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# Three Issues in Employment Law to Which Employers Need to Pay More Attention:

- **Interactions of Age and Disability Claims**
- **Reasonable Accommodations of Disabilities**

**and**

- **Interactions of the ADA and the FMLA**

**by**

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## A. The Intersection of Age and Disability Issues

### 1. Potential "Age plus Disability" or "Disability plus Age" Claims

The leading case is *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). There, the employer refused to hire women with pre-school-age children, although it hired men with pre-school-age children. Because it hired women at rates higher than their proportion of applicant-flow, the company argued that no one could contend there was sex discrimination. The Court rejected defendant's bottom-line approach, and stated: "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children." The case was remanded for consideration of possible BFOQ issues.

After *Phillips*, three Circuits have recognized claims combining protected statuses. *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980), was a Title VII case alleging among other things combined race-plus-sex discrimination. The court of appeals held that this was a proper claim:

> We agree with Jefferies that the district court improperly failed to address her claim of discrimination on the basis of both race and sex. The essence of Jefferies' argument is that an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females. We agree that discrimination against black females can exist even in the absence of discrimination against black men or white women.

*Accord, Lam v. University of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (combined race and sex discrimination against an Asian woman); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) ("The third question is whether, in determining the pervasiveness of the harassment against a plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility. We conclude that such aggregation is permissible.") (combined

racial and sexual harassment against a black woman). *Cf. Sherman v. American Cyanamid Co.*, 188 F.3d 509 (Table, text in WestLaw) (noting that no Circuit has held that there is a combined sex-plus-age claim but declining to address the issue because in any event plaintiff could not prove pretext), c*ert. denied*, 529 U.S. 1037 (2000).

**2. Unique H.R. Challenges in Combined-Discrimination Situations**

The history of "sex-plus" discrimination is that managers tend to take false comfort in looking at overall performance, and tend to conclude there is nothing to worry about because women as a whole are faring well. As a result, liability can build up without the attention and curative actions in which the employer would otherwise engage.

For example, I had a case years ago against a unit of the National Archives. African-American men were promoted above the GS-12 level, and women were promoted above the GS-12 level, but there was an enormous problem in the promotion of African-American women above that level. The government ultimately agreed to a nationwide class settlement. I have had a number of other class actions in which the form of racial discrimination was different for African-American men than for African-American women, and separating them out for analysis produced a far more compelling claim than a combined analysis would have done. *See, e.g.*, *Sledge v. J.P. Stevens & Co., Inc.*, 10 CCH Emp.Prac.Dec. ¶ 10,585 (E.D.N.C. 1975), *aff'd in part and rev'd in part*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

The challenge for an H.R. department is to get the possibility of combined forms of discrimination on its radar screen, so that it can identify any problem areas and tackle them as effectively as it does problems of single-category discrimination.

**3. Special H.R. Challenges in Combined Age and Disability Situations**

Some disabilities may manifest themselves in ways that are associated with age stereotypes, and some may worsen as an employee ages.

A manager or H.R. official who is only thinking in terms of age is unlikely to think of the possibility of a reasonable accommodation because that is a remedy under the ADA, not under the ADEA. Even if the employee requests an accommodation, a manager of H.R. official who has pigeonholed the employee's problems in an "age" category is unlikely to be receptive. If there is really an ADA claim, the employer may wind up exposed to common-law damages for failure to engage in the interactive process

The H.R. challenge is to ensure that both H.R. officials and line managers are trained to think "outside the box," so that they do not make an unquestioned assumption that only age is involved and overlook the possibility that some accommodation will resolve the problem.

### B. The Accommodation of Disabilities

The Supreme Court granted certiorari in a case that would have tested the extent of the affirmative action required by the ADA. The defendant asserted that the ADA could not require it to modify its rule requiring the selection of the best qualified candidate. It lost in the district court, and won in the court of appeals. After the Supreme Court granted certiorari, however, the case was settled and the petition was dismissed. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007), *reh'g and reh'g en banc denied*, 493 F.3d 1002 (8th Cir. 2007), *cert. granted on Question 1*, __ U.S. __, 128 S. Ct. 742, 169 L. Ed. 2d 579 (2007) (No. 07-480), *cert. dismissed*, __ U.S. __, 128 S. Ct. 1116, 169 L. Ed. 2d 801 (2008); 30 Employment Discrimination Report 128 (January 23, 2008).

The ADA Amendments Act of 2008, H.R. 3195, which passed the House of Representatives on June 25, 2008, by a vote of 402 to 17, focuses most of its provisions on the definition of disability, and does not directly change the duty to provide a reasonable accommodation. By repudiating the Supreme Court's narrowing of statutory coverage, however,

it will require much more by way of accommodations. Sec. 3(5)(D)(i)(III), however, provides a rule of construction:

> (5) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY- The definition of `disability' in paragraph (1) shall be construed in accordance with the following:
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> * * *
>
> (D)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—
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> * * *
>
> (III) reasonable accommodations or auxiliary aids or services; . . . .

This, too, will broaden the coverage of the statute.

One key issue for employees, and therefore for employers, is the need to adjust accommodations as a condition improves or worsens, and as medications are adjusted to take into account their effectiveness and side effects. An employer may think that the employee is sliding in and out of covered disability status, and that it has a right to terminate all accommodations as it thinks the employee is leaving covered status. The employee may think that adjusting the accommodation is critical to avoid returning to a more severe situation that would clearly be covered, and will understandably be upset that the employer's withdrawal of all accommodations will harm the employee's health, perhaps causing permanent harm or hastening the progress of a progressive disease or condition. The potential for litigation in such situations is high, and the employer's insistence on withdrawing all accommodations may expose it to a damages award higher than it would have been if it had guessed wrong but taken a more flexible approach.

My perception is that employees are much less likely to file an EEOC charge or a lawsuit against an employer they perceive as trying to work with them in good faith, but are much more

likely to file an EEOC charge or lawsuit if they think the interactive process is being abused to set them up for litigation. Because juries react similarly, it seems to me very important that an employer both be flexible and provide enough information so that the employee, and any attorney the employee retains, can see that the employer has been flexible and has good reasons for its ultimate decision on the extent of the accommodation it can offer. That is supposed to be the whole purpose of the interactive process, but it is astonishing how often reported decisions show that the employer simply made a decision on its own, communicated it as a final decision without allowing meaningful discussion or an opportunity to point out mistakes in its assumptions, and was then surprised with a finding of liability. *See, e.g., Gile v. United Airlines, Inc.*, 213 F.3d 365, (7th Cir. 2000) ("It is here that United flunked its obligations under the ADA. In the face of Gile's repeated pleas for a shift transfer, United refused her request for a modest accommodation, then did nothing to engage with Gile in determining alternative accommodations that might permit Gile to continue working. [Regional Medical Director Dr.] McGuffin provided no help at all except to suggest that Gile 'just resign and stay home.' United's only action in the subsequent months was to terminate Gile in January—a move that United subsequently disclaimed.").

Dodge-ball can be similarly ineffective as a defense. *Gile* is a good example. There were a number of vacant positions on shifts that that would have satisfied plaintiff's accommodation request. Defendant did not transfer plaintiff or take any other action with respect to these vacancies, then claimed at trial that plaintiff had obstructed the interactive process by failing to bid on the vacancies during the annual open period. The court held that United should simply have transferred plaintiff. Whatever an employer's understanding of the law, it is worth asking why an employer would want to gamble on bring right. There were still open positions after the

bidding process that would have accommodated plaintiff, and defendant had two choices: spend five seconds being flexible, or spend six years in litigation with two trips to the Seventh Circuit in efforts to justify refusing to spend the five seconds. There is room for business judgment here.

A review of the last three months' issues of BNA's EMPLOYMENT DISCRIMINATION REPORT ("EDR") shows the variety of situations in which employers are being held to fail in providing reasonable accommodations: failing to transfer employee with PTSD from field position for which she was hired into office position led to a denial of summary judgment, (*Pugliese v. Verizon N.Y.*, S.D.N.Y., No. 05-CV-4005 (KMK), 7/9/08); 31 EDR 172 (August 6, 2008); failure to exempt female bartender with breast cancer from requirement that she wear a skimpy tank top led to a $75,000 settlement with a consent decree, (*EEOC v. Mears Marina Assocs. Ltd. P'ship d/b/a Red Eye's Dock Bar*, D. Md., No. 1:07-cv-02516-RDB, *consent decree signed* 3/17/08), 31 EDR 169 (August 6, 2008); company's failure to initiate the interactive process when employee with cerebral palsy did not, but where the disability was obvious to the company, led to affirmance of $600,000 in compensatory damages under the New York Human Rights Law and $300,000 in punitive damages under the ADA, (*Brady v. Wal-Mart Stores Inc.*, 531 F.3d 127, 31 EDR 74 (2d Cir. 2008)), failure to accommodate long-time successful employee disabled with spinal-cord injuries from a gunshot wound and firing her led to a $250,000 settlement and consent decree, (*EEOC v. Wal-Mart Stores Inc.*, D. Md., No. 1:06-cv-2514, consent decree entered 6/9/08), 30 EDR 831 (June 25, 2008); the failure to transfer a police officer with a brain tumor to a job outside the Police Department led to a denial of summary judgment (*Fitzsimmons v. Phoenix*, D. Ariz., No. 06-3103, 5/28/08), 30 EDR 838 (June 25, 2008); failure to give employee with breathing disability a climate-controlled office led to affirmance of award of $58,309 in back pay and $10,000 in compensatory damages, (*Benaugh v.*

*Ohio Civil Rights Comm'n*, 6th Cir., No. 07-3825, unpublished opinion 5/16/08), 30 EDR 788 (June 18, 2008); failure to waive vision standard for detention officer position led to affirmance of award of $9,000 in nonpecuniary compensatory damages, $46,471 in attorneys' fees, and $2,423 in costs, (*Poquiz v. Homeland Sec. Dep't*, EEOC, Appeal No. 0720050095, 4/10/08), 30 EDR 610 (May 7, 2008). EDR also reported some wins for employers in other cases.

Where there are numerous types of situations giving rise to demands for reasonable accommodations, there are few bright-line rules. Flexibly attempting to meet the need for a reasonable occupation involves a fraction of the cost of years of litigation.

There is a good discussion of problems in accommodations, focusing on "regarded as" cases but not limited to them, in 31 EDR (August 13, 2008). The article focuses on an ALI-ABA conference with Lorrie McKinley of McKinley & Ryan in West Chester, Pa., and Deborah Weinstein of the Weinstein Firm in Philadelphia. Among their points is that the need to make a reasonable accommodation for a disability can be confusing for employers without a sophisticated H.R. department—and even for lower-level managers where there is a sophisticated H.R. department, because making a reasonable accommodation involves treating a disabled employee differently than others, and the goal of all other civil rights laws is equality of treatment.

### C. The Interplay between the FMLA and the ADA

The differences in coverage and application of the FMLA and ADA are important. Based on the perspective of a plaintiff's attorney, many smaller employers fail to consider FMLA rights when a covered employee, or someone in the employee's family, has a serious health condition within the meaning of the FMLA. They make decisions based on standards more applicable to the ADA than to the FMLA, such as refusing leave if the condition is not

immediately disabling or if a close family member has the qualifying condition, or if the employee is employee is assertedly not qualified to perform the job with or without a reasonable accommodation. See, e.g., *Vincent v. Wells Fargo Guard Services, Inc. of Fla.*, 3 F.Supp.2d 1405, (S.D.Fla. 1998). Where this kind of misunderstanding occurs, the employee may call the U.S. Department of Labor and the Department of Labor will have a friendly and effective chat with the employer, and the situation may be resolved. There are still lawsuits filed over these mistakes, however, so efforts to resolve the matter early may collide with questions of "face" for the manager involved. It is expensive for an employer to humor a manager who has made a mistake.

The difference in enforcement mechanisms for the ADA and the FMLA is also important. While an employee has to file an ADA charge with the EEOC before filing suit, the employee can file suit immediately under the FMLA and obtain reinstatement, back pay, and attorneys' fees. An employer will often find itself responding simultaneously in court and before the EEOC, and the EEOC's conciliation process will be directed only to the claim under the ADA. Counsel for the plaintiff and counsel for the employer then commonly negotiate to include all claims.

It is important that the employee not allow the FMLA case to go to judgment prior to amending to bring in the ADA claim, because otherwise the judgment in the FMLA case may be held *res judicata* of all claims arising out of the operative facts, including the ADA claim and any State-law disability claim. *See*, *e.g.*, *Churchill v. Star Enterprises*, 183 F.3d 184, 189-95 (3d Cir. 1999). Plaintiffs' attorneys need to seek the preliminary relief of reinstatement, and then move to stay the case until plaintiff receives a Notice of Right to Sue on the ADA claim, and then timely amend the original case to include the subsequent claim before judgment is entered

in the original case. It is not a defense to the doctrine of claim preclusion that plaintiff was required to exhaust administrative remedies on the subsequent claim.

There can be a direct concatenation of FMLA and the substantive definitions of the ADA when a parent needs to invoke FMLA in order to care for a disabled child. The Sixth Circuit has held that "an employee may take FMLA leave to care for an adult child only if that child is 'disabled' for purposes of the ADA. We must therefore evaluate the adult child's condition under the ADA statute, regulations, and case law." *Novak v. MetroHealth Medical Center*, 503 F.3d 572, 581 (6th Cir. 2007).

There can be a disparity of remedy under the statutes. If an employee is entitled to more than 12 months' leave as an ADA accommodation and seeks leave under both statutes, an employer would make a mistake by applying the 12-week FMLA limit to the ADA request. A claim asserting such a theory was brought in *Zwygart v. Board of County Com'rs of Jefferson County*, 483 F.3d 1086 (10th Cir. 2007), but the case was disposed of on other grounds.

While an employer's decision to place an employee on disability leave may be evidence that the employer regarded the employee as disabled, *Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1133-34 (11th Cir. 1996), *amended in part on reh'g*, 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997), the concepts of "serious health condition" and disability have been held to be so different that an employer's suggestion or grant of FMLA leave does not create an inference that the employer regards the employee as disabled. *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1219-20 (10th Cir. 2007).