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On HRhero.com

Holiday Liability

The holidays are here. Time for friends, family, merriment — and liability. During this time of year, you can easily find yourself with a harassment or discrimination suit in your stocking. At www.HRhero.com, you can find the following tools to make sure the season is merry and bright:

- HR Sample Policy — Respectful Workplace, www.HRhero.com/lc/policies/220.html
- HR Sample Policy — Harassment and/or Discrimination, www.HRhero.com/lc/policies/204.html

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ADA AMENDMENTS ACT

Swine flu not a disability under the ADAAA

A federal court in Tampa has found that an employee's evidence that she missed work because she contracted swine flu (the H1N1 virus) was insufficient to meet the definition of "disability" under the ADA Amendments Act (ADAAA). It was the first time the Florida court had considered the issue. The court held that based on the evidence presented by the employee, the actual or perceived impairment was both transitory and minor. Because of the extremely short duration of her illness, the symptoms she described were "temporary impairments" and were insufficient to qualify as an actual disability under the ADAAA.

Background

Priscilla Lewis worked as a foreclosure specialist during most of her brief employment at Florida Default Law Group, P.L., which assists Florida residents with foreclosures. She was originally hired as a foreclosure supervisor in January 2009. She later accepted a lower-level position (foreclosure specialist) and was terminated on November 4 for poor attendance.

Lewis was leaving work on the afternoon of October 28 when she began experiencing flu-like symptoms. She went to the emergency room (ER) at St. Anthony's Hospital with a low-grade fever, a cough, yellow sputum, diarrhea, a sore throat, malaise, and left

lower-quadrant abdominal pain. The ER physician diagnosed her with influenza A, which he described as "seasonal flu." Although the H1N1 virus is within a class of viruses included under the "influenza A" label, the flu test performed by the ER doctor didn't delineate the specific strain of influenza A. Therefore, Lewis wasn't diagnosed as having the H1N1 virus, although she concluded that she did.

Lewis was out of work on October 29 and 30 but called her supervisor each day. On October 31, she sent an urgent and confidential e-mail to the law firm's HR officer and its chief operating officer stating that she had gone to the emergency room and had been "diagnosed with Influenza A (Swine Flu) and other underlying issues."

On November 3, Lewis went to see her primary care physician, who didn't perform any test to determine whether she had the H1N1 virus. Her doctor gave her a note excusing her from work from October 28 until November 3. According to Lewis, she had been bedridden and vomiting and suffering from diarrhea. She claimed she was physically drained, dizzy, and short of breath. Further, she claimed that as a result of her condition, she was unable to take care of her children, cook, run errands, or perform tasks around her house such as doing laundry and washing dishes.

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AGENCY ACTION

DOL, IRS teaming up on misclassification compliance. The U.S. Department of Labor (DOL) and the IRS have signed a memorandum of understanding aimed at improving departmental efforts against misclassification of employees. In addition, labor commissioners and other agency leaders representing seven states signed memorandums of understanding with DOL divisions during a ceremony with Secretary of Labor Hilda L. Solis on September 19. Those states are Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah, and Washington. Solis also announced agreements to enter into memorandums of understanding with Hawaii, Illinois, and Montana as well as with New York's attorney general. The memorandums enable the DOL to share information and coordinate law enforcement with the IRS and participating states. The memorandums arose as part of the DOL's Misclassification Initiative.

PBGC waiving some premium penalties. The Pension Benefit Guaranty Corporation (PBGC) has announced that it will waive some penalties for late payments of 2011 premiums. A September statement from the agency said other premium-related relief also is being granted as part of an effort to ease regulatory burdens. Companies that pay their premium up to seven days past the due date won't have to pay a penalty. The relief is in response to an executive order mandating federal agencies to improve regulations and the process used to review them and from feedback from pension professionals.

OSHA issues directive on workplace violence. The Occupational Safety and Health Administration (OSHA) in September issued a directive titled *Enforcement Procedures for Investigating or Inspecting Incidents of Workplace Violence*. It establishes uniform procedures for OSHA field staff for responding to incidents and complaints of workplace violence and conducting inspections in industries considered vulnerable to workplace violence, such as health care and social service settings and late-night retail establishments. Workplace violence has ranked among the top four causes of death in workplaces during the last 15 years. More than 3,000 people died from workplace homicide between 2006 and 2010, according to the Bureau of Labor Statistics (BLS). Additional BLS data indicate that an average of more than 15,000 nonfatal workplace injury cases was reported annually during this time. ❖

She testified that she had a friend come to her house to take care of her children while she was sick.

When Lewis returned to work on November 4, she was fired for her previous absenteeism and her recent four-day absence for the flu. The law firm explained that after reviewing all the time she missed, it had determined that her absences had been excessive, and at that point, "it was just too much."

Lewis filed suit, claiming Florida Default discriminated against her based on an actual or perceived disability (the H1N1 virus). Specifically, she claimed that the law firm terminated her because she (1) had the H1N1 virus or (2) was perceived as having the virus. The court analyzed the case under the ADAAA, adopted in 2009.

Court's analysis

In analyzing Lewis' claims, the court noted that the ADAAA makes it clear that an impairment lasting or expected to last fewer than six months may qualify as a disability. The court reviewed the Equal Employment Opportunity Commission's administrative interpretations of the ADA and noted the following comment:

While an impairment need not last for more than six months to be considered substantially limiting, "the duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. *Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.*" (Emphasis added by the court.)

In a footnote, the court noted that before the ADAAA, most courts that had addressed the issue had found that conditions ranging from pneumonia to seasonal flu did *not* meet the definition of a "disability" under the Americans with Disabilities Act (ADA).

The court found that Lewis had failed to show that the temporary impairments she experienced "substantially limited" any major life activity given the extremely short duration that she suffered from those impairments. According to the court:

To be certain, taking care of one's children, cooking, running errands, and performing tasks around the house such as laundry and dishes[,] may in most circumstances be "major life activities," but the fact that Lewis could not perform those functions for a period of one to two weeks does not mean her symptoms "substantially limited" those activities.

As a result, the court found that Lewis did not have an actual disability under the ADAAA and was therefore *not entitled* to a reasonable accommodation by the law firm.

Lewis not 'regarded as' having a disability

Even if an employee fails to establish that she was disabled and thus entitled to a reasonable accommodation under the

ADAAA, she still may claim she was “regarded as” disabled and thus protected by the law. Lewis claimed that she was entitled to protection under the “regarded as” prong of the ADAAA.

Although she didn’t present any evidence that she actually had the H1N1 virus, she did introduce two e-mails from the law firm that were sent to employees in response to an emergency bulletin issued by the Centers for Disease Control and Prevention (CDC) in Atlanta. The e-mails instructed law firm employees to stay home and avoid infecting other workers if they were sick or experiencing symptoms that could be associated with the H1N1 virus.

The court found that Lewis could not establish this claim, either. That’s because her actual or perceived impairment was both transitory and minor with an actual or expected duration of fewer than six months. In analyzing her claim, the court noted there was no evidence that the law firm was aware that Lewis had the H1N1 virus. Additional evidence showed that none of the other employees that the law firm recognized as having the H1N1 virus had been fired.

The court found that the relevant question was whether the actual or perceived impairment on which Lewis’ termination was based was objectively transitory and minor, not whether the law firm claimed it *subjectively believed* the impairment was transitory and minor. To analyze Lewis’ claim that she was “regarded as” disabled, the court stated that the focus was on the perceived impairment itself, not on the condition leading to the impairment:

The fact that Florida Default and the healthcare community may have viewed a potential H1N1 pandemic as quite serious is not relevant to a determination of whether Florida Default perceived Lewis herself as seriously impaired by the H1N1 virus.

Although the court recognized that the ADAAA was intended to expand the scope of the ADA to protect individuals who weren’t previously covered under the Act, it found that Lewis’ actual and perceived impairments were both transitory and minor, which is insufficient to prove a claim under the “regarded as” prong of the ADA. *Priscilla Lewis v. Florida Default Law Group, P.L.*, Case No. 08:10-CV-1182-T-27EAJ (M.D. Fla., September 16, 2011).

Bottom line

This is one of the first cases in Florida to be analyzed under the ADAAA. It usually takes a couple of years for cases to reach a court after the passage of a new law. It was perhaps significant that Lewis never presented any evidence that she actually had the H1N1 virus. As noted

by the court, in this case, the term “pandemic” referred to the number of actual swine flu cases, not the number of people with symptoms. The CDC has stated that the duration of influenza A can run between five and 15 days and that most patients “recover rather well.” The court found that short-term symptoms and short-term impairments are the types of conditions the ADAAA’s “transitory and minor” exception was intended to cover.

Lewis hadn’t been employed by the law firm long enough to be covered under the Family and Medical Leave Act (FMLA). Had she been employed for over a year and met other FMLA requirements, her claims under that law would have been analyzed differently. Nevertheless, in this case, her employer had ample evidence of her poor attendance and that she had been reprimanded before her flu-related absences. Even with employees who are (or have been) out with the flu, it’s a good idea to review your documentation before making a termination decision.

→ You can research the ADAAA or any other employment law topic in the subscribers’ area of www.HRhero.com, the website for Florida Employment Law Letter. Access to this on-line library is included in your newsletter subscription at no additional charge. ❖

TERMINATION

Take this job and what? Tell us about creative quitters

Sometimes employees who are ready to look for greener employment pastures give two weeks’ notice, say their goodbyes, and hit the road. Sometimes, though, they get a bit more creative.

You probably remember the flight attendant who quit his job in August 2010 by activating the commercial jet’s emergency evacuation chute, grabbing a beer from the plane’s galley, and sliding off the job.

And you may have seen the video from October about Joey DeFrancesco, who quit his job at a Rhode Island hotel by bringing in a marching band to give himself a special sendoff. The hotel employee lined up an ensemble complete with trumpets, saxophones, drums, cymbals, and a sousaphone.

DeFrancesco and the merry musicians were all waiting when the boss arrived at work. The employee handed his boss a resignation letter — the cue that struck up the band — and the former employee and his friends marched away.

Do you have a favorite employee-quits story? Tell us about it, and we’ll compile an article for an upcoming newsletter issue. Send your stories to iquit@mleesmith.com. ❖

For a copy of this article please send an e-mail request to Tom Harper at: gth@harpergerlach.com

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