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EMPLOYMENT LAW

Managing Employee's Intermittent Leave Under the FMLA

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Special to the Legal

Intermittent leave under the Family and Medical Leave Act continues to bedevil employers in implementing leave management measures balanced with maintaining workforce productivity. When intermittent FMLA is combined with the so-called "hidden disabilities" such as migraines, fibromyalgia or asthma, employers are often hard-pressed to manage their workforce in compliance with the various statutes that come into play. This difficult balance was recently addressed by the U.S. District Court for the Eastern District of Pennsylvania in *Brady v. United Refrigeration*, No. 13-6008 (E.D. Pa. June 3, 2015) (Robreno, J.).

NO FRAGRANCES REQUIRED

Christine Brady was a credit manager for United Refrigeration Inc. from May 2001 through her termination/layoff in October 2011. Although she claims to have suffered from chemical sensitivity for at least a decade, she first informed URI of her condition in December 2010, when she advised the company that perfumes and fragrances bothered her, according to the opinion. She inquired whether she could have a "fragrance-free zone." This started a 10-month accommodation tug-of-war that ultimately ended in Brady's termination.

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Specifically, URI looked into a private office for Brady, but determined that this was impractical and incompatible with her particular position. In order to accommodate her condition in the general workplace, URI started by purchasing Brady an electronic air cleaner. The company issued the first of many "no fragrance memos," which Brady claims were never enforced. There was even evidence that some coworkers increased their use of fragrances in response to the memos, the opinion said.

Brady's desk was moved—but next to an employee who had a medical exemption to the no-fragrance policy, unbeknownst to Brady for approximately five months. The company purchased air-filtering masks for Brady, which she refused to wear, according to the opinion.

In February 2011, Brady notified URI that the workplace appeared to be full of fragrances and asked that the "no fragrance memo" be redistributed. The company did so but "non-compliance issues continued to persist," the opinion said.

MEDICAL LEAVE TAKEN

Brady went on medical leave related to her condition in May 2011 and when she returned, URI had moved the fragrance-wearing coworker to another part of the building and had purchased Brady a new air cleaner. These steps appear to have worked temporarily but the problems resumed in September. By October, the company advised Brady that she was potentially eligible for FMLA leave. She applied but received no response as to whether her request was approved or denied.

Brady left work early on Oct. 15 with headaches and over the next few days inquired repeatedly about possible accommodations. On Oct. 19, the company sent her a letter listing all that it had done to accommodate her—but which concluded:

"These accommodations have not allowed you to report to work regularly, which you need to do. We do not have work available that meets all of your restrictions. Accordingly, effective today, you are being laid off."

Brady brought suit under the FMLA (both interference and retaliation) and Americans with Disabilities Act (failure to accommodate and termination). At the close of discovery, URI moved for summary judgment.

FMLA CLAIM

URI argued that Brady was not eligible for FMLA leave because she was essentially requesting the right to take "unscheduled leave at a moment's notice for the rest of her life," the opinion said. The court found, however, that while Brady could not anticipate her symptoms, her "episodes of incapacitation often last only a few hours." Moreover, despite URI's characterization of Brady's request, the court found that at this point, she was seeking "approval of a reduced schedule that would accommodate plaintiff's frequent flare-ups and permit her to work for a substantial number of hours each week."

With respect to Brady's FMLA retaliation claim, the court noted that the fact that Brady had not commenced an FMLA leave was not dispositive as an employer cannot "'avoid liability simply by firing the employee before the leave begins,'" citing *Erdman v. Nationwide Insurance*, 582 F.3d 500, 508 (3d Cir. 2009). The court rejected URI's argument that her discharge resulted from her "inability to report to work regularly" and not "from her request for leave." The court noted that URI did not question her attendance or quality of work until one week before her discharge and immediately after Brady's physician submitted her medical forms and FMLA leave request—thus making the timing alone "unusually suggestive" of retaliation.

The court also noted that, while the termination letter said that Brady had "still not been able to consistently perform the essential functions of her job," there was no evidence prior to the FMLA request that the company had problems with her performance. Again, this created a genuine issue of fact on which summary judgment was denied.

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ADA CLAIM

Summary judgment was denied on Brady's ADA claims along the same lines. Initially, while URI submitted evidence that Brady was capable of maintaining her activities of daily living with little to no disruption, including activities that forced her into contact with fragrances and pungent smells, the court observed that the workplace was different, in that she was expected to be in the presence of fragrances and perfumes for eight straight hours, five days per week.

URI argued that the ADA does not "protect persons with erratic and unexplained absences even when they result from a disability." Brady's absences, however, were not "unexplained," the opinion said. Rather, the court observed that they resulted from stimuli that resulted, at least in part, from URI's failure to enforce its "no fragrance" policies. Moreover, Brady's requests for leave were distinguished from an "open-ended and indefinite request," since the court observed that Brady was seeking the right to "[take] off a few hours of work when her symptoms flare up." She was not "completely missing in action for months with no end in sight."

Finally, the court found that two of URI's supervisors had (possibly) expressed discriminatory animus by making what Brady considered to be "smart" remarks, accompanied by looks of "disgust." Summary judgment was therefore denied with respect to Brady's ADA claim.

The case makes it apparent that URI felt like Brady was moving the goal line with every request. It should also be observed that stricter enforcement of the "no fragrance" policy would have gone a long way to both accommodating Brady and demonstrating that the company took her request seriously. •