. 1994 (“A regular and reliable level of attendance is a necessary element of most jobs.”); *Matzo v. Postmaster General*, 685 F.Supp. 260, 263 (D.D.C. 1987), *aff’d*, 861 F.2d 1290 (D.C. Cir. 1988) (regular attendance is an essential function); *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 899 (7th Cir. 2000) (regular timely attendance essential function of tool and die maker’s job); *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101-1102 (8th Cir. 1999)(employer’s detailed attendance policies and procedures were evidence that attendance was essential function of job); *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001) (“[W]e will not say that attendance is an essential function of every employment position, [but the plaintiff’s assembly line job] can easily be added to the ‘attendance required’ list. ... [M]aintenance and production functions cannot be performed if the employee is not at work.”); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) (holding that “coming to work regularly” is an “essential function”); *Jackson v. Veterans Admin.*, 22 F.3d 277, 279-80 (11th Cir. 1994) (holding that an employee with a history of sporadic unpredictable absences was not “otherwise qualified” for the position).

²⁸ *Ward v. Massachusetts Health Research Institute, Inc.*, 209 F.3d 29, 36 (1st Cir. 2000) (regular punctual attendance as essential function of data entry clerk not presumed).

- (a) making existing facilities used by existing employees “readily accessible and usable” by disabled employees, and
- (b) “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.”²⁹

(2) The ADA was substantially modeled after the 1973 Rehabilitation Act, which prohibited discrimination by certain Federal contractors on the basis of disability. The Rehab Act, as it is known, also includes a “reasonable accommodation” requirement. Cases arising under the Rehab Act may be cited as precedent on the issue of what constitutes “reasonable accommodation” under the ADA. Thus, there is more than a quarter of a century of case law precedent on this issue.

- (g) The “**interactive process**” and the employee’s duty to request accommodation.

Boiled down to it’s essence, the rule under the ADA is that an employer cannot be required to accommodate a limitation that it does not know about. The employee’s limitation, and the need for accommodation, must either be obvious to the employer or made known to the employer and a request for accommodation made before the employer’s duty to explore whether reasonable accommodation can be made arises. The regulations promulgated under the ADA impose a duty on the employer and employee to

²⁹ 42 U.S.C. § 12111(9) (West 1995).

engage in an informal “interactive process” in reaching a reasonable accommodation. This process commences only when the employer is made aware that the employee has a physical or mental condition that requires accommodation.³⁰ Most of the Federal Circuits that have addressed the question have ruled that, absent unusual circumstances, an employee who never made the employer aware of the disability and requested accommodation, cannot recover for discrimination under the ADA “lest a disabled employee keep his disability a secret and sue later for failure to accommodate.”³¹

Once the employee has made the employer aware, or once the employer has otherwise become aware, that the employee has a disability under the ADA and accommodation is needed, then the employer has a duty to engage in the interactive process in a good faith effort toward finding a reasonable accommodation. The Fifth Circuit has held that the duty to engage in the interactive process is triggered by a request by the employee for accommodation.³²

³⁰ 29 C.F.R. § 1630.2(o)(3).

³¹ *Jovanovic*, 201 F.3d at 899, quoting *Beck v. University of Wis. Bd. Of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996); see also *Scheer v. City of Cedar Rapids*, 956 F.Supp. 1496, 1500 (N.D. Iowa 1997) (employee generally has responsibility to inform employer of disability and need for accommodation), citing DOL Reg. at 29 C.F.R. § 1630.9; *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 163-164 (5th Cir. 1996) (no ADA liability if employer did not know of employee’s limitation); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 318-319 (5th Cir. 1997) (employer not required to accommodate alcoholic employee who insisted he required no work concession); *Lawrence v. Nat’l. Westminster Bank*, 98 F.3d 61, 69 (3rd Cir. 1996) (employee has duty to inform employer of existence of impairment before duty to engage in interactive process arises); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046 (6th Cir. 1998) (holding that EEOC placed the initial burden of requesting accommodation on the employee; employer not required to speculate as to the disability or need or desire for accommodation).

³² *Loulseged v. Akzo Nobel, Inc.*, 178 F.3d 731, 735 (5th Cir. 1999); *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998) (when the nature of disability, resulting limitations and necessary accommodation are uniquely within knowledge of employee, employee cannot remain silent and expect employer to bear initial burden of identifying disability and suggesting appropriate accommodation), citing *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d at 165 (5th Cir. 1996); see also *Jovanovic*, 201 F.3d at 894.

“Undue hardship” means, generally, an action requiring significant difficulty or expense.³³ Under the ADA, an accommodation is unreasonable and need not be provided to the employee if it would impose an undue hardship on the employer. The factors to be considered in determining whether the employer will experience undue hardship in accommodating an employee’s disability are:

- (1) the nature and cost of the accommodation,
- (2) overall financial resources, employment, effect, and impact on the facility or facilities involved,
- (3) overall financial resources, size of business, and number, type and location of facilities of the employer, and
- (4) the type of operations, including the composition, structure and functions of the workforce, the geographic separateness, and administrative or fiscal relationship of the affected facility to the employer.³⁴

(4) Leave as a “Reasonable Accommodation” Under the ADA.

- (a) **In General.** Leave may be a reasonable accommodation under the ADA. The courts have held that where the employee is a “qualified individual with a disability” and requests leave to recuperate from an injury or illness that is or will be of a definite and relatively short duration, and if the employer cannot otherwise demonstrate the accommodation is unreasonable or that an “undue hardship” will result, then such leave may be considered a reasonable accommodation under the ADA. For

³³ 42 U.S.C. § 12111(10)(A) (West 1995).

example, in *Cehrs v. Northeast Ohio Alzheimer's Research Institute*,³⁵ the plaintiff requested an additional one-month of leave after a leave of absence of eight weeks to complete a course of treatment for Psoriasis. The court held that a genuine issue of material fact (allowing a trial to be held on the issue) existed as to whether the accommodation the employee had requested was reasonable.

(b) Extended or Indefinite Leave as a “Reasonable Accommodation” of a Disability.

However, a leave that was over an extended time period and of indefinite duration, with no reasonable expectation or indication that the individual would return to work in the identifiable future, was held to be “objectively unreasonable” in *Walsh v. United Parcel Service*.³⁶ Gary Walsh was a “management pilot” for UPS who, following a car accident in which he broke his wrist and fractured his spine, was unable to continue his duties for over a year, during which time he was on paid leave. After refusing to attend a physical requested by UPS for the purpose of determining whether he could return to flight status or work in a non-flying position, and after Walsh’s failure to provide medical information or a medical opinion as to a definite date on which he would be released to return to work, both of which were repeatedly requested by UPS over a six month period, UPS terminated Walsh’s employment. Walsh subsequently sued for discrimination under the ADA. The District Court granted summary judgment for UPS and the Sixth Circuit affirmed, holding that in order to be reasonable, an accommodation of leave must be for a “definite and

³⁴ *Id.* § 12111(10)(B).

³⁵ 155 F.3d 775, 778 (6th Cir. 1998).

³⁶ 201 F.3d 718, 727-728 (6th Cir. 2000).

relatively short” period of time, “accompanied by a reasonable prospect of recovery. “

(1) In *Walsh*, the court held, quoting *Monette v. Electronic Data Systems Corp.*:³⁷

[E]mployers simply are not required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future. Moreover, employers are not required to create new positions for disabled employees in order to reasonably accommodate the disabled individual.³⁸

(2) The *Walsh* court specifically held:

We therefore hold that when, as here, an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation.³⁹

In an accompanying footnote, the court buttressed its holding with a cost/benefit analysis, reasoning that after so long a leave, further leave with no end in sight placed too high a burden on the employer with little chance of an offsetting benefit for either employer or employee.

When both the time and likelihood of return to work cannot be roughly quantified after a significant period of leave has already been granted, the costs of the requested additional leave outweigh the benefits. Some Courts have explained the inquiry into the reasonableness of an accommodation as involving a benefit burden type analysis. Such an analysis could be employed here. The employer incurs additional administrative costs and more importantly is forced to

³⁷ 90 F.3d 1173, 1187 (6th Cir. 1996).

³⁸ *Walsh*, 201 F.3d at 725.

³⁹ *Id.* at 727.

shoulder long-term uncertainty regarding the composition of its work force. Further, during the extended leave, the employee loses valuable work skills, and if the employee ever returns, he or she will likely require significant retraining. When this is balanced against the potential benefit derived from the employee returning to work, which must be significantly discounted by the obvious indeterminacy involved, the cost exceeds the likely benefit.⁴⁰

(3) The Federal Circuits which have considered this issue have generally held that in order to constitute a “reasonable accommodation” under the ADA, the requested leave must be of reasonably short and definite duration accompanied by a reasonable prospect of recovery, and that a request for a leave of indefinite duration is *per se* unreasonable as an accommodation.⁴¹

(4) However, not all situations in which an employee requests additional leave following an already extended leave will be considered as an unreasonable accommodation request *per se* under the ADA. In *Garcia-Ayala v. Lederle Parenterals, Inc.*,⁴² the employee, who was undergoing treatment for breast cancer, following a paid leave of one year, requested additional leave of about a month to complete recovery and return to work. The employer refused and terminated Ms. Garcia-Ayala. The employer asked the court to establish a rule by which a

⁴⁰ *Id.* at 727-728, n.5 (citations omitted).

⁴¹ *Jovanovic*, 201 F.3d at 899 (erratic attendance makes it impossible for employee to perform essential functions of position, therefore employee is not a protected individual under ADA); *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 9 (2nd Cir. 1999); *Myers v. Hose*, 50 F.3d 278, 280 (4th Cir. 1995); *Rogers v. Int’l Marine Terminals, Inc.*, 87 F.3d 755, 759-760 (5th Cir. 1996); *Nowak v. St. Rita High School*, 142 F.3d 999, 1004 (7th Cir. 1998); *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225-26 (11th Cir. 1997).

⁴² 212 F.3d. 638, 642 (1st Cir. 2000).

requested leave of more than one year is *per se* unreasonable under the ADA. This the court declined to do, holding that whether a requested accommodation is unreasonable requires an “individual assessment,” and that in any event, the employer failed to put on any evidence of unreasonable accommodation. In the meantime, the court relied on the fact that the employer had been using temporary workers to perform the essential functions of the plaintiff’s position while she was on leave, negating, in the court’s view, an argument that additional leave would impose an “undue hardship” on the employer. Given the fact that the additional leave requested was of short, definite duration, and that the employer put on no evidence of undue hardship, the court reversed summary judgment for the employer and remanded the case for trial.

(c) Request to Work from Home or Part Time Work Distinguished From Indefinite Leave.

A request for indefinite leave as an accommodation under the ADA should be distinguished from a request to “telecommute” or work from home or a request for part-time work for an indefinite period, where such an accommodation would be otherwise reasonable under the ADA. In any such situation, the employee must be able to carry his or her burden of demonstrating that they can perform the “essential functions” of the position in such circumstances.⁴³ On the other hand, the employer may have a difficult time arguing that the requested accommodation to work

⁴³ *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 335-336 (2nd Cir. 2000) (request for part time work raised issue of fact allowing plaintiff to overcome summary judgment as to whether requested accommodation was reasonable).

from home is unreasonable or will impose a hardship where the employer has a “telecommuting” policy or allows other employees to work from home.⁴⁴

(d) **Erratic, Unexplained Absences.** The courts have also held that an employer may discharge an employee under its regular attendance policy for unexplained erratic attendance without violating the ADA.⁴⁵ This situation may be resolved under the uniform enforcement of the employer’s neutral absence control policy, but in this case the court decided the issue on the theory that the employee, by merely absenting himself from work without explanation, was not entitled to protection under the ADA even if the absences were the result of an otherwise protected disability. *Id.* Still, it is important that the employer have a neutral absence control policy in place in order to provide the framework for the termination or other discipline. In addition, in order to succeed in such a case the employer must be able to show that regular and timely attendance is an essential function of the position.

(e) **Where Regular Attendance Not an Essential Job Function.** Note that if regular, punctual attendance is not an essential function of the job, or if the employee can demonstrate that he or she can perform the essential functions of the job working at home, then the employer may have a duty to accommodate such a request unless an “undue hardship” can otherwise be shown.⁴⁶ In *Norris*, the court noted that under the DOL Regulations, reasonable accommodation may include “job restructuring, part-time, or

⁴⁴ See *Humphrey v. Memorial Hosps. Ass’n*, 239 F.3d 1128, 1137 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 550.

⁴⁵ *Jovanovic*, 201 F.3d at 899.

modified work schedules.”⁴⁷ Therefore, allowing an employee to work at home may be a reasonable accommodation under the ADA if the employee can perform the “essential functions” of the position from home, or partly at home with part-time in the office.⁴⁸

Even more to the point is *Humphrey*, a case that received some notoriety as it involved a medical transcriptionist who suffered from obsessive-compulsive disorder (“OCD”) which the court pointed out had been recently portrayed in the hit film “As Good As It Gets.”⁴⁹ Ms. Humphrey’s OCD manifested itself as rituals surrounding the process of getting ready to go to work, involving repeated bathing, dressing, grooming her hair, and getting ready to go to work, a process which could take all day. Indeed, Ms. Humphrey found sometimes that by the time she was ready to go to work, it was quitting time. The plaintiff at first rejected, and then later accepted, the employer’s proffered accommodation of flex time, but still had problems getting in to work, even when the employer provided her with an arrangement whereby she had only to be at work during some eight hour time period during a 24-hour day. Even this proved insufficient. The employer had a policy of allowing medical transcriptionists to work from home, but denied the plaintiff’s request because she was being disciplined for attendance. After the plaintiff’s psychiatrist

⁴⁶ *Norris v. Allied-Sysco Food Services, Inc.*, 948 F.Supp. 1418, 1431-1432 (N.D. Cal. 1996).

⁴⁷ 42 C.F.R. § 12111(9).

⁴⁸ *Norris*, 948 F.Supp. at 1432, citing *Langdon v. Dept. of Health & Human Serv.*, 959 F.2d 1053, 1060-61 (D.C. Cir. 1992).

⁴⁹ *Humphrey*, 239 F.3d at 1130-1133.

requested leave to treat her OCD, plaintiff was fired following two more unexcused absences.

The court found that Ms. Humphrey was an individual with a disability under the ADA, and that OCD can be a disability under the ADA if it substantially interferes with the major life activity of caring for oneself. The court further held that Ms. Humphrey was a qualified individual with a disability because the only negative comments were about her absenteeism, which was caused by the impairment. The court further held that allowing her to work at home would have been a reasonable accommodation, particularly since the employer had a policy allowing other employees in the same position to do so. Indeed, the court held that Attendance was not an “essential job function” due to work at home policy. In this case, the court held that the interactive process broke down in that the defendant had an affirmative duty to explore methods of accommodation such as at-home work. Indeed, the defendant MHA never even claimed that the requested accommodation would create an “undue hardship.” As for the leave requested by Ms. Humphrey’s psychiatrist to treat her OCD, the facts of the case indicate that the request for leave was not of any definite duration, rather the plaintiff’s psychiatrist merely requested leave to “treat the condition” without specifying how long it would take. The court simply did not address the “short definite duration” aspects of the requested leave, but merely held that that employee does not have to demonstrate that the leave is certain or even likely to be successful to show that leave is a reasonable accommodation under the ADA.

Certainly, *Humphrey* is an illustration that employers cannot take for granted the notion that attendance is an essential function of every job, or that an extended leave is not a reasonable accommodation under the ADA.

C. The Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act of 1993 (“FMLA”) requires certain employers with 50 or more employees to provide up to 12 weeks of unpaid leave in the case of a serious health condition of the employee, that of certain family members, or to care for a newborn or newly adopted child. Although apparently simple enough, there are a myriad of conditions which must be met before an employee is eligible for FMLA leave.

In contrast to the ADA’s underlying purpose as a pro-work statute, the FMLA is intended to protect an employee’s right to take unpaid leave under certain circumstances, while receiving protection for their job and benefits.

The FMLA is a detailed statute with extremely complex regulations. Accordingly, the FMLA is best analyzed and applied based upon a careful analysis of the Final Regulations promulgated for enforcement by the Department of Labor (“DOL”). It is these regulations, which became final on April 6, 1995, that govern current leave situations under the FMLA.

(1) **Employers Covered:** An employer engaged in commerce or in an industry or activity affecting interstate commerce that employs 50 or more employees⁵⁰ on each working day during each of the 20 or more

⁵⁰ Contrast this threshold requirement of the FMLA, which requires an employer to employ 50 or more employees, with that of the ADA, which applies to employers with 15 or more employees.

calendar work weeks in the current or preceding calendar year, or its successor-in-interest, and any public agency (without regard to the number of employees employed).

For purposes of counting employees, an employer is considered a separate identity unless the employer is a part of an “integrated employer”. If this test is met, employees of all the entities will be counted as being employed by a single employer for purposes of FMLA.

Corporate officers “acting in the interest of an employer” are treated as an employer and therefore are individually liable for violations of FMLA.⁵¹

(2) Employee’s eligibility:

An “eligible employee” is one employed by a covered employer and who:

- (a) has been employed for at least 12 months, as of the date of the requested leave;
- (b) has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and
- (c) is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

The 12 months of employment need not be consecutive. Employment for any part of a week including any periods of paid or unpaid leave (sick leave or vacation) during which other benefits or compensation are provided (e.g., workers’ compensation, group

health plan benefits, etc.) counts as a whole week. For purposes of determining whether intermittent employment qualifies as “at least 12 months,” 52 weeks of employment is deemed employment for 12 months.

The determination of whether an employee has met the requisite number of hours to be eligible for FMLA leave is based upon the number of hours an employee has worked for the employer within the meaning of the Fair Labor Standards Act (“FLSA”). If accurate records of hours worked are not kept, employers have the burden of showing that the employee has not met the eligibility requirements. If an employer cannot meet this burden then the employee is deemed to have met the test.

Eligibility determinations should be based upon the period prior to the employee’s request for FMLA leave.⁵² However, the regulations further provide that if the employer determines that the employee is not eligible for FMLA leave, even if the employee does not meet the basic FMLA eligibility requirements, the employer must notify the employee of the ineligibility prior to the date the requested leave is to commence, or the employee will be deemed eligible.⁵³

⁵¹ 29 C.F.R. § 825.104.

⁵² 29 C.F.R. § 825.110.

⁵³ 29 C.F.R. § 825.110(d). This portion of the regulation has been held invalid by the Eleventh Circuit as an impermissible extension of the eligibility rules under the FMLA. *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 795-796 (11th Cir. 2000). However, since other Federal Circuits have not addressed this issue, employers in those Circuits should follow the regulations.

(3) Qualifying Reasons for FMLA Leave:

An eligible employee is entitled to take up to 12 weeks of unpaid leave during a 12 month period, under the FMLA, in the following four circumstances:

- (a) for the birth of a son or daughter, and care for the newborn child;
- (b) for placement with the employee of a son or daughter for adoption or foster care;
- (c) to care for the employee's spouse, son, daughter, or parent with a serious health condition; and
- (d) because of a serious health condition that makes the employee unable to perform the functions of the employee's job.⁵⁴

Circumstances may require that FMLA leave be granted before the birth, placement, or adoption of a child takes place. And FMLA leave is equally available to male and female employees. For purposes of these qualifying reasons, foster care is 24-hour care for children in substitution for, and away from, their parents or guardians. For foster care to be covered by the FMLA, there must be some

⁵⁴ 29 C.F.R. § 825.112. The ability of an employee to take leave under the FMLA turns upon certain circumstances that may exist with regard to other family members. Under the regulations these terms are defined as follows: "Spouse" means a husband or wife recognized under state law where the employee resides, including common law marriage if recognized. The preamble to the final regulations states that, by virtue of the statutory definition which specifies "husband or wife", it is the intent of this provision that same sex marriages are not included, even if recognized under state law. "Parent" means a biological parent or an individual standing "in loco parentis" to the employee, but does not include in-laws. "Son or daughter" means a biological, adopted, or foster child, step-child, legal ward, or child of a person standing "in loco parentis", under the age of 18 or if older, "incapable of self-care because of a mental or physical disability." For purposes of the FMLA "incapable of self-care" is defined the same as under ADA; namely, that an individual requires active supervision or assistance in engaging in "activities of daily living" (grooming, hygiene, bathing, dressing, etc.) or "instrumental activities of daily living" (cooking, cleaning, shopping, using public transportation, etc.). "Physical or mental disability" means a physical or mental impairment that substantially limits one or more major life activities, as defined in the DOL regulations under the ADA. *See* 29 C.F.R. § 1630.2 (h-j). The employer may require reasonable documentation or statement of family relationship in considering a request for family leave. 29 C.F.R. § 825.113.

involvement of the State as opposed to the potential for agreements privately between parents or guardians and persons seeking to provide foster care.⁵⁵

Employees who have been laid-off are not entitled to FMLA leave until they return to work. However, once an employee does return to work, an eligible employee is immediately entitled to further FMLA leave for qualifying reasons.

FMLA leave may be granted to attend substance abuse counseling and treatment. However, the FMLA does not prevent an employer from terminating an employee who has violated an established, communicated policy providing for termination for substance abuse. FMLA is also available to care for an immediate family member who is receiving substance abuse treatment.⁵⁶

(4) “Serious health condition:”

A “serious health condition” is defined as an illness, injury, impairment or physical or mental condition involving, in effect, six situations. These are:

- (a) any situation resulting in in-patient care (an overnight stay in a hospital, hospice or residential medical facility), including any period of incapacity (which is defined to mean the inability to work, attend school or perform other regular daily activities due to the condition, its treatment or recovery) and subsequent related treatment, or
- (b) continuing treatment by a health care provider in the following situations:

⁵⁵ 29 C.F.R. § 825.112(e).

- (1) a period of incapacity of more than three (3) consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves two (2) or more visits to the health care provider or treatment on at least one occasion resulting in a regimen of continuing treatment under supervision of the health care provider;
- (2) incapacity due to pregnancy or for prenatal care;
- (3) any period of incapacity or treatment due to a chronic serious health condition;
- (4) a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, requiring continuing supervision of but not necessarily treatment by a health care provider (e.g., Alzheimer's, stroke, terminal disease), or
- (5) any period of absence required to receive multiple treatments by a health care provider or provider of health services under orders of or referral by a health care provider (e.g., chemotherapy, radiation, kidney dialysis, physical therapy, or severe arthritis).

For purposes of this provision, “incapacity” means inability to work, attend school or perform other regular daily activities because of the condition. “Treatment” includes examinations but not routine examinations (physical, eye, or dental) in the absence of the other factors. Generally, cosmetic treatments are not included unless in-patient care is required or unless complications develop. The final

⁵⁶ 29 C.F.R. § 825.112(g).

regulations specify that such conditions as the common cold, flu, ear aches, upset stomach, minor ulcers, headaches, other than migraine, routine dental or orthodontist problems, periodontal disease, etc., generally are not “serious health conditions” unless complications arise.⁵⁷ However, mental illness resulting from stress or allergies may be a serious health condition provided that all other conditions of the section are satisfied.

Substance abuse may be a serious health condition if the other requirements are met. However, absence because of the employee’s use of the substance, rather than for treatment, does not qualify for FMLA leave.

Absences caused by incapacity as described in paragraph (2)(a) above can qualify for FMLA leave even if the absence does not last more than three (3) days. Examples include employees who may suffer from an asthma attack or morning sickness arising out of pregnancy, which impede the employee’s ability to report to work.⁵⁸

(5) Leave may be intermittent or on “reduced leave schedule:”

An employee may take FMLA leave “intermittently or on a reduced leave schedule.” Intermittent leave is time taken in separate blocks of time due to a single qualifying reason. Reduced leave is a leave schedule that reduces the employee’s usual number of working hours per workweek, or hours per workday. In order to qualify for

⁵⁷ 29 C.F.R. § 825.114(c). However, the flu was held to be a “serious health condition” in *Miller v. AT&T*, 250 F.3d 820, 831 (4th Cir. 2001). Relying on the regulation’s language that the flu is not “ordinarily” a “serious health condition,” the court held that where the regulation’s requirement of (i) a condition that lasted more than three days and (ii) the employee was under the care of a physician and required at least two visits for “treatment,” where one of the visits was for follow-up and evaluation of the condition, the regulatory conditions of a “serious health condition” were satisfied. *Id.* citing 29 C.F.R. § 825.114(b).

⁵⁸ 29 C.F.R. § 825.114.

intermittent FMLA leave or leave on a reduced leave schedule, there must be a medical need for such leave. The requisite “medical necessity” must be such that it can best be accommodated through an intermittent or reduced leave schedule. An employee requesting intermittent or a reduced leave schedule must obtain the employers consent. Such leave must then be scheduled, if possible, “so as not to disrupt the employer’s operations.” The employer is permitted to reassign the employee to an alternative equivalent position that better accommodates the intermittent or reduced leave schedule.

An employee is not entitled to take intermittent or reduced schedule leave for the birth or placement of a child unless the employer permits it. The employer’s agreement, however, is not required for leave during which the mother has a serious health condition related to the birth or if the newborn child has a serious health condition.

An employer may limit the increments of leave permitted by an employee to the shortest period of time for which the employer’s payroll system uses to account for absences, provided it is one hour or less. Generally, an employee cannot be required to take more FMLA leave than is necessary to address the reason giving rise to need for the leave. There are exceptions to this rule for employees of local educational agencies.⁵⁹

⁵⁹ 29 C.F.R. §§ 825.117, 825.203.

(6) Employer may substitute other qualifying paid or unpaid leave as FMLA leave:

(a) FMLA leave is generally unpaid.

The FMLA does not require the employer to grant paid leave. However, eligible employees may choose to substitute paid or unpaid leave, or an employer may require the employee to substitute and/or exhaust accrued paid or unpaid leave for FMLA leave.⁶⁰ The following circumstances address the substitution of other paid or unpaid leave for FMLA leave:

(1) Substitution of paid leave.

- (a) Paid vacation, personal leave, or family leave may be substituted for unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition;
- (b) Paid vacation, personal leave, or medical or sick leave may also be substituted for unpaid FMLA leave needed to care for a family member or the employee's own serious health condition;
- (c) The FMLA does permit an employer to substitute paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's own uniform policies would not normally provide such paid leave. There are exceptions for substituting employer paid leave for childbirth and workers' compensation covered injuries.
- (d) However, note that at least one Federal Circuit Court of Appeals has held that the FMLA provision permitting

employers to “substitute” other paid leave for FMLA leave means that the employer has two and only two choices in formulating its FMLA policies.⁶¹ The choices are: (1) FMLA may be used sequentially with paid leave or (2) FMLA may be used concurrently with paid leave. In *Strickland v. Water Works and Sewer Board of the City of Birmingham*, the employer elected to have paid sick leave and FMLA leave run concurrently. Therefore, the employer could not discharge an employee who went out on sick leave that would have qualified for FMLA leave where he had not exhausted his FMLA entitlement.⁶²

(2) Substitution of Paid Leave Inapplicable

(a) Disability Leave for Childbirth

Generally, disability leave for childbirth is considered FMLA leave for a serious health condition and counts towards the 12 week leave entitlement provided by the FMLA. The employer may designate a paid pregnancy leave under a temporary or short term disability (STD) plan as FMLA leave and count it as running concurrently for both the STD plan and the FMLA leave entitlement.

(b) Workers Compensation and FMLA Leave

The FMLA provides that a serious health condition may result from injury to the employee “on or off” the job. Either the employee or the employer may designate the

⁶⁰ 29 C.F.R. § 825.208

⁶¹ *Strickland v. Water Works & Sewer Board of the City of Birmingham*, 239 F.3d 1199, 1205 (11th Cir. 2001).

leave as FMLA leave if the injury meets the criteria for a serious health condition. In such a case, the employee's FMLA 12-week leave entitlement may run concurrently with the workers' compensation absence. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, and the employer has a job meeting the employee's medical restrictions, the employee may decline the employer's offer of a "light duty job." As a result the employee may lose workers' compensation benefits, but he is still entitled to remain on unpaid FMLA leave, if otherwise qualified, until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. At this point, the employee becomes subject to the employer's regular attendance policies, subject to any other law or rule of law that might require further leave.

In order for this substitution to be available, the paid leave used must be taken for purposes which would otherwise qualify for FMLA leave.

(c) Compensatory Time Off (Comp Time)

⁶² 289 F.3d at 1205.

Compensatory time off (comp time) may not be used for FMLA leave.⁶³

(d) Employer's Obligation to Designate Leave as FMLA Leave and as Paid or Unpaid

In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to provide proper notice of the designation to the employee.

When an employer has knowledge that a leave is being taken for an FMLA required reason, the FMLA regulations required that the employer must "promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave."⁶⁴ A divided Supreme Court has ruled that the penalty portion of the regulation is invalid because it impermissibly punishes employers for providing more leave than the FMLA allows, and expands FMLA's penalties by relieving employees of their burden of proving that they were prejudiced by the employer's lack of notice that the other unpaid leave would count as FMLA leave.⁶⁵

⁶³ 29 C.F.R. § 825.207.

⁶⁴ 29 C.F.R. § 825.208(b)(1).

⁶⁵ *Ragsdale v. Wolverine World Wide, Inc.*, ___ U.S. ____ (No. 00-6029, 2002). The Court struck down DOL Reg. § 825.700, which required employers to provide advance notice that "other leave" would count as FMLA leave, but left open the question of whether the DOL's general notice requirement in regulation § 825.208 is valid. Compare *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1307 (11th Cir. 1999) (striking down the regulations because they improperly expand the substantive guarantees of the statute *Schloer v. Lucent Tech., Inc.*, 2000 WL 128698 (D.Md. 2000) (same); *Neal v. Children's Habilitation Ctr.*, 1999 WL 706117 (N.D. Ill. 1999) (same); *Donnellan v. New York City Transit Auth.*, 1999 WL 527901 (S.D.N.Y. 1999) (criticizing the regulations but finding for the employer on narrower ground); with *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 935-936 (6th Cir. 2000) (distinguishing between notice requirements for paid as opposed to unpaid leave but appearing to uphold both 29 C.F.R. § 825.208(c) and § 825.700(a) as valid exercises of regulatory power); *Ritchie v. Grand Casinos of Mississippi, Inc.*, 49 F.Supp.2d 878, 881 (S.D. Miss. 1999) (holding that the

The regulations provide that the employer's notice to the employee that the leave has been designated as FMLA leave may be oral or in writing. Oral notice shall be confirmed in writing, no later than the following payday. The written notice may be in any form, including a notation on the employee's pay stub.⁶⁶

If the employer requires paid leave to be substituted for unpaid leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave or, if the employer does not have sufficient information as to the reasons for the leave, when the employer determines the leave qualifies as FMLA leave. Notice of the employer's requirement must be given before the FMLA designated leave begins unless the employer has insufficient knowledge or information about the reason for the leave until after the leave commences.

Be wary of the trap that could result from failing to notify an employee that a paid leave is to be designated as FMLA qualifying leave. Under the Regulations, if the employer had the knowledge or information to determine that the paid leave is for an FMLA qualifying reason at the time that the employee gives notice of the need for leave **or** commences the leave and fails to designate the leave as FMLA leave and so notify the employee, then the employer may not designate the leave as FMLA leave retroactively.

DOL's regulations appropriately "filled the gaps" of the FMLA); *Chan v. Loyola Univ. Med. Ctr.*, 1999 WL 1080372 (N.D. Ill. 1999) (same).

⁶⁶ 29 C.F.R. § 825.208(b)(2).

Accordingly, under the Regulations, the employer may designate only prospectively, as of the date of notification to the employee of such designation. The employee is entitled to the full protections of the FMLA, 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.⁶⁷

If the employer learns that leave is for an FMLA purpose after the leave has begun, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave.⁶⁸

The regulations relating to this topic are very detailed and complex. A close review of them is advisable prior to resolving any specific situation regarding the requirements for designation of leave as FMLA leave and notifying employees whether the leave must be paid or unpaid leave.⁶⁹

(7) Notice Requirements:

Employee's Notice Requirements

The notice requirements imposed upon an employee under the FMLA depend upon whether the employee's leave is foreseeable or unforeseeable.

⁶⁷ 29 C.F.R. § 825.208(c).

⁶⁸ 29 C.F.R. § 825.208(d)

⁶⁹ The DOL has promulgated a form (DOL Form WH-381) for responding for an employee's request for FMLA leave and notifying the employee that other leave will be counted against the employee's FMLA entitlement. <http://www.dol.gov/dol/esa/fmla.htm>.

Foreseeable Leave – 30 Days Notice

If the leave is foreseeable, the employee must provide the employer at least 30 days advance notice before FMLA leave is to be taken based upon an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member.⁷⁰

Unexpected Leave – As Soon as Practicable

If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave may be required to begin, notice must be given as soon as practicable. “As soon as practicable” means as soon as both practical and possible. Such notification ordinarily means at least verbal notice to the employer within one or two business days of when the need for leave becomes known to the employee.⁷¹

(8) Employee’s Articulation of the Need for FMLA Leave

An employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. However, there is no obligation on the part of the employee to use certain terms or

⁷⁰ In *Gilliam v. United Parcel Service, Inc.*, 233 F.3d 969, 970 (7th Cir. 2000) the plaintiff requested leave to be with his girlfriend and infant son the day after she gave birth. His supervisor gave him permission but expected him to return or notify the supervisor of when he would return to work within three days as required under a collective bargaining agreement. When Gilliam did not report in within three days, he was deemed to have abandoned his job pursuant to a “no-call, no-show” provision in a collective bargaining agreement. He sued UPS for retaliation and other violations of the FMLA. The District Court dismissed his suit and the Seventh Circuit affirmed, holding that his failure to provide UPS the required 30 days notice placed him outside the protection of FMLA. The court held that it would not convert “humanitarian leaves and discretionary acts” into FMLA leaves where they did not otherwise qualify.

⁷¹ 29 C.F.R. §§ 825.302 and 825.303; *see also Hopson v. Quitman County Hospital & Nursing Home, Inc.*, 119 F.3d 363, 367 (5th Cir. 1997) (a change in eligible employee’s insurance coverage requiring

make a specific or express request that his absences be considered for FMLA purposes. There is no requirement that the employee even mention the FMLA.⁷² Under the FMLA regulations, it is the employer's responsibility to inquire further to obtain more information about whether FMLA leave is being sought by the employee and what the details are of the leave to be taken.⁷³

An employer may waive employees' FMLA notice requirements. In addition, an employer may not require compliance with the more strict FMLA notice requirements if an employee elects to substitute paid leave for the unpaid FMLA leave, where the employer's paid leave plan imposes no prior or less strict notice requirements on employees. Employers may require the employee only to comply with its usual and customary notice and procedural requirements for requesting leave. If an employee fails to provide the required notice with no reasonable excuse for the delay, the employer may delay the FMLA leave until at least 30 days after the employee provides notice.⁷⁴ However, such a delay can only be made if it is clear that the employee had actual notice of the FMLA notice requirements and that the need for leave was foreseeable to the employee 30 days before the leave.⁷⁵

Employer's Notice Requirements

All employers subject to the FMLA must post a notice that explains the FMLA and provides information regarding the procedures for

surgery to be performed by a certain date was a "change in circumstances" permitting less than 30 days notice for foreseeable leave), *revised opin.*, 126 F.3d 635 (5th Cir. 1997).

⁷² *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 762-763 (5th Cir. 1995).

⁷³ 29 C.F.R. § 825.302(c)

⁷⁴ See *Gilliam v. United Parcel Service, Inc.*, footnote 70, *supra*.

⁷⁵ 29 C.F.R. §§ 825.302 and 825.304.

filing complaints for violation of the FMLA. Such notice should be capable of being read by the employer's workforce. This means that if a significant portion of the workforce is not literate in English, then the employer is responsible for providing the notice in a language in which the employees are literate. Failure to post such notice could subject the employer to civil fines. In addition, it could result in an employer's being unable to deny FMLA leave to employees for failing to provide the employer with advance notice of a need to take FMLA leave.⁷⁶

If an employer has any written guidance to employees such as policy manuals or handbooks concerning employee benefits or leave rights, information concerning FMLA entitlements and employee obligations under the FMLA must be included in these sources. Even if an employer does not have such written guidance, the employer shall provide written guidance or notice specifically addressing an employee's rights and obligation under the FMLA and any consequences of a failure to meet these obligations. Such specific notice must include (a) whether leave is being counted as 12 weeks of FMLA leave; (b) any medical certification requirements; (c) the employer's requirement, if any, of substituting paid leave or employees' right to elect paid leave; (d) required payments, if any, for continuing health or other benefits during leave; (e) requirements for a fitness for duty certificate to be restored to work; (f) an employee's status as a "key employee" and the import of that designation with respect to FMLA rights; and (g) the right to return to the same or equivalent job. The employer's notice described above must be

⁷⁶ 29 C.F.R. §§ 825.300 and 825.301.

provided to the employee within one or two business days, if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.⁷⁷ These notice requirements should be read in conjunction with the employer's requirements to designate leave as FMLA leave or as paid or unpaid leave as discussed above and in 29 C.F.R. § 825. 208.

(9) Employee Rights – Benefits and Reinstatement:

(a) Job Restoration

On return from FMLA leave, an employee is entitled to be returned to the same position or a position equivalent to the position that the employee held prior to the commencement of the leave. An “equivalent position” is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions. An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. For example, if the employee's position would have been eliminated or the employee laid off during the leave period notwithstanding the employee's absence for the leave, then the employee is not entitled to restoration. An employer may deny job restoration under certain circumstances to “key employees.”⁷⁸

The FMLA does not entitle employees on leave to accrue seniority or other employment benefits. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to

⁷⁷ 29 C.F.R. § 825. 301.

⁷⁸ See 29 C.F.R. §§ 825.216(c), 825.217-.219.

other employees on “leave without pay.” Employees are entitled to be restored to a position with the same or equivalent pay premiums.

The FMLA may affect pay bonuses based upon job-related performance. To the extent a bonus is related to attendance or factors that do not require performance by the employee, if the employee had met all of the requirements for such bonuses prior to FMLA leave, the employee is entitled to continue this entitlement upon return from FMLA leave. However, for production bonuses that require performance by the employee, the employee on FMLA leave during any period such bonus is calculated is entitled to the same consideration as other employees on paid or unpaid leave as appropriate.⁷⁹

(b) Health Insurance Coverage

The FMLA requires the employer to maintain the employee’s coverage, during FMLA leave, under any group health plan on the same conditions as for current employees, as if the employee had not gone out on FMLA leave. This includes rights to enrollment, changes in coverage, and all levels of coverage. Employees on leave must be given notice of opportunities to change plans or benefits. However, the employer may require the employee to pay for the actual cost of maintaining coverage, even if the employer normally pays all of the cost of coverage for employees who are not on FMLA leave.⁸⁰

The employee may elect not to maintain coverage under the employer’s group health plan while out on FMLA leave. Similarly,

⁷⁹ 29 C.F.R. § 825.214 -.216

⁸⁰ It should be noted here that FMLA did not amend the Federal benefits law, the Employee Retirement Income Security Act of 1974 (“ERISA”). Therefore, rights to coverage during FMLA

the employee may lose coverage during the FMLA leave by failing to pay the applicable premium or other cost of maintaining coverage. However, upon returning from FMLA leave, the employee is entitled to be reinstated under any such coverage without any conditions such as waiting for open enrollment, submitting to a physical examination or insurability conditions, waiting periods, or pre-existing condition limitations or exclusions. Therefore, due to the applicable limitations under the group policy or other plan maintained by the employer, the employer may find it a practical necessity to keep the employee (and any covered dependents, if appropriate) coverage in place even if the employee chooses not to maintain coverage during the FMLA leave, in order to be in a position to discharge its obligation to reinstate coverage at the end of leave.

An employee's entitlement to benefits other than group health benefits during a FMLA leave is determined by the employers' policy toward such benefits when an employee is on other forms of leave (paid or unpaid, as appropriate).⁸¹ The employer's obligation to maintain health benefits during leave under FMLA ceases if and when the employment relation would have terminated if the employee had not taken FMLA leave.

(c) Interaction of COBRA with FMLA

Knowing when the employee's employment terminates is vital for a number of reasons. One such reason is that the employer needs an identifiable trigger point at which it's COBRA obligation commences.

leave apparently arise under the FMLA, not ERISA. Rights to benefits under the benefit plan, however, are enforceable under ERISA.

⁸¹ 29 C.F.R. § 825.209.

COBRA requires that a group health plan provide notice and opportunity to elect continuation coverage under the employer's group health plan. In the case of a "qualified beneficiary" who loses coverage because of the "qualifying event" of termination of employment, the minimum period of continuation coverage is generally 18 months.⁸²

Generally, the FMLA regulations appear to take the position that an employee's COBRA right to elect continuation coverage is triggered (that is, the "qualifying event" occurs) when the employee's employment terminates, which is generally the time when the employee's employment would terminate had FMLA leave not been taken (e.g. lay-off), when the employee informs the employer of his or her intent not to return from leave, if the employee fails or refuses to provide a proper request for further medical certification of a "serious health condition," or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement. However, the IRS has weighed in with its own pronouncements, and as a result there can be said to be some confusion as to exactly when the COBRA "qualifying event" takes place in the FMLA situation.⁸³ From the perspective of the IRS guidance:

- (1) Upon the occurrence of the "qualifying event," the employee is entitled to COBRA notice and opportunity to elect even if the employee's coverage during the FMLA leave is discontinued due

⁸² See, generally, § 4980B of the Internal Revenue Code of 1986 as amended (26 U.S.C. § 4980B); ERISA § 601-619 (29 U.S.C. § 2601-2619).

⁸³ The IRS issued IRS Notice 94-103, 1994-2 C.B. 569 as temporary guidance on the interaction between COBRA and FMLA. Most of the positions taken in Notice 94-103 were later embodied in

to the employee's failure to pay the required premium. Thus, the IRS regulations provide that the employer may not condition the availability of COBRA continuation coverage on the employee's payment of premiums during the FMLA leave. This is evidently due to the fact that until the FMLA leave terminates, the employee has a continuing right to be reinstated in such coverage upon returning to work at the end of the leave.⁸⁴

- (2) In and of itself, FMLA leave is not a "qualifying event" triggering the COBRA notice and election requirement because FMLA leave is temporary and the employee has the right to continue medical coverage during the leave.
- (3) FMLA does not change the existing rule that the employer is not obligated to provide COBRA continuation coverage after it has terminated all group health plans with respect to its employees.⁸⁵
- (4) Where the employee (or covered dependent) meets all three of the following conditions, a "qualifying event" has occurred:
 - ◆ The employee does not return at the end of FMLA leave (or employment otherwise terminates during the leave);
 - ◆ The employee (or covered dependent) was covered under the employer's group health plan the day before the FMLA leave began; and
 - ◆ The employee (or covered dependent) would otherwise lose coverage because of the termination of employment before

regulations that were proposed on February 3, 1999. Prop. Treas. Reg. § 54.4980B-10 (64 Fed.Reg. 5237).

⁸⁴ Prop. Treas. Reg. § 54.4980B-10, Q&A-3, Q&A-5.

⁸⁵ *Id.* at Q&A-1.

the end of the COBRA minimum coverage period due to the termination of employment.⁸⁶

- (5) Normally the date of the “qualifying event” is deemed to be the date last day of the FMLA leave if the employee fails to return to work, and the minimum continuation coverage period runs from that date. However, the proposed IRS regulations state that if coverage would not be lost until a later date, and the group health plan provides for “optional extension” of the minimum continuation coverage periods, then the COBRA continuation coverage period will run from the later date.⁸⁷

The proposed regulations do not discuss what date is the qualifying event where the employee fails to provide a required medical certification or otherwise fails to comply with FMLA’s requirements for leave. Presumably, at that point, the employee’s FMLA protection is lost and termination of employment is determined in reference to the employer’s regular leave and absence control policies.

(10) Medical Certification for a Serious Health Condition:

Where the FMLA leave is due to a “serious health condition,” the employer may required a certification by the health care provider of the employee or the employee’s family member. The employer must notify the employee in writing that the certification is required. In the case of foreseeable leave, subject to the thirty (30) day employee notice requirement, the employer may require certification in advance of the commencement of the leave. The employer’s requirements for certification must allow at least fifteen (15) calendar days after the

⁸⁶ *Id.*

⁸⁷ *Id.* at Q&A-2; Prop. Treas. Reg. § 54-4981B-7, Q&A-4.

employer's request for the employee to comply and also provide the employee with notice of the consequences of failure to provide the certification. If an employee's certification is incomplete, the employer should so advise the employee and permit the employee a reasonable opportunity to cure any deficiency.⁸⁸

The employer may not ask for information beyond that required by the DOL "Certification of Health Care Provider" Form WH-380. To avoid issues or concerns regarding the information being requested of employees for medical certification the best practice is to use the DOL form.⁸⁹ If the employee submits a certification signed by a health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, *with the employee's permission*, for purposes of clarification and authenticity of the medical certification. If the employee is on FMLA leave running concurrently with a workers' compensation absence, and the workers' compensation statute permits the employer or its representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

An employer may seek a second opinion, at its expense, to confirm the validity of the employee's medical certification. Notwithstanding this right of the employer, the employee is still entitled to receive FMLA benefits provisionally.⁹⁰

⁸⁸ 29 C.F.R. § 825.305.

⁸⁹ 29 C.F.R. § 825.306. A copy of DOL Form WH-380 may be downloaded from the DOL's web site at <http://www.dol.gov/dol/esa/fmla.htm>.

⁹⁰ 29 C.F.R. § 825.307.

The employer may request medical re-certification at reasonable intervals, but not more often than every 30 days, unless specific exceptions apply as outlined in the regulations.⁹¹

The employer may also require, as a condition to restoring an employee to the same or equivalent position, that such employee, whose leave was the result of his/her own serious health condition, present a certification from the employee's health care provider that the employee is able to resume work. Such "fitness for duty" reports can be required only if the employer has a uniformly-applied policy or practice that requires all similarly-situated employees who take leave for medical conditions to obtain and present similar reports. Employees must have notice of the requirement of fitness for duty reports as part of the employer's notice to employees at the time the employee requests or takes leave. An employer may delay restoration to employment until the employee submits the required fitness for duty certification.⁹²

(11) FMLA's Relation to other Statutes

The FMLA is a minimum rights statute. It does not modify or affect any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability. Under the FMLA regulations, employers must provide leave under whatever statutes (e.g. ADA, FMLA, state workers' compensation) provide the greater rights to the employees.⁹³ An employee may be entitled to protection under more than one of the statutes. Therefore, employers

⁹¹ 29 C.F.R. § 825.308.

⁹² 29 C.F.R. § 825.310.

⁹³ 29 C.F.R. § 825.702(a).

must review and apply each of the statutes independently and then assess under which statute or statutes more protection is afforded.

For example, the policies underlying the ADA are intended to permit certain disabled employees to participate in the workforce – the FMLA, on the other hand, is intended to provide employees the opportunity to take unpaid leave, while having their jobs and benefits protected, because of adoption, a serious health condition or an ill family member. So while a relatively short leave of definite duration may be a reasonable accommodation under the ADA, the point is to get the employee back to work. On the other hand, the taking of leave with the right to reinstatement at the conclusion of the leave is the whole point of the FMLA.

Another distinction that causes confusion between the FMLA and the ADA is that the basis for inclusion as a protected individual under the ADA is a “disability” – which means that the individual has a mental or physical impairment which interferes with a major life activity, but which, taking into account corrective measures, still leaves the individual capable of performing the essential functions of the position held or desired with “reasonable accommodation.” The FMLA, on the other hand, requires, where the employee’s physical condition creates the entitlement, that the employee have a “serious medical condition,” which leaves the employee unable to perform the essential functions of the position held. These are two completely different conceptual approaches, and it is certainly possible, if not likely in the ordinary case, that a person who suffers from a “serious medical condition” may not have a “disability” – although the two are by no means mutually exclusive.

D. Claims of Retaliation Under State Workers' Compensation Act

(1) Retaliation Under State Workers' Compensation Statutes in General

Workers compensation statutes establishing a system to compensate employees for on-the-job injuries proliferated during the early part of the 20th Century and now exist in apparently every state. Such statutes commonly relieve employers from personal liability for such injuries, and liability is transferred to the state workers' compensation system. Typically, claims are made under an insurance policy issued under the auspices of the system. In exchange for immunity from suit and transfer of liability, the statutory scheme generally provides for absolute liability for employee injuries and a schedule of benefits under the statute. In addition, such statutes characteristically include an anti-retaliation provision, providing that an employer may not take an adverse employment action against an employee because the employee has filed a claim under the state's workers' compensation act.⁹⁴ In some states, the claim of retaliation under the workers' compensation statute may not be set out in the statute itself, but lies as a separate cause of action under a common law public policy analysis.⁹⁵

(2) The Texas Workers' Compensation Anti-Retaliation Statute

The Texas workers compensation anti-retaliatory provision is typical of many, although Texas's strict at-will doctrine may work to make enforcement of the employer's neutral absence control policy more effective. Nevertheless, discussion of the Texas statute may be illustrative of the analysis employed in many states. However, as will

⁹⁴ See, e.g., Section 451 and McKinney's Workers' Compensation Law (New York) § 241.

⁹⁵ See, e.g., *Marin v. American Meat Packing Co.*, 562 N.E.2d 282 (Ill. App. Ct. 1990); *Schick v. Shirey*, 716 A.2d 1231 (Pa. 1998).

be seen, it is critically important to carefully examine the specific facts of the case in light of the local statute or rule on workers compensation retaliation.

Under the Texas Workers' Compensation Act Section 451,⁹⁶ an employer engages in a prohibited act if it discharges or otherwise discriminates against an employee for filing a workers' compensation claim in good faith. Section 451 provides, specifically, as follows:

A person may not discharge or in any other manner discriminate against an employee because the employee has:

1. filed a workers' compensation claim in good faith;
2. hired a lawyer to represent the employee in a claim;
3. instituted or caused to be instituted in good faith a proceeding under Subtitle A; or
4. testified or is about to testify in a proceeding under Subtitle A.

Employees who prevail in an action under Section 451 may recover "reasonable damages," including reinstatement. As with other discrimination claims, the burden of proof in a Section 451 retaliation claim is on the employee.⁹⁷ In examining summary judgment actions under Section 451, the Texas courts generally follow the "burden shifting" analysis that is employed by the Federal courts in discrimination cases arising under Title VII. This requires a three-step approach.

(3) The "Burden-Shifting" Analysis in a Section 451 Claim in Texas

⁹⁶ See Section 451.

⁹⁷ TEX. LAB. CODE ANN. § 451.002 (Vernon 1996).

(a) Step One: Causation

In proving up a claim under Section 451, the employee initially has the burden of demonstrating a *prima facie* case – that is, that the employee filed a claim under the Texas Workers’ Compensation Statute and that his or her employment was terminated as a result, that is, “but for” the workers’ compensation claim, the employer would not have terminated the plaintiff’s employment when it did.

The plaintiff can establish the causal connection between the workers’ compensation claim and the termination either through direct or circumstantial evidence. Circumstantial evidence includes (1) knowledge of the claim by the person who made the decision to terminate the employee (however, that fact alone does not establish liability, but merely places the plaintiff in the protected class and must be considered together with all the other evidence); (2) expression of a negative attitude toward the injured employee’s condition; (3) departure from established company policies; (4) discriminatory treatment in comparison to similarly situated employees; (5) evidence that the stated reason for the termination was false, and (6) providing incentives to refrain from reporting on the job injuries.⁹⁸

The employee may not rely on “legally justified conduct,” such as obtaining information about the employee’s prior injuries upon authorization from the employee and contesting the employee’s injury

⁹⁸ *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 451 (Tex. 1996); See *Texas Division-Tranter Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994); *Vallance v. Irving C.A.R.E.S., Inc.*, 14 S.W.3d 833, 837 (Tex.App.—Dallas 2000, no writ); *Urquidi v. Phelps Dodge Ref. Corp.*, 973 S.W.2d 400, 404 (Tex.App.—El Paso 1998, no writ).

as compensable under the Workers' Compensation Act, as evidence of a "negative attitude" toward the employee's injury.⁹⁹

If the employee cannot make out a "prima facie" case, then the matter ends there. For example, some cases have held that the employee is subject to summary judgment if it cannot be shown that the person making the employment decision did not know that the employee had filed or intended to file a workers' compensation claim, or otherwise engaged in conduct protected by Section 451.

(b) Step Two: Employer's Legitimate Non-retaliatory Reason for the Action

If the plaintiff can make the initial showing of a causal nexus between the filing of a claim and the termination or other employment discrimination, the burden then "shifts" to the defendant employer to articulate a legitimate nondiscriminatory reason for the termination.¹⁰⁰ This is basically where the employer's employment and leave policies become all-important. In the workers' compensation leave situation, a leave or absence policy can be critical, but notice that other policies may come into play in presenting a legitimate nondiscriminatory reason for the employer's action.

For example, in one situation that arose with one of the clients in this office, an employee failed to report an on-the-job injury within 24 hours as required by written company safety policy. When the employee's supervisor questioned the employee about the situation the next day, the employee became belligerent and abusive, and, in front of numerous witnesses, threatened the supervisor with bodily harm in a very graphic manner. The employee was fired for failing to

⁹⁹ *Continental Coffee*, 937 S.W.2d at 451-452.

¹⁰⁰ *Id.*

comply with written company safety policy, and for violating numerous other written policies prohibiting insubordination, threatening fellow employees and engaging in abusive language to fellow employees. When these facts were presented to the former employee's attorney in response to a demand letter having to do with workers' compensation retaliation, the former employee and the attorney were never heard from again.

While not all situations end so happily for the employer, the presence of well-crafted employee conduct, safety, attendance and absence policies can be crucial if the issues are joined in a workers' compensation retaliation claim.

(c) Step Three: Employee's Burden to Rebut Employer's Legitimate Non-retaliatory Reason for the Action

If the employer can show that there was a legitimate nondiscriminatory reason for the employee's termination or other employment action, then, the burden "shifts" back to the plaintiff to show that the true reason for the termination not the reason stated by the employer and was in fact retaliatory – in other words – that the employer's proffered reason for the termination was a mere pretext for retaliation under Section 451. If the employee cannot show that the employer's reason for the termination or alleged discrimination was false, then the employee will not be able to prevail.¹⁰¹

¹⁰¹ *Id.*; *Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 562 (5th Cir. 1992) (employee terminated for failure to comply with facially neutral and uniformly applied absence control policy contained in a collective bargaining agreement failed to show retaliatory motive). Note, however, that not all state courts agree that a termination due to nondiscriminatory application of a neutral absence control policy will inculcate the employer from liability for retaliation. *See cases cited id.* at 563, n. 3. Therefore, if the laws of a state other than Texas control the facts of the situation, those laws should be reviewed before proceeding.

(d) Neutral Absence Control Policy

In the context of failure to comply with a neutral absence policy of the employer, the courts have generally held that once such failure is shown, the employee has the burden of showing that the true reason for the claimed discrimination was retaliation for the filing of a workers' compensation claim. In *Texas Division-Tranter, Inc. v. Carrozza*,¹⁰² the Texas Supreme Court held that termination of an employee for his failure to comply with his employer's nondiscriminatory absence control policy did not constitute retaliatory discharge in violation of Section 451. Carrozza failed to report back to work following a medical leave as a result of a compensable injury. The employer terminated the employee for violating an absence control policy contained in a collective bargaining agreement requiring termination of any employee who, except for special circumstances, is absent three consecutive work days without giving notice or receiving prior permission from the employer.¹⁰³

The case of *Fenley v. Mrs. Baird's Bakeries, Inc.*¹⁰⁴ is an illustration of the importance of consistent, neutral enforcement of the absence control policy. In *Fenley*, the plaintiff claimed the employer discharged him in retaliation for filing a claim under the Texas Workers' Compensation Act in violation of Section 451. However, the employer was able to point to instances of several other employees who had received letters terminating their employment for violating the absence control policy even though they had not filed workers' compensation claims. The

¹⁰² 876 S.W.2d 312, 314 (Tex. 1994).

¹⁰³ *Id.* at 313.

¹⁰⁴ 59 S.W.3d 314 (Tex.App.—Texarkana 2001, no writ).

court noted that he plaintiff could point to no instance in which the employer had waived the absence policy.¹⁰⁵

(e) Analysis Under Texas §451 Where Employer Has No Absence Control Policy

In *Terry v. Southern Floral Co.*,¹⁰⁶ the First District Court of Appeals held that a specific written absence control policy is not a prerequisite for the employer to defend a Section 451 action. Terry was terminated by Southern Floral after a leave of nearly seven months following a workers' comp injury. As a result of this indefinite leave, the employer found it necessary to fill her position because the work she was hired to do simply was not getting done. Therefore, the employer filled Terry's position and terminated her, though it informed her that once she was released to return to work, she would have first preference for the first available position with Southern Floral. Terry then filed an action for retaliatory discharge under Section 451.

Even though Southern Floral did not have a "specific" absence control policy, the continuing absence, with no indication when Ms. Terry would, if ever, return to work, and the fact that her accounts were not getting the attention they required, made it impossible for the employer to hold her position open indefinitely. This, the court held, was a legitimate nondiscriminatory reason for the discharge. And, since the plaintiff was unable to point to any evidence that the proffered reason for the discharge was false, the court upheld summary judgment for the employer.

¹⁰⁵ *Id.* at 321. The court also noted as factors in its decision that (1) the plaintiff had been off for over a year at the time he was discharged, (2) he had refused, when asked by the defendant, to provide a definite date on which he expected to return to work, and (3) that he had experienced numerous prior on-the-job injuries and workers compensation claims but had always been allowed to return to work.
Id.

¹⁰⁶ 927 S.W.2d 254 (Tex.App.—Houston 1996, no writ).

While Southern Floral was successful in defending Terry’s claim even in the “absence” of a specific written absence control policy, it is extremely advisable to have such a policy in place in order to be able to defend against Section 451 retaliation claims.

(f) Getting Off Course: Discriminatory Absence Control Policies

Note that in order for an absence control policy to furnish a legitimate reason for termination of an employee on leave due to workers’ compensation injury, the policy must be neutral as to any protected leave. Therefore, the absence control policy cannot target employees who go out on such injuries.

One employer learned this lesson the hard way. In *Trevino v. Corrections Corp. of America*, the employer’s policy provided that it would not hold a position open for more than six months “while an employee is on Workman’s Comp.” Since the plaintiff had been on worker’s compensation leave for more than six months, she was terminated. The El Paso Court of Appeals held that the policy itself was directed not at all employees who went on leave, but only those who took leave due to injuries that were compensable under workers’ compensation. Therefore, the policy taken on its face placed a heavier burden on employees who took leave due to a workers’ compensation injury than those who took other types of leave. Since the policy itself was not facially neutral toward employees who experienced workers’ compensation related injuries, the court held that it was a violation of Section 451 to terminate an employee who violated the policy.¹⁰⁷

(g) Other Neutral Policies Relating to Safety or Injuries

¹⁰⁷ *Trevino v. Corrections Corp. of Am.*, 850 S.W.2d 806, 808-809 (Tex.App.—El Paso 1993, writ denied).

Note also that the application of other facially neutral policies that are administered in a nondiscriminatory manner will not be considered evidence of retaliation. For example, a requirement that an employee must undergo a work tolerance test or “functional capacity assessment” upon returning from a medical leave of at least thirty days was held not to be evidence of retaliation in violation of Section 451 in *Urquidi v. Phelps Dodge Refining Corp.*¹⁰⁸ Urquidi was terminated when it was determined that he was not physically able to perform his job after returning from a leave of more than thirty days was due to an on-the-job injury. The court noted that according to its policy, all employees of Phelps Dodge who were returning from a medical leave of more than thirty days were required to undergo the assessment, not just those returning from a workers’ comp leave. Since there was no evidence that the policy was applied more strictly to employees who were returning from workers’ comp leave than to those returning from other types of medical leave, the court held that “[l]egally justified conduct is not probative of discrimination under Section 451.001 nor is it evidence of a negative attitude [toward the employee’s injury,]” and affirmed a directed verdict in favor of the employer.¹⁰⁹

The court also held that the refusal of Phelps Dodge to create a “light duty” position for the plaintiff where none existed, in order to accommodate his on-the-job injury was not evidence of retaliation under Section 451, where the company had a policy of creating a light duty position only where the employee’s recovery from his injury was expected to be relatively short duration. That was shown not to be the

¹⁰⁸ 973 S.W.2d 400, 405 (Tex.App.—El Paso 1998, no writ).

¹⁰⁹ *Id.* at 404.

case in that instance, and the employer's policy was held to be an "otherwise lawful employment policy" and not evidence of discrimination.¹¹⁰

In short, in the Section 451 framework, the employer may successfully defend an allegation of retaliatory discharge by showing that the employee was terminated for a legitimate nonretaliatory reason and if the plaintiff cannot show that the employer's proffered reason was pretextual. One such legitimate reason is where the employee violates a specific, neutral (both as written and applied) absence control policy, or even where the employee's extended and indefinite absence places the employer in a position of being forced to act to replace the injured employee, as in *Terry v. Southern Floral Co.*

(4) An Exception to the Exception – California – Enforcement of Absence Control Policy Where Employee is Absent Due to Industrial Injury is Retaliatory

As has been seen, many States permit the uniform enforcement of a reasonable, neutral absence control policy even where the employee's absence is caused by a compensable on-the-job injury. However, the local State statute or rule must always be carefully examined, as this may not always be the case. California, for example, will not permit an employer to enforce its absence control policy where the absence was caused by an on-the-job injury. Thus, where the employee is absent due to such an injury, terminating the employee prior to such employee being released to return to work may result in liability for retaliation.¹¹¹

¹¹⁰ *Id.* at 405.

¹¹¹ See, e.g., *Fortner v. Safeway Stores, Inc.*, 229 Cal.App.3d 542, 550 (Cal. App. Ct. 1991), abrogated on other grounds by *City of Moorpark v. Superior Court*, 959 P.2d 752 (Cal. 1998); *Leamon v. Workers' Comp. Appeals Bd.*, 190 Cal.App.3d 1409, 1418 (Cal. App. Ct. 1987).

E. A Framework for Analysis – Getting Out of the “Bermuda Triangle”

The analogy the “lost patrol” bears to the employer whose employee is out on indefinite workers’ compensation leave is an apt one, since many employers and their human resources managers quickly lose their way. In simply trying to fly through the situation, they, like Lt. Taylor, trying to catch sight of the Florida keys as he led his group of fledgling aviators farther and farther out over the Atlantic, try to pick up landmarks that are not going to be there because they are thinking about one law while attempting to analyze the facts under another.

For example, one employer recently was trying to determine whether terminating an employee who had been on leave for nearly a year would violate the ADA because the employee had a “serious health condition.” “Serious health condition” is an element of FMLA leave, not the ADA, and while the concepts are similar, they certainly not the same. “[D]isability’ under the ADA and ‘serious health condition’ under the FMLA are different concepts which must be analyzed separately.”¹¹²

Perhaps one of the best, and most recent, cases illustrating the hazardous intersection between the ADA and FMLA is *Spangler v. Federal Home Loan Bank of Des Moines*.¹¹³ Ms. Spangler suffered from depression which caused her to experience severe problems getting to work. Over a period of two years, she had numerous occasions of unexcused absences and tardiness, or times when she would call in to say she would be late, and end up not showing up for work at all. She informed her employer that

¹¹² *Vincent v. Wells Fargo Guard Servs., Inc. of Fla.*, 3 F.Supp.2d 1405, 1420 (S.D. Fla. 1998), *citing* 29 C.F.R. § 825.702(b); *see also Ellis v. Mohenis Serv. Inc.*, 2000 WL 708388 (E.D.Pa. 1998) (leave provisions of FMLA are “wholly distinct” from ADA concepts of reasonable accommodation, and an employee with a “serious health condition” under the FMLA is not necessarily “disabled” under the ADA, *citing* 29 C.F.R. § 825.702(a)).

the cause was depression for which she was receiving medical treatment. After a string of absences and late arrivals, her employer placed her on probation. On the day before she was terminated, she called in to say she would not be in to work because it was “depression again.” When she did not show up for work her employer finally terminated her. She sued for violations of the ADA and FMLA.

The court made short work of Ms. Spangler’s ADA claim, finding that her position in the Demand Services Department of the Bank made her responsible for routing cash to other banks in the Federal Reserve system, requiring her to take phone calls, answer inquiries, and schedule armored cars and cash deliveries to other banks. Thus, regular punctual attendance was an essential function of her position. Her inability to regularly attend work was so severe that it rendered her unqualified for her position. Therefore, her ADA claims failed. The court noted that an employee who is unable to come to work is not only unable to perform some of the essential functions of the position, but is unable to perform any of them.

However, the court ruled that while her inability to attend work made her unqualified for the position under the ADA, the FMLA has different purposes, namely, to allow the employee the opportunity to obtain treatment for the “serious health condition” that is causing her to be unable to perform each of the “essential functions” of her position. Therefore, the fact that Ms. Spangler was not qualified for the position under the ADA did not mean that her claim under FMLA was barred.

The court went on to note that Ms. Spangler had placed her employer on sufficient notice with her comment that her absence was due to

¹¹³ 278 F.3d 837 (8th Cir. January 30, 2002) (publication page references are not yet available for this document).

“depression again” to trigger the employer’s duty to inquire further as to the need for FMLA leave. Since the employee’s notice duty was discharged, a fact question was raised as to whether the employer failed to follow through with offering FMLA leave. The court noted that the employer could have exercised its right under the FMLA to obtain a medical certificate as to fact that the absence was indeed caused by the claimed serious health condition. The court noted that the employer’s claim that Spangler’s notice was unclear, untimely or otherwise invalid was a question for the jury, and it could not rule that it was defective as a matter of law. Therefore, the court sent the case back to the District Court for further proceedings on Ms. Spangler’s FMLA claim.

This case illustrates why employers must analyze situations of employee absence due to medical conditions under all the applicable laws separately, in order to reach the correct result. While it may be asking too much to require line supervisors to examine each situation that arises in the “heat of battle” with the same detachment as a skilled attorney sitting in his or her office, training may help smooth the way to approaching the situation.

The fact is, in these situations, what must be done is to go through each of the applicable laws separately, step by step, without transposing concepts from one statute to the next, and triangulate, if you will, the employer’s position relative to each of them by applying the law against the employer’s absence control or other relevant employment policy. The employer is not safe to proceed until it is reasonably certain that its position is clear as to each of the three statutes and the employer’s own promulgated absence policy.

Obviously, in situations where the employer cannot find the way back to *terra firma*, the advice of a competent navigator, in the form of competent employment counsel is indispensable.

