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## LITIGATION

### Theme of the Month

Two cases this month illustrate the dangers of rushing to judgment, skipping procedural steps, or ignoring company policy provisions before discharging an employee. Another case shows how having a clear handbook policy and *following it* can provide a firm defense against unfair termination cases.

### *Family and Medical Leave Act*

**Employer Skipped a Step in Firing Employee for Falsifying FMLA**. The FMLA does not prohibit discharging someone for dishonesty, taking leave under false pretenses, submitting false or forged certifications, etc. However, one must be *sure* their employee is falsifying FMLA, rather than jumping to conclusions and neglecting to follow procedures. In *Mook v. City of Martinsville, Virginia, et al.* (W.D. Va., 2024), the City doubted an Assistant Attorney's medical certification to take FMLA for his mother's medical situation. The certification had been signed by a physician's assistant and the Assistant Attorney claimed he had accompanied his mother to the clinic. The City called the clinic and spoke to the doctor in charge, who stated that she had not authorized signing any FMLA certification. So, the City fired the Assistant Attorney for falsification. The FMLA regulations, however, specify that when there is any question about certification, including its legitimacy, the first step is to inform the employee and allow that employee the opportunity to clarify or "cure any deficiencies." The City skipped this step. In the aftermath, it was shown that the doctor was in error. The certification had legitimately been signed by the physician's assistant

and the medical need was legitimate. Even if there had been an FMLA falsification, the employer would have still had to *follow the required process*. Skipping steps and rushing to a judgment can void any action the employer may take.

## *Discrimination*

### Age

**Rush to Judgment Supports Age Claim**. *Schofield v. Amazon Logistics (S.D. OH, 2024)* is a good lesson in the danger of a sparse pre-termination investigation and being too quick to act. Amazon fired a 64-year-old manager for allegedly asking another employee to work without recording their time. This was based on the employee's statement to HR, which seemed to change a bit when she talked to a second HR representative. No one asked the manager his side of the story. He only learned about it after the firing at which time he denied the accusation. Then the company also denied the manager the company's standard appeal process for terminations. He filed an age discrimination case alleging he was adequately doing his job, fired for no valid reason, and replaced by a substantially younger person. In allowing the case to proceed to a jury trial, the court opined that this was a close call, but the company's "threadbare" and one-sided "investigation," the apparent rush to judgment, and the denial of the standard internal appeal process created every appearance of pretext. Thus, a jury could believe that age was the real motivating factor for the action. This case is a good illustration of why taking the time to do a thorough and fair investigation is important. Amazon may well win the trial, but it has put itself in the position of having to spend large sums and effort to go through a lengthy litigation process that could have been avoided.

### Disability

**Employer Violates ADA and GINA by Exploiting its Employees with Medical Conditions**. A pharmacy service will pay over half a million dollars to settle charges claiming it exploited its employees. The Company hired people who had hemophilia or whose family members had the condition. Then, it pressured them to purchase the expensive hemophilia medication and medical management services it provided. Employees testified that the Company conditioned their continued employment on continuing to pay for these specific medications and services. This violates the ADA and violates GINA prohibitions for improper use of employees' medical information. Neither law allows the use of personal or family medical information for commercial purposes or

threatening to use it for employment decisions. *EEOC v. Factor One Source Pharmacy, LLC* (D. Co., 2024)

**Wearable Magnifier and Headlamp Accommodation Was Not Part of the Standard Uniform**. A visually impaired employee took medical leave and then was certified to return with the recommendation that he use a wearable magnifier and headlamp to do his job. The company kept him on leave, telling him there were no openings available for a return and eventually terminated him due to the extent of the leave. At no time did the company explore the accommodation request. In the resulting ADA suit, it was discovered that there had been several relevant job openings during the time the employee was being denied the ability to return. Then the company tried to defend the case by claiming that the wearable magnifier and headlamp were not reasonable because they were not part of the standard employee uniform. There was no evidence that these items would impair the ability to work in any way, and there had been no discussion with the employee or exploration of the issue under the ADA's interactive process requirement. This created a viable claim for disability discrimination. *Garcia v. Walmart, Inc.* (9th Cir., 2024)

**Good Evaluation Right Before Discharge Overcomes Employer's Defense**. A Program Director for a community agency was terminated while on medical leave of absence for kidney disease treatments. The leave had been approved as an accommodation for this disability. She filed an ADA suit for denial of accommodation. The employer's defense was (1) she was fired for performance and poor conduct, especially a negative incident with another employee before taking leave; and (2) the agency *did* grant the accommodation and approved the leave of absence. The evidence showed there was no documentation of any poor performance or negative behaviors. A performance evaluation just before the leave of absence, and after the supposed "incident," was within the "meets expectations" range. There was only one small mention of "communication style" improvement needed, but no "unsatisfactory" mark. The other employee supposedly involved in the "incident" stated that it was not a negative discussion. The good evaluation caused the employer's defense to seem like pretext and was unpersuasive. As to the accommodation defense, the court found that initially granting an accommodation leave has little meaning if it is then withdrawn. Termination while on leave nullifies the accommodation and can violate the ADA. *Holt v. Community Action Council* (E.D., KY, 2024). This case is a good reminder about prompt documentation of problems, and supervisors treating performance evaluations seriously. Too often, employees with serious performance issues are given a "pass" in the evaluation; the issues are not

labeled as serious enough to lead to discharge. This harms the employer's later efforts to justify a discharge decision. It is also unfair to the employee. It denies them a fair chance to understand the seriousness of the issues, and the opportunity to correct them. They think all is okay, they have okay evaluations and are then blindsided by a discharge. [For more information on this issue, request the article *We Have the Straw that Broke the Camel's Back, But where is the Rest of the Camel?* By Boardman Clark].

**Sex**

**Off-Job Harassment is Still Harassment if Done by a Manager and a Discrimination Case is Not the Only Way to Address Sexual Harassment – Bigger Damages, Personal Liability, and Longer Statutes of Limitations Available**. Usually, the route for sexual harassment cases is Title VII or state antidiscrimination laws. There are 300-day statutes of limitation and damage award caps under these laws. However, there are other avenues as well. One is via state tort action; civil suits that may have several-year statutes of limitations, unlimited damages, and allow the plaintiff to sue and collect from more defendants. *Doe v. Marriott Hotel Services LLC* (D. RI, 2024) is a suit about negligent hiring, training, and supervision, and it alleges that a manager began harassing a female employee at work and then sexually assaulted her after an off-work social event. The manager had previously worked for the employer over a decade ago and had been asked to resign due to sexually harassing a housekeeper. He was rehired a few years later and was again asked to leave for sexually harassing a housekeeper. Then he was again rehired several years later, those who hired him figured he had "matured" and "grown up." This time the sexual assault occurred. The plaintiff filed the suit a year and a half later alleging that the company knew of the manager's prior record, and his propensity for sexual impropriety, and should have known he posed a danger to women with whom he would come in contact. The company was "on notice" that he presented a danger, yet it hired him anyway and then provided inadequate training and oversight, thus leading to the assault. The company's primary defense was that it should not be held responsible for things occurring off the job and outside the regular employment context. The court did not accept this argument stating, "The prior wrongful conduct in the workplace would have placed the employer on notice that he presented a danger to other employees" and "It is well established that an employer that employs a vicious person to do acts which necessarily bring him in contact with others is subject to liability for harm caused by the vicious propensity." The employer had a duty of care not to hire the person, or if it had hired the person, it had a duty to closely monitor and

supervise to assure the safety of others. The off-duty argument failed because it was the employer's act putting the perpetrator and victim together which enabled the harm, regardless of when or where it occurred. *This is similar to other cases* in which employers are found liable for off-duty acts of their employees, such as when a home repair employee uses their work time to "case" a customer's home for valuables, then returns to burglarize it on their off-duty time. This is why background checks, references, proper monitoring and supervision, and training are crucial when problematic propensities are known or noticed.

**Court Again Verifies that Hiring Salary Should Not be Based on Prior Pay Level**. A female Veteran's Administration pharmacist filed an Equal Pay Act (EPA) suit due to being paid less than a male pharmacist hired at the same time and period and doing the same GS-12-rated work. The Agency defended by claiming it based the pay on market factors and the male pharmacist's higher prior salary history. So, he had to be paid more to get him to take the job. The court ruled that this is not a valid defense under the EPA. Equal work deserves equal pay. To justify a greater hiring pay, the employer must show clear proof that there was a valid difference in skill, education, qualifications, or other non-gender-related factors that enable the person to operate at a higher functional level or do more than others. Pay disparities between men and women for the same work have generally been due to discriminatory factors. Using prior pay as a hiring factor for equal work simply adopts and perpetuates the discriminatory practices of prior employers. *Boyer v. U.S.* (Fed. Cir., 2024)

## *Employment Policies*

**Handbook Provisions Saves City from Liability**. A city employee was on a leave of absence for over a year due to medical conditions. His employment was terminated. He filed a 42 U.S. Code § 1983 case claiming that he, before his leave and even after, had expressed disagreements with certain city decisions, and his termination was in retaliation for this "protected First Amendment speech." The court validated a summary judgment dismissing the case. The city handbook had a policy stating that no leave of absence would continue beyond 12 months, and then employment would end. The city's termination letter cited this policy. The employee admitted he was still unable to return to work even after 12 months. Even two years later during the suit, he admitted he still could not work. The court found that there was no pretext in the city's reason for termination. Regardless of any protected First Amendment speech, the employee would have been terminated anyway under the clear policy stated in

the handbook. *O'Neal v. City of Hiram, et al.* (11th Cir., 2024). *Warning – be careful* in being *too rigid* in following a handbook policy. A number of cases, especially under the ADA, have been decided against employers who had knowledge an employee was almost ready to return in an established time, yet "jumped" to terminate the "moment" the company handbook leave policy timeframe expired. This over-eagerness to use the policy rather than do a short extension was seen as evidence of an intent to discriminate and a denial of reasonable accommodation. So, consider some flexibility and perhaps check with legal counsel before rigidly enforcing the letter of the policy. **Also,** *beware of short timeframes*. Too short of a maximum leave limit may not meet the reasonable accommodation requirements. For instance, adopting the FMLA 12-week limit for the maximum for all medical absences protection will almost always violate the ADA accommodation requirements. They are different laws and the FMLA's limited protected leave has no bearing on what may be deemed "reasonable" under the ADA.

## *Privacy*

**School District Cannot be Sued for Coworker's Invasive Search of Purse**. A school counselor was arrested for having a gun on school property. This occurred after two coworkers observed her slurring her words, appearing intoxicated, and saw her taking pills. After this, they went into her office and looked in her desk and purse to see if there were alcohol or problem medications. Instead, they found a gun in the purse. This was not reported to school authorities. Rather, another employee who heard them talking about it informed a sheriff's deputy, who then reported this to the school safety officer and Superintendent. The deputy then went to the school. The counselor was called to the Superintendent's office and told of the report of having a firearm in her possession and asked if it was in her purse. She then voluntarily opened the purse revealing the gun. The deputy arrested her for violating the state law against weapons on school grounds. The counselor sued the district for violation of her Fourth Amendment Unreasonable Search and Seizure rights. The Court found the district immune. The two coworkers may have violated the counselor's privacy, but they were not acting under a District policy or in a supervisory capacity. There was no link between the coworkers' inappropriate curiosity and an official District sanctioning or urging of that behavior. Further, when the counselor was called into the meeting, the District had legitimate safety reasons to conduct an investigation based on the information it received.

The teacher voluntarily showed her purse. So, there was no unreasonable or forced search or seizure. *Lawson v. Creely, et al.* (E.D., KY 2024)

## *Unfair Discharge*

**You Don't Have to be Right — Mistaken Belief Can Be Basis for Discharge**. A sales representative driving a company vehicle told a manager that he was "packing" in case he came into a threatening situation. The manager believed this meant he was carrying a firearm in the company vehicle, a serious violation of company policy. So, the sales representative was fired. The salesman sued for unfair discharge and violation of the state's statute on carrying firearms. The fact was that the sales representative was referring to a Taser he had in the vehicle. This was not a "firearm" under the policy. It was also not a "firearm" under state law, which allowed employers to prohibit firearms in company vehicles. So, the sales representative's suit claimed the "non-firearm" taser situation did not actually violate either the company policy or the state law provisions. The court granted summary judgment dismissing the case. An employer does not have to be correct in its decisions. It just has to have good faith and believe in its reason for discharge. The sales representative's statement that he was "packing" provided a good reason for the employer's actions. The state law also did not provide any foundation for the sales representative's case. It allowed the employer to prohibit firearms in a company vehicle, and it did not have any provisions limiting the employer's ability to act if the item was mistakenly believed to be a firearm. The law did not cover Tasers or other sorts of weapons. *Sheard v. Novo Nordisk Inc.* (W.D., KY, 2024)

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