The Latest in Accommodating Disabilities:

Pregnancy Discrimination, PUMP Act, and Disability Discrimination

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I. Pregnant Workers Fairness Act (PWFA).

A. General Overview.

1. The PWFA was first introduced into Congress in May 2012. President Biden signed the PWFA into law on December 29, 2022, and it went into effect on June 27, 2023.

a. This law strengthens the Pregnancy Discrimination Act (PDA) and gives workers more protection for pregnancy-related conditions. It does not displace other anti-discrimination laws such as the Family and Medical Leave Act (FMLA).

i. The U.S. Supreme Court's decision in *Young v. United Parcel Service*, 575 U.S. 206 (2015) made clear that pregnant workers are not entitled to a "most-favored-nation" status in the workplace. Some believe that this decision removed the teeth from the intent of the PDA.

ii. The PWFA therefore expands federal protections for pregnant workers while borrowing certain existing principles from the ADA.

b. Prior to this law, federal law only required covered employers to reasonably accommodate pregnant employees' medical restrictions if those restrictions rendered the employees "disabled" under the ADA as amended.

B. Coverage.

1. Applies to all private employers who have 15 or more employees, federal/state/local employers, employment agencies, and labor organizations.

2. Both employees and applicants are entitled to protection if they are considered "qualified." An applicant or employee is "qualified" under the PWFA if:

   a. They can perform the essential functions of the job with or without a reasonable accommodation; or

   b. Their inability to perform an essential function of the job is temporary and can be reasonably accommodated.

C. Remedies.

1. Employees must first exhaust administrative remedies prior to bringing a private action. The EEOC and the U.S. Attorney General possess the same enforcement and investigatory rights that they have under Title VII.

2. The PWFA has the same compensatory and punitive damages as Title VII as well as the right to award attorneys' fees to prevailing employees.

3. The PWFA does grant employers a defense to failure-to-accommodate claims. More specifically, employers may avoid liability for damages: "if the covered entity demonstrates good faith efforts, in consultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity."

D. On August 7, 2023, the EEOC published its Proposed Rule interpreting the PWFA. The Proposed Rule sets forth how the EEOC intends to interpret the law. This is just a Proposed Rule and could change. The Proposed Rule can be found here: https://public-inspection.federalregister.gov/2023-17041.pdf

E. Key Provisions Of The EEOC's Proposed Rule.

1. "Known limitation" is defined in the PWFA as a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the covered entity whether or not such condition meets the definition of disability" under the ADA.

2. "Known" means "the employee or applicant, or representative of the employee or applicant, has communicated the limitation to the covered entity."

3. "Limitation" means "a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The physical or mental condition that is the limitation may be a modest, minor, and/or episodic impediment or problem. The physical or mental condition also may be that a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy. The physical or mental condition required to trigger the obligation to provide a reasonable accommodation under the PWFA does not require a specific level of severity."

4. If an employer has reasonable concerns about whether a physical or mental condition or limitation is "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," the employer may request information from the employee regarding the connection using the principles set out in the sections in the Proposed Rule about the interactive process and supporting documentation. However, the EEOC has stated they believe in most instances this will be a straightforward determination that can be accomplished through a conversation between the employer and employee as part of the interactive process and without the need for the employee to obtain documentation or verification.

5. The Rule proposes two definitions of "qualified".

    a. The PWFA uses language from the ADA: "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment."

    b. Second, the PWFA allows an employee or applicant to be qualified even if they cannot perform one or more of the essential functions of the job if the inability to perform the essential function(s) is "temporary," the worker could perform the essential function(s) "in the near future," and the inability to perform the essential function(s) can be reasonably accommodated.

        i. The terms "temporary" and "in the near future" and "can be reasonably accommodated" are not defined in the PWFA. However, the Proposed Rule defines them as follows:

            a) "Temporary" means lasting for a limited time, not permanent, and may extend beyond "in the near future."

b) "In the near future" generally means 40 weeks. The EEOC suggests that could extend to 52 weeks in some circumstances. The guidance provides this does not mean the essential function must always be suspended for 40 weeks, but emphasizes that any time period up to and including 40 weeks will not, on its own, render a worker unqualified under the PWFA. Essentially, the employer will then likely have the burden of proving the time period would create an undue hardship.

ii. "Can be reasonably accommodated," may mean that:

a) One or more essential functions are temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of the job.

b) For other jobs, some of the essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may be assigned to other tasks to replace them.

c) In other situations, one or more essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of a different job to which the employer temporarily transfers or assigns them,

d) Or the employee may participate in the employer's light or modified duty program.

e) The Rule emphasizes that throughout this process an employer may need to consider more than one alternative to identify reasonable accommodations that does not pose an undue hardship.

6. Reasonable accommodation is a term from the ADA and the PWFA uses a similar definition. Reasonable accommodation could include:

a. Frequent breaks;

b. Sitting/standing;

c. Schedule changes, part-time work, and paid/unpaid leave;

d. Telework;

e. Parking;

f. Light duty;

g. Making existing facilities accessible or modifying the work environment;

h. Job restructuring;

i. Temporarily suspending one or more essential functions;

j. Acquiring or modifying equipment, uniforms, or devices; or

k. Adjusting or modifying examinations or policies.

7. "Undue hardship" is also a term from the ADA and the PWFA uses a similar definition.

8. Additional factors an employer may have to consider when determining if the temporary suspension of an essential function causes an undue hardship include:

a. Consideration of the length of time that the employee or applicant will be unable to perform the essential functions.

b. Whether there is work for the employee or applicant to accomplish.

c. The nature of the essential function, including its frequency.

d. Whether the employer has provided other employees or applicants in similar positions who are unable to perform essential functions of their positions with temporary suspensions of those functions and other duties.

e. Whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential functions in question.

f. Whether the essential functions can be postponed to remain unperformed for any length of time and if so for how long.

9. Simple modifications that are almost automatic reasonable accommodations include:

a. Allowing an employee to carry water and drink, as needed, in the employee's work area.

b. Allowing an employee additional restroom breaks.

c. Allowing an employee whose work requires standing to sit, and whose work requires sitting to stand.

d. Allowing an employee breaks, as needed, to eat and drink.

10. The delineation of these modifications does not remove the "individualized assessment" that must be conducted for each employee.

11. Supporting documentation. Under the Proposed Rule an employer is not required to seek supporting documentation from a worker who seeks an accommodation under the PWFA. If an employer decides to require supporting documentation, it is only permitted to do so under the Proposed Rule if it is reasonable to require documentation under the circumstances for the employer to determine whether to grant the accommodation. When requiring documentation is reasonable, the employer is limited to requiring documentation that itself is reasonable.

12. The Proposed Rule and Appendix provide examples of when it would not be reasonable for the employer to require documentation. The Proposed Rule also defines "reasonable documentation" as documentation that describes or confirms:

a. The physical or mental condition;

b. That it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and

c. That a change or adjustment at work is needed for that reason.

13. Requesting accommodation. The request for accommodation has two parts:

a. The employee or applicant (or their representative) must identify the limitation that is the physical or mental condition and that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

b. The employee or applicant (or their representative) must indicate that they need an adjustment or change at work.

c. Under the Proposed Rule a request for reasonable accommodation does not need to be in writing or use any specific words or phrases.

d. If there is more than one effective accommodation, the employee's or applicant's preference should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between the potential reasonable accommodations.

F. We are expecting additional guidance from the EEOC regarding examples of what qualify as reasonable accommodations by December 23, 2023. The EEOC has already released FAQs which can be reviewed here: https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act

G. Key Takeaways.

1. The PWFA requires employers to reasonably accommodate pregnancy-related medical conditions regardless of whether the condition rises to the level of a disability under the ADA unless the employer can show that such an accommodation would impose an undue hardship.

2. To succeed on a claim of pregnancy discrimination under the PWFA, employees no longer must identify another employee who was "similar in their ability or inability to work."

3. Employers may no longer require that a qualified employee take paid or unpaid leave if another reasonable accommodation is available. So, employers can only require leave if no other accommodation is available.

4. An employee is entitled to a reasonable accommodation even if they cannot perform an essential function of their position if that inability is temporary and the employee will be able to perform that essential job function in the near future with a reasonable accommodation.

   This is different from the ADA's requirement that only requires employers to reasonably accommodate a condition to the extent that an employee "can perform the essential functions of the employment position that [she] holds or desires."

II. The PUMP Act.

A. General Overview & Key Takeaways.

1. The PUMP Act responds to coverage gaps in the federal Fair Labor Standards Act (FLSA). When the Affordable Care Act amended the FLSA in 2010, it obligated covered employers to provide "reasonable break time" for employees who were not exempt from overtime requirements "to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk."

2. This meant that employees who were exempt from overtime requirements and were nursing were not legally entitled to break time to express milk. Many employers adopted policies or practices to cover exempt employees even though they were not legally required to do so.

    a. Commentary estimates that millions of additional nursing workers will now be legally entitled to break time and designated pumping space under the PUMP Act.

3. The PUMP Act mandates covered employers to provide <u>all</u> nursing employees with a reasonable break time to express breast milk for 1 year after the child is born when the mother needs to express milk.

    a. According to the Department of Labor (DOL), "[t]he frequency and duration of breaks needed to express milk will likely vary depending on factors related to the nursing employee and the child."

    b. Covered employers will therefore need to be flexible with employees' requests to pump and address such requests on a case-by-case basis.

4. In addition, covered employers must provide the employee with "a place, **<u>other than a bathroom</u>**, which is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

    a. Practically speaking, this may mean designating a room or a visually secluded area with access to a compatible electrical outlet. This space must likely have to have the capacity to be locked or at the very least designated with a sign depending on the circumstances. Employees should also be given a space to sit and a surface to place the pump.

    b. The importance of providing a clean, functional, secluded, and designated space cannot be overstated. Being able to pump in the workplace is a private, personal matter which helps nursing mothers be the best mother and workers they can be. Employers invite more legal risk if the designated space is unfit for pumping.

B. Coverage.

1. Employers that are covered by the FLSA are now covered by this law. There are limited, industry-specific exceptions which include:

    a. Rail, air, and motorcoach.

    b. Small companies (fewer than 50 employees), can also be exempt if they can demonstrate that compliance would "impose an undue hardship."

i. The 50-employee threshold counts all employees regardless of full-time status or job site.

ii. According to the DOL, "[w]hether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business."

iii. In practice, this may be a difficult standard for small employers to meet.

C. Remedies.

1. Employees may file complaints with the DOL's Wage and Hour Division (WHD) or bring a civil suit against the employer for damages and other relief in a court of competent jurisdiction.

2. Different procedures apply depending on the type of complaint and the forum:

a. If the employee intends to file suit due to an employer's failure to provide a space to pump, the employee must give ten days of notice for the employer to cure the issue prior to filing suit. During this period, the employer can change its practice to avoid liability. There is no ten-day notice period for break time complaints under the PUMP Act.

b. This safe harbor requirement will not apply if the employer does either of the following: (1) retaliates against the employee for asserting their rights under the PUMP Act; or (2) if the employer has stated that it will not be complying with the law's requirements.

c. Employees do not have to give this notice if they want to file a complaint with the WHD under the PUMP Act.

i. Beginning April 28, 2023, employees may obtain as relief: employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate.

D. Compensation.

1. Employees are not necessarily required to be compensated each time they take a break to express breast milk, but payment is complicated under Wisconsin law.

a. If the employer does provide paid breaks to employees, nursing employees must also be compensated in the same way for time to express milk.

i. For example, if the employer provides a 20-minute paid break to employees during the day and a nursing worker opts to use that 20-minute break to express milk, the break must be paid.

b. If the employer does not provide paid breaks, then the employee must be completely relieved from duty each time they need to express milk.

2. Under Wisconsin state law, the general rule is that any break that is less than a full 30 minutes (and completely relieved from duty) must be paid, unless it can be shown that the break is solely for the benefit of the employee. However, it is unclear from the state law guidance we have received whether an employee who needs multiple breaks shorter than 30 minutes during the day to express milk must have that time paid if the employee needs more breaks than the employer already grants.

III. Updates to Employer Obligations to Accommodate Disabilities Under Wisconsin State Law

A. *Wingra Redi-Mix v. LIRC*. The Wisconsin Court of Appeals recently decided a case which clarified the scope of employers' duty to accommodate disabilities under Wisconsin state law.

B. The Wisconsin Fair Employment Act (WFEA) prohibits covered employers from discriminating against employees based on disability. Failing or refusing to reasonably accommodate an individual with a known disability is a form of disability discrimination.

C. The court held that the employer violated the WFEA by repeatedly refusing to even consider accommodating a truck driver who was complaining about pain he had while performing his job duties. Scott Gilbertson drove truck for Wingra Redi-Mix Inc., delivering ready-mix concrete to construction sites. He began working for Wingra in June 2011, and his job required him to be in a vehicle for long hours each day. Wingra assigned employees a specific truck, and Gilbertson's assigned vehicle was an older "glider" model that lacked shock absorption. Wingra also had "non-glider" trucks in its fleet which were newer and more comfortable to drive. Wingra's fleet contained 65 trucks, only 9 of which were gliders.

D. By the late fall of 2012, Gilbertson was experiencing low back pain and fatigue, which he attributed to the effects of driving the rougher-riding glider truck. In June 2013, he requested a meeting with his manager regarding his pain. Wingra lacked a written disability policy and did not provide training to its managers on how to handle disability accommodation requests. When Gilbertson asked one of his managers about filing a worker's compensation claim, he was cautioned that if it was determined that his work was not causing his medical issues, worker's compensation insurance may not cover his medical bills. Gilbertson did not have health insurance of his own. As a result, he opted not to file a claim or see a doctor.

E. Later that summer, Gilbertson asked if he could be reassigned to a non-glider truck. The dispatcher initially told him that he would be allowed to switch to the non-glider truck when the registration on his current truck expired, but that decision was overridden by a higher-level manager. The higher-level manager cited the company's policy against allowing truck reassignment and the lack of evidence regarding Gilbertson's claimed condition (even though a manager previously cautioned Gilbertson from seeing a doctor, which might have provided that evidence to upper management).

F. Gilbertson was upset and wrote a derogatory statement about the manager who denied his request for a non-glider truck. That manager learned of this and stated: "I know [Gilbertson] wants a different truck, but as far as I'm concerned, f*** it. He can haul concrete in a wheelbarrow. I don't care how badly [Gilbertson's] hurt, he'll drive [his assigned truck] until h*** freezes over."

G. By fall 2013, Gilbertson's condition deteriorated, and he felt it was impossible for him to continue working. Gilbertson placed his truck key and timecard on a manager's desk, and said that he "never wanted to quit," but he was "just asking for help" so that he could "operate [his truck] safely]." He filed a complaint of disability discrimination with the Wisconsin Equal Rights Division (ERD) in February 2014.

H. Gilbertson was diagnosed in July 2014 with "chronic lower back pain due to multilevel degenerative disc disease, right sciatic radiculopathy and right foot drop, and right sacroiliac joint dysfunction." Four years later, in 2017, a spine specialist opined that Gilbertson suffered from several permanent physical impairments and assigned Gilbertson a 10 percent permanent partial disability rating. The specialist opined that switching Gilbertson to a non-glider truck would have allowed him to continue working.

I. This case has a long procedural history. An ERD investigator initially found no probable cause that discrimination occurred. An Administrative Law Judge (ALJ) affirmed that finding. The Labor and Industry Review Commission (LIRC) reversed the ALJ's decision and ordered a hearing on the merits. After the hearing on the merits, an ERD ALJ found that Gilbertson was disabled, that Wingra failed to accommodate his disability, and that reassigning Gilbertson a new truck would not have imposed an undue hardship. However, the ALJ determined that because Wingra did not know during the term of Gilbertson's employment whether his condition was a permanent disability, Gilbertson had not established that Wingra violated the WFEA.

J. Gilbertson appealed this decision, and the matter came before the Wisconsin Court of Appeals. The Court held that the WFEA does not require an individual to have a formal disability diagnosis to qualify as an individual with a disability. While the Court agreed with Wingra that the language of WFEA does require an employer to have some level of knowledge about an employee's disability, the Court disagreed that employees must initially provide medical evidence of a diagnosed disability at the time of the accommodation request to trigger the employer's obligation to consider the request. The Court reasoned that one stated purpose of the WFEA is to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals, and ambiguous provisions in the WFEA shall be liberally construed to accomplish that purpose.

K. The Court did make an unexpected comment and questioned whether the WFEA requires employers to engage in the interactive process with an employee following receipt of a disability accommodation request (as is required under the ADA). While this language might suggest that Wisconsin courts may someday chart a course different than under the ADA, employers should continue to engage in the interactive process.

L. **Key Holding**. If an employer has sufficient facts that would reasonably lead the employer to recognize that an employee has a disability, then the courts will consider that sufficient to place the employer "on notice" of the employee's status as an individual with a disability under the WFEA. Since Gilbertson had consistently expressed concerns about his pain and had made numerous attempts to request accommodations, the Court found that Wingra was on notice of Gilbertson's status as an individual with a disability. Wingra could have required Gilbertson to provide medical verification of his condition, but it did not do so, and then the company refused to entertain Gilbertson's accommodation request in part due to the very lack of medical verification it failed to request. Accordingly, Wingra violated the WFEA by failing to grant Gilbertson an accommodation.

M. The *Wingra* case contains helpful reminders for employers that receive complaints from employees regarding medical issues or physical or mental conditions.

Employers should not unilaterally deny an accommodation request because it is not initially accompanied by medical proof of the condition. Rather, once an employer is on notice of a potential medical condition, the employer can require medical proof of the condition and its effect on the employee's ability to successfully perform their job duties, along with input from the employee's health care provider about what accommodations might be available that could enable the employee to successfully perform their job duties.

IV. Employer Obligations To Accommodate Disabilities Under Federal Law.

A. *EEOC v. Charter Communications, LLC*. The Seventh Circuit Court of Appeals reversed a trial court decision which held that an employee was not entitled to a modified work schedule as a reasonable accommodation. The core issue in the case was whether an employee with a disability can be entitled to a work schedule accommodation to allow the employee to commute more safely.

1. The employee suffered from cataracts and requested a modified work schedule to allow him to travel to and from work while it was light outside. The employer initially granted a temporary schedule change but refused to extend the change.

2. The trial court ruled that an employer is not required to make an accommodation to help an employee commute to work successfully, but the Seventh Circuit reversed and refused to establish a bright-line rule on whether accommodations must be made for employees to help them commute safely. Thus, employers must consider these issues on a case-by-case basis.

3. One thing to consider with how the court approached this case is that the facts of this case arose well before the COVID-19 pandemic. So, the parties, the trial court, and the Seventh Circuit assumed that physical presence at the workplace was an essential function of the job. However, the Seventh Circuit observed that during the COVID-19 pandemic, many employers found ways for employees to accomplish work without having many employees physically present at the workplace. Thus, given that remote work is so prevalent now, we don't know if the employer may have considered remote work for this employee as an alternate accommodation rather than a modified work schedule.

4. However, the Seventh Circuit's holding that employers must consider modified work schedules to help a disabled employee commute to work will likely remain good law moving forward.

B. *Hirlston v Costco Wholesale Corporation* (7th Cir., September 1, 2023). The Court upheld jury's verdict that no accommodation would allow employee to perform the job of Optical Manager. The important point for employers to take away from this case was the Court stressing the obligation of the employer to take an active role in considering and suggesting accommodations beyond what the employee proposes. The Court's statements (which usually cited prior cases) included:

- Who is more responsible for the breakdown of the interactive process
- Employer must consider more than just what plaintiff proposes
- Proposed accommodation not limited to what plaintiff introduces into the process
- Employer must do more than just "sit on its hands"
- Employer's duty to assist in identifying possible accommodations

V. FMLA and ADA – Notable Cases and DOL Developments.

A. Honest Belief of Employee Dishonesty. *Juday v. FCA US LLC*. In a recent decision from the U.S. Court of Appeals for the Seventh Circuit ruled that an employer lawfully disciplined a married couple who provided false and misleading information regarding their requests for FMLA leave.

1. The married couple had each put in requests for leave for qualifying conditions which the employer granted. The employer used a third-party administrator to assist with requests for FMLA leave, and the administrator noticed that many of the couple's requests for days off overlapped.

2. The employer investigated the issue, and the couple could not explain why their requests overlapped. The employer suspended the couple for violating the company's policy requiring that honest information be provided in connection with leave requests. The couple was eventually returned to work.

3. The husband then sued and alleged that the employer had violated the FMLA by retaliating and interfering with his FMLA rights. The Appeals Court ruled that the evidence showed that the employer had *an honest belief* that the couple had violated the company's honesty policy, and thus the discipline was not a violation of the FMLA.

B. Pressuring About FMLA Is A Violation. *Ziccarelli v. Dart.* A recent decision from the Seventh Circuit Court of Appeals held that an employer does not need to actually deny an employee's FMLA request to trigger a valid FMLA interference claim. Threatening to deny such a request may be sufficient.

1. An employee sought treatment for PTSD and attempted to use FMLA leave. The employee had previously used some, but not all, of his available leave under the FMLA.

2. When he requested to use his remaining leave for additional treatment, he alleges that his employer threatened to discipline him, which he understood as a threat of termination. The employer disputed that characterization of what was said, and ultimately, the employee did not take leave and retired instead. The employee then filed suit.

3. The court concluded that the employee had presented enough evidence from which a reasonable jury could find that the employer interfered with the employee's right to take FMLA leave. Specifically, the court determined that it was sufficient for the employee to allege that he was threatened with discipline as a result of his leave request.

4. *Ziccarelli* serves as a reminder that employers must be careful with their messaging surrounding FMLA leave. The fact that the employer and employee both hotly disputed what was said during the verbal request for leave further underscores the necessity of clear written documentation of such leave requests. Disciplining or threatening to discipline an employee for requesting FMLA leave might constitute interference.

IV. DOL FMLA Fact Sheets and Opinion Letters.

A. The Department of Labor has recently issued fact sheets on FMLA and mental health, FMLA for a family member's serious health condition and FMLA in connection with birth, placement and bonding with a child. https://www.dol.gov/agencies/whd/fmla/factsheets

B. DOL FMLA Opinion Letter on Use of Intermittent FMLA to Indefinitely Reduce Work Hours. In an opinion letter issued February 9, 2023, the Department of Labor issued an opinion letter stating that an eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day or per week for an indefinite period of time as long as the employee does not exhaust the FMLA leave entitlement.

1. The employer had several employees who had submitted FMLA certifications indicating that their workdays must end at the conclusion of an 8-hour day. The employer regularly scheduled employees for longer than 8-hour shifts, and the limited workdays made covering the 24-hour coverage needs of the department difficult.

2. The employer stated to DOL its belief that it would be "preferable" to treat the requests as requests for reasonable accommodation under the ADA.

3. The DOL stressed that leave provisions under the FMLA are wholly distinct from reasonable accommodation obligations of employers under the ADA. At the same time, employees have the right to invoke the protection of both laws simultaneously, and employers who are covered these laws must comply with both laws.

4. A recent case filed by the Equal Employment Opportunities Commission illustrates this same point under the ADA.

    a. In late March, the EEOC sued a Walmart in North Carolina over Walmart's termination of a manager who had several absences due to a seizure disorder.

    b. Although the employee had told his superiors that his absences were due to a disability, they terminated him for violating the company's attendance policy.

    c. The EEOC first tried to mediate/conciliate with Walmart, but after that was unsuccessful, the EEOC sued Walmart.

    d. The case stresses a key point for employers: intermittent absences may have to be tolerated as a reasonable accommodation under disability laws.