August 24, 2015

ADAAA/FMLA/PDA
The Year in Review:
The ADAAA after 25 Years and The PDA After Young

Patricia L. Ogden
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, IN 46204
(317) 236-1313
Patricia L. Ogden

Partner
317-231-7712
317-231-7433 Fax
patricia.ogden@btlaw.com
11 South Meridian Street
Indianapolis, Indiana 46204

Patricia L. Ogden is a partner in Barnes & Thornburg LLP’s Indianapolis, Indiana office and a member of the firm’s Labor & Employment Law Department. Ms. Ogden exclusively represents management interests for a broad client base, including both private and public employers of varying size. On the litigation side of her practice, Ms. Ogden routinely defends allegations of wrongful discharge, wage and hour claims, discrimination, retaliation, sexual and other forms of harassment, whistleblower complaints, OSHA violations, worker’s compensation matters, and a variety of other employment claims. In addition to defending claims in federal and state court, Ms. Ogden has represented clients in a variety of administrative forums, including the Department of Labor, matters before the EEOC, federal and state OSHA matters, unemployment appeals, and worker’s compensation claims. With regard to OSHA matters, Ms. Ogden has assisted employers defend claims, including multiple fatality cases, in multiple jurisdictions and with regard to both federal and state plans.

Recognizing the significance of being proactive in employment matters in order to reduce legal risks, Ms. Ogden spends a substantial amount of her practice in daily client counseling, effective policy development, and client training on a variety of legal compliance issues, including by way of example Title VII of the Civil Rights Act, harassment issues, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), various state statutes, wage and hour compliance issues, effective hiring, as well as other effective supervisory skills. Her practice regularly involves advising human resource professionals and management personnel who hold the responsibility of administering the FMLA and ADA compliance, as well as advising clients on OSHA compliance and training requirements and best practices. In addition, Ms. Ogden works with clients on consulting agreements, independent contractor issues, handbooks, and in analyzing reductions-in-force and preparing severance packages.

Prior to joining Barnes & Thornburg, Ms. Ogden was a practicing registered nurse (RN) specializing in research and transplantation and critical care, as well as the nurse manager of a large medical unit. Due to her background as an RN, Ms. Ogden participates in healthcare symposiums and advises clients and other HR personnel on updates to the ADA and FMLA, workplace medical issues, risk management, effective documentation, legal issues involving unemployment proceedings, transfer of patients between facilities, and other healthcare-related topics.

Ms. Ogden earned her B.S. from Ball State University in 1990, and her J.D. summa cum laude in 1996 from the Indiana University School of Law - Indianapolis. While in law school, she was the executive editor for notes and
topics for the *Indiana Law Review*. Ms. Ogden has been selected for inclusion in *The Best Lawyers in America*® 2015.

Ms. Ogden is a member of the Indiana State Bar Association and the American Bar Association, and is admitted to practice in the United States District Courts for the Northern and Southern Districts of Indiana.
The ADA 25 Years Later

- Initially signed into law in 1990 by President George H.W. Bush
- Over the next 18 years, series of court decisions narrowed the scope of coverage under the ADA
- The ADAAA, signed by President George W. Bush, resulted in a dramatic overhaul to the law in 2008 - we now have about 7 years’ experience with the new law
- Trends - more focus on reasonable accommodation and less focus on what is or is not a disability; more varied accommodation situations

ADAAA: A Legal Review of Recent Cases
Inability To Pass Entrance Exam Not Evidence Of Disability
Novak v. Board of Trustees
7th Cir. 2015

- In Title II case, participant in doctoral program who had PTSD alleged discrimination when he was ultimately dismissed from the program for failing to successfully complete the preliminary exam, despite multiple accommodations and several attempts to pass the exam.
- Plaintiff attacked the evaluators’ substantive methodology/conclusions as evidence of discriminatory motive.
- The Court upheld the summary judgment for the University, holding that there was no evidence of pretext and the evaluators’ lapse, if any, nonetheless reflected an honest appraisal of his work.

Reasonable Accommodations/Interactive Process/Transfer To Vacant Position
Stern v. St. Anthony’s Health Center
7th Cir. 2015

- Chief psychologist for acute-care facility sued the hospital for ADA discrimination/failure to accommodate after his termination due to the hospital’s determination that he was no longer qualified based on cognitive and memory issues.
- Held: Summary judgment affirmed for the employer, even though they failed to engage in an interactive process.
Reasonable Accommodations/Interactive Process/Transfer To Vacant Position
Stern v. St. Anthony’s Health Center
7th Cir. 2015

• During an exit interview, one of plaintiff’s subordinates disclosed that she was leaving because of concerns with the plaintiff’s cognitive issues.

• The Hospital investigated and her concerns were corroborated by other department members.

• The Hospital required a fitness for duty evaluation, and the plaintiff selected the provider.

• The medical provider indicated that there were short-term memory issues, and did not believe he was fit for his position at the time.

• The IME provider made several speculative suggestions, such as relieving him of the administrative responsibilities, structuring a lighter case load, working part-time.

• The Hospital discussed the results of the report but did not meet with the plaintiff to discuss possible accommodations.

• During the termination meeting, the plaintiff suggested the elimination of his nonclinical duties or swapping positions with another psychologist - the Hospital declined.
Reasonable Accommodations/Interactive Process/Transfer To Vacant Position
Stern v. St. Anthony’s Health Center
7th Cir. 2015

• Held: The administrative, supervision and clinical practice were all essential job functions – no need to carve off.
• Transfer as reasonable accommodation only related to vacant positions, not swapping positions.
• Having another provider shadow him was not a reasonable accommodation.
• Plaintiff failed to provide any competent evidence that he was qualified for the job with reasonable accommodations.

But see:
Kauffman v. Petersen Health Care
7th Cir. 2014

• Plaintiff was a hair dresser at a nursing home, and suffered an injury that resulted in permanent restrictions of pushing or carrying anything over 50 pounds.
• When she informed the employer that she had the restrictions, she was informed that the employer did not allow employees to work with restrictions.
• Part of her job was to wheel residents across the campus to and from the salon.
**But see:**
Kaufman v. Petersen  Health Care  
7th Cir. 2014

- The issue was whether wheeling patients to and from the beauty shop was an essential function of the job.
- The estimates of the time spent doing this task were greatly varied.
- There was no interactive process.
- Held: Wheeling patients was a marginal function that could be carved off - no undue hardship.
- **No restrictions policy** was unlawful.

**Duty of Reasonable Accommodation; Discrimination Claim**
Taylor-Novotny v. Health Alliance Medical Plans, Inc.  
7th Cir. 2014

- Plaintiff was a contract specialist which involved document preparation, negotiating and reviewing contracts, etc.
- Plaintiff had a demonstrated pattern of tardiness from the point of hire. She was diagnosed with MS about 1 ½ years post hire.
- She was permitted to work from home 3 days per week, and continued to have attendance and punctuality problems.
Duty of Reasonable Accommodation; Discrimination Claim
Taylor-Novotny v. Health Alliance Medical Plans, Inc.
7th Cir. 2014

- Regular attendance was required for individuals in her position.
- Her demonstrated inability to perform this job function rendered her not qualified for the position.
- She was also not meeting her employer’s expectations.
- Her request to use her badge in swipe as proof of attendance was denied - not a reasonable accommodation as she was not prevented from calling supervisor as requested, by her condition.

Temporary Impairment May Still Be A Disability
4th Cir. 2014

- The 4th Circuit reversed the district court’s decision dismissing the ADA complaint based on the temporary nature of the condition at issue.
- The plaintiff incurred injuries to both knees in a fall - left leg fracture and torn meniscus and fracture of right ankle and ruptured tendon.
- He required 2 surgeries and extensive PT.
- The plaintiff requested leave and the ability to work from home and gradually build up time.
- There was no interactive process or discussion - he was terminated and replaced.
Temporary Impairment May Still Be A Disability
4th Cir. 2014

• The appellate court held that under the revised law, a short term condition can be substantially limiting and thus be a disability, citing and relying on the revised EEOC regulation to the effect.

Routine Hernia Surgery Not A Disability
Brodzik v. Contractors Steel, Inc.
N.D. Ind. 2014

• On a Motion to Dismiss, the court granted the company’s motion without prejudice.
• The employee had a routine hernia operation, a recovery period of 6 weeks and was then released without restrictions.
• Upon return to work, the plaintiff was transferred from outside to inside sales, and was screamed at by his supervisor.
• He ultimately quit and alleged a constructive discharge.
• The court held that short term impairments, such as a routine hernia surgery, still do not qualify as a disability under the revised ADAAA.
Open-ended Medical Leave Not A Reasonable Accommodation
S.D. Ind. 2014

- Plaintiff was a 5th grade teacher with diabetes and high blood pressure and he also had a minor son with sickle cell anemia.
- He had significant performance issues with classroom management, lesson plans and parent complaints.
- He also missed a substantial amount of work due to his own conditions and those of his son (although he never applied for FMLA leave).

The court held that the plaintiff was not otherwise qualified as he was not meeting the employer’s legitimate expectations.

In addition, the court reiterated that the 7th Circuit had rejected the notion of an open-ended schedule as a reasonable accommodation.

Finally, the plaintiff never requested an accommodation.

Summary judgment granted for employer on the ADA claims.
Telecommuting As A Reasonable Accommodation
EEOC v. Ford Motor Co.
6th Cir. April 2014

• Plaintiff suffered from severe IBS.
• She was a resale steel buyer at Ford.
• Her formal evaluations were good on substantive issues, but noted a weakness in interpersonal skills; however, in informal “contribution level” management rankings, she was rated at the low end of the spectrum.
• She requested flex time as a reasonable accommodation, but was unable to establish consistent work hours.
• Leave was approved when needed.
• She requested telecommuting up to 4 days a week; this was denied.
• The company believed that the essence of the job was group problem-solving, which it believed had to be accomplished in person.
• Plaintiff made errors because she did not have access to buyers in the off hours.

Telecommuting As A Reasonable Accommodation
EEOC v. Ford Motor Co.
6th Cir. April 2014

• When the plaintiff worked weekends and nights, she missed deadlines and made mistakes.
• With supplier meetings, the plaintiff said she could reschedule meetings if she was having a bad day.
• Summary judgment denied – not clear that in-person problem-solving is an essential function of the job – technology has diminished the necessity of in-person contact.
Telecommuting As A Reasonable Accommodation
EEOC v. Ford Motor Co.
6th Cir. April 2015 (Rehearing en banc)

• In a rehearing *en banc*, the 6th Circuit reversed its prior decision, finding:
  – Regular and predictable attendance at work was an essential function of the resale-buyer job, noting that the majority of the courts have so held.
  – **Regular in-person attendance is an essential function - and a prerequisite to essential functions - of most jobs.**
  – Employers are not required to lower production standards.
  – Based on the record, plaintiff could not perform at least 4 of her job duties remotely.
• Note: There had been three unsuccessful telecommuting trials.

---

Failure To Disclose Condition And Ask For Accommodation Dooms Case
Walz v. Ameriprise Financial
8th Cir. 2015

• Plaintiff was a process analyst whose job duties admittedly required teamwork, and good communication skills.
• Plaintiff suffered from bipolar disorder, which she alleged caused her to disrupt meetings, disrespect her supervisor and disturb her coworkers.
• Plaintiff received a warning for her behavior, then sought FMLA leave which was granted by the third party provider.
• After returning from leave, the behaviors resurfaced, and she was ultimately terminated.
Failure To Disclose Condition And Ask For Accommodation Dooms Case
Walz v. Ameriprise Financial
8th Cir. 2015

- The court reasoned that the evidence was clear that the plaintiff could not perform the essential functions of the job without accommodation.
- But since the plaintiff failed to notify the employer of her medical condition or need for accommodation, there was no duty of accommodation.
- Here, the employer had provided her with the process for seeking an accommodation upon her return from leave - she never did.
- The plaintiff argued unsuccessfully that the return to work slip coupled with her erratic behavior was sufficient to put the employer on notice; however, the court held that the condition was not open and obvious.
- With regard to the accommodation claim, the plaintiff argued that the employer should have forced her to take leave. There is no duty to guess an employee’s disability and force her to take leave.
- Summary judgment granted for the employer.

Plaintiff is Only Entitled To A Reasonable, Not Preferred, Accommodation
2nd Cir. 2015

- Plaintiff was a deaf software engineer.
- The employer provided onsite and remote ASL interpreters, as well as communication access real time translation.
- He wanted all the video files on the intranet to be close-captioned, which was declined.
- He sued, arguing that the accommodations provided were not as effective as they distracted him, and that the company failed to engage in the interactive process.
Plaintiff is Only Entitled To a Reasonable, Not Preferred, Accommodation

2nd Cir. 2015

• The court held that a reasonable accommodation is one that enables the individual to perform the essential functions of the job.
• Plaintiff’s claim was that immediate access was required to enjoy equal benefits and privileges of employment.
• The court held that the accommodation was reasonable given all the facts and circumstances - it must only be effective, not the preferred accommodation.
• Because a reasonable accommodation was provided, failure to engage in interactive process was not actionable.

FMLA Developments:
Recent Decisions
FMLA Interference Claim
Taylor-Novotny v. Health Alliance Medical Plans, Inc.
7th Cir. 2014

• Plaintiff was a contract specialist which involved document preparation, negotiating and reviewing contracts, etc.
• Plaintiff had a demonstrated pattern of tardiness from the point of hire. She was diagnosed with MS about 1 ½ years post hire.
• She was permitted to work from home 3 days per week, and continued to have attendance and punctuality problems.

• When Plaintiff submitted an FMLA cert indicating that she needed intermittent FMLA leave and ability to work from home two days per week, it was approved.
• The employer told the plaintiff that it was her responsibility to let her manager know when absences would be necessary and whether it was due to the FMLA reason for leave.
• When she was later restricted from working in the office to two half day periods per week, she was informed that she needed to take FMLA for the balance of those days and inform her manager. She refused to take FMLA for the balance.
• She was ultimately terminated for lack of punctuality and failure to accurately report her work time.
• She was never denied leave for any time she identified.
• There is no accommodation provision under the FMLA.
Failure To Seek Recert When Condition Changes
Hansen v. Fincantieri Marine Group
7th Cir. 2014

• Plaintiff was within one point of termination when he sought FMLA leave for depression.
• The cert indicated the need for intermittent leave for flare-ups and estimated the frequency as four episodes in six months with 2-5 days of incapacity per episode.
• On the 8th occurrence, the employer sent a vague note requesting clarification but identified the wrong portion of the cert.
• The employee was terminated for that absence.

• The estimate on the FMLA form is just that – an estimate.
• The employer’s option if the manner of taking leave changes is to get a recertification, not deny leave for those absences.
• Summary judgment denied.
What Is The Effect Of Failing To Get Clarification Of A Cert. Form?
Hansler v. Lehigh Valley Hospital Network
3rd Cir. 2015

- Plaintiff submitted FMLA certification for intermittent leave.
- Without seeking clarification on the medical cert, she was terminated at the end of that month for absenteeism.
- The employer had not denied the leave in writing at that point either.
- The appellate court reversed the district court and denied summary judgment as the employer failed to allow the statutory opportunity to cure the deficient certification.

What Is An Overnight Stay?
Bonkowski v. Oberg Ind.
3rd Cir. 2015

- Former employee with heart condition and diabetes brought an FMLA interference and retaliation claim when he was terminated for leaving work due to shortness of breath, chest pain, and dizziness.
- The plaintiff experienced these symptoms while his supervisor was discussing his recent suspension for sleeping on the job, and was given permission to leave.
- He went to the ER and the tests performed did not confirm any complications and was released later that day (he argues he arrived before midnight but was not checked in until after MN).
- He was given no restrictions.
What Is An Overnight Stay?
Bonkowski v. Oberg Ind.
3rd Cir. 2015

• The court wrestled with the regulatory definition of inpatient care and overnight stay.
• The Court held that the term means a stay in a hospital, hospice or residential care facility for a substantial period of time from one calendar day to the next calendar day as measured by the time of admission and discharge.
• The Court used the calendar day approach.

What Is The Effect Of Presuming That An Employee Will Not Timely Return To Work?
White v. Beltram Edge Tool Supply
11th Cir. 2015

• In this interference claim, the plaintiff initially injured her knee but worked 10 months thereafter.
• She took off beginning on December 23 for a host of other maladies through January 27.
• At that point, Plaintiff fell, reinjuring her knee. The next day, she spoke to her supervisor and advised of the injury, and she requested FMLA paperwork.
• The doctor was on leave, so the plaintiff requested an extension to get the cert in.
• The employer requested doctor’s notes to explain her absences since 12/27. After receiving the doctor’s notes, the plaintiff was fired.
• Although in dispute, the FMLA form which was received around that time anticipated a need for leave for almost 13 weeks.
• Later, her surgeon indicated that she recovered well and could have returned within the 12 week period.
What Is The Effect Of Presuming That An Employee Will Not Timely Return To Work?
White v. Beltram Edge Tool Supply
11th Cir. 2015

- Problems with the leave management
  - The FMLA forms were not sent at the beginning of her time off in December, although probably on inquiry notice.
  - The extension of time for getting the cert back was reasonable under the circumstances, yet although it was verbally approved, the employer relied on not timely returning the cert to terminate her.
  - The employer did not seek clarification or FMLA certification for any of the other reasons for absences.
  - The employer banked on the employee’s inability to return in 12 weeks to terminate.

What Happens When the Plaintiff Breaks Down the Process?
Norris v. Allison Transmission
S.D. Ind. 2015

- Plaintiff requested leave for spouse’s condition, received a copy of the cert and the policy - the leave was approved.
- Plaintiff exceeded the expected amount of time off - the employer requested a recertification, which was received and increased the number of days/month covered.
- Almost immediately thereafter, the employee indicated that his wife may need surgery and was told that he needed a new cert for that as the current cert only indicated intermittent leave.
- He did not return a new cert.
What Happens When the Plaintiff Breaks Down the Process?
Norris v. Allison Transmission
S.D. Ind. 2015

• Held: The court held that the second certification was clear and unambiguous and the employer was entitled to rely on it. The cert indicated that the employee did not need continuous leave.

• Further, the employer did request another cert, which the plaintiff never provided, despite being given 15 days to do so.

GINA Developments:
Recent Decisions
Most Creative Employer
Lowe v. Atlas Logistics Group Retail Services

• The employer operates warehouses for the storage of grocery store products.
• A mystery employee began defecating in the warehouse.
• The employer required several employees to be submitted to a cheek swab to determine who the culprit was.
• Their tests were not a match.

Most Creative Employer
Lowe v. Atlas Logistics Group Retail Services

• The test done could not determine the propensity for disease.
• The Court struck the Defendant’s argument that the test was not covered because it could not detect any information concerning the propensity for disease, stating that the statutory language is plain on its face and the test was prohibited.
Who Is Responsible When The Medical Provider Seeks Genetic Information?
Lee v. City of Moraine Fire Dept.
S.D. Ohio March 2015

• The plaintiff was a firefighter and was required to submit to a physical exam. It was revised in 2011 to only require a questionnaire for firefighters under 40 and a physical exam if over 40.
• The doctor conducting the evaluations used the OSHA questionnaire and added a question about family history of heart attacks and required additional screening for firefighters with prostate cancer familial history.
• The City defended, indicating that the doctor added the question.
• The court held that the City was liable for the actions of its agent, and that the inquiry violated GINA.

The PDA - The Landscape Has Changed
Update on Pregnancy Discrimination Post Young

PREGNANCY

* Typically not a “disability” under the ADA (however, the coverage issue may be analyzed broader with the ADAAA)

* Touchstone: Cannot discriminate; must treat as other medical conditions...

Pregnancy and the Duty To Accommodate

Young vs. UPS

• UPS had a CBA in place that provided for temporary light work assignments for employees temporarily unable to perform the job duties due to an occupational injury, a disability under the ADA, or for DOT-covered drivers who were disqualified from driving.

• Pregnant employees were ineligible for such an assignment.

• Plaintiff (pregnant) had a 20 pound lifting restriction in a driver position requiring up to 70 pound lifts. She received extended leave, and eventually lost her health insurance.

• She alleged a PDA claim.
Pregnancy/Accommodation
Young vs. UPS
Circuit Court Holding

• With regard to the PDA claim, no direct evidence of discrimination – the policy was “pregnancy blind.”

• PDA only requires that individual be treated the same as non-pregnant employees similarly situated in their ability to work.

• An employee with a temporary lifting restriction is not similar to a disabled employee under the ADA.

• Not unlawful for the CBA to have a provision requiring light duty for occupational injuries.

Pregnancy-Based Discrimination
Young vs. UPS

• On March 25, 2015, the Supreme Court reversed the 4th Circuit which had dismissed the case on summary judgment for the employer.

• In doing so, the Court rejected both the plaintiff’s position and the employer’s position, instead carving out an intermediate position.
  – Plaintiff’s interpretation of a “most-favored nation” status for pregnant employees was rejected, which would in essence require an employer to provide all pregnant workers with an accommodation if it provided an accommodation to another employee, regardless of the nature of their jobs, the employer’s business needs or other legitimate criteria.
  – UPS’s interpretation that there was no duty of accommodation in a gender-based disparate treatment case, including pregnancy discrimination cases, was too broad.
Pregnancy-Based Discrimination

- Absent direct evidence of discrimination, the *prima facie* case for PDA disparate treatment claims include: (1) member of the protected class; (2) employer did not accommodate her; and (3) the employer accommodated others “similar in their ability or inability to work.”
- Once established, the employer can provide the legitimate, nondiscriminatory reasons for denying the request (not sufficient to claim more expensive or less convenient to add pregnant women to the list).
- Once established, the plaintiff can establish pretext by providing sufficient evidence that the employer’s policies “impose a significant burden on pregnant workers” and that the employer’s reasons “are not sufficiently strong to justify the burden, but rather - when considered along with the burden imposed - give rise to an inference of intentional discrimination.”

Pregnancy as a Disability

Young vs. UPS

- **With regard to light duty programs:**
  - Evaluate any written policies and update.
  - Evaluate whether a cap on length of light duty assignments makes sense.
  - Evaluate requests for light duty by pregnant employees with counsel.
- **If no light duty programs, no need to create one for pregnant employees.**
Union organizing campaigns. Tough labor negotiations. Tricky terminations. Collective bargaining actions. That’s all right in our sweet spot. Barnes & Thornburg steps up with a national Tier One ranking for its labor law and employment law practices. So bring the heat.