THE FMLA AND THE ADA

BASIC PRINCIPLES, LEGAL UPDATE, AND HOT TOPICS

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INTRODUCTION

- **The Americans With Disabilities Act of 1990**
  - Prohibits employers from discriminating against a qualified individuals who have a "disability," and requires employers to provide reasonable accommodations to such individuals unless doing so would impose an undue hardship. 42 U.S.C. §12101 *et seq.*
    - O.R.C. §4112.02 – imposes the same obligations on employers.
- **The Family and Medical Leave Act of 1993**
  - Requires employers to provide a specific accommodation – *i.e.* leaves of absence – to employees for various reasons including, *inter alia*, a "serious health condition." 29 U.S.C. §2601 *et seq.*
    - No Ohio law equivalent.

INTRODUCTION

- **ADA Coverage**
  - "Employer" = a person engaged in an industry affecting commerce who has ***15 or more employees*** for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person. 42 U.S.C. §12111(5).
    - O.R.C. §4112.01(A): "Employer" = any person employing ***four or more persons*** within the state, and any person acting directly or indirectly in the interest of an employer.
- **FMLA coverage**
  - "Employer" = any person engaged in commerce or in an industry affecting commerce who employs ***50 or more employees*** for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer. 29 U.S.C. §2611(4).

INTRODUCTION

- **Enforcement of the ADA**
  - An employee must exhaust his or her administrative remedy by seeking recourse with the EEOC before filing an action in court. 42 U.S.C. §12117(a) (incorporates the procedures applicable to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*)
    - An EEOC charge must be filed within 300 days of the discriminatory act.
    - A lawsuit must be filed within 90 days of an EEOC "right to sue" letter.
  - O.R.C. Ch. 4112 disability discrimination claims: No exhaustion of remedies requirement. An action must be commenced within six years of the discriminatory act. *Cosgrove v. Cincinnati Mgt. Co.*, 70 Ohio St.3d 281 (1994) (6-year statute of limitations codified in O.R.C. §2305.07 applies to O.R.C. Ch. 4112 claims); *Jackson v. International Fiber*, 169 Ohio App.3d 395 (2nd Dist. App. 2006) (disability discrimination claim).
  - Remedies available under the ADA and O.R.C. Ch. 4112: Reinstatement, back pay, front pay, noneconomic damages (subject to statutory caps, *see* 42 U.S.C. §1981a and O.R.C. § 2315.18, § 2315.21). Attorney's fees may be recovered under the ADA.
  - Federal and Ohio courts have concurrent jurisdiction to adjudicate ADA claims.

INTRODUCTION

- **Enforcement of the FMLA**

  - Employees can file FMLA complaints with the Department of Labor or in court. 29 U.S.C. §2617(a)(1), (2); 29 U.S.C. §2617(b)(1); 29 C.F.R. §825.400(a). There is no exhaustion of remedies requirement.

  - The statute of limitations for filing an FMLA complaint is two years after the date of the last event constituting the violation (or three years for willful violations). 29 U.S.C. §2617(c); 29 C.F.R. §825.400(b).

INTRODUCTION

- **Enforcement of the FMLA**

  - An FMLA complaint must be filed within a reasonable time of when the employee discovers his or her rights have been violated, but no later than two years after the last event constituting the violation (or three years for willful violations). 29 C.F.R. §825.401(a).

  - Remedies available under the FMLA: Reinstatement, lost wages or actual monetary loss (if there were no lost wages), lost benefits, liquidated (double) damages (unless the employer establishes a good faith defense), attorney's fees. 29 U.S.C. §2617(a)(1); 29 C.F.R. §825.400(c).

  - Federal and Ohio courts have concurrent jurisdiction to adjudicate FMLA claims.

The FMLA – "Eligible Employee"

- An eligible employee is one who:
  - Has been employed for at least 12 months by the employer with respect to whom leave is requested;
  - Has been employed for at least 1,250 hours of service with the employer during the previous 12-month period (*i.e.*, the 12-month period immediately preceding the date leave is requested); and
  - Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

- 29 U.S.C. §2611(2)(A), (B)(ii); 29 C.F.R. §825.110(a).

The FMLA – Qualifying Reasons and Length of Leave

- 29 U.S.C. §2612(a)(1); 29 C.F.R. §825.112(a): An eligible employee shall be entitled to a total of 12 workweeks of unpaid job-protected leave during any 12-month period for one or more of the following:
  - Because of a ***serious health condition*** that makes the employee unable to perform the functions of his or her position.
  - Because of the birth of a son or daughter of the employee and in order to care for him or her.
  - Because of the placement of a son or daughter with the employee for adoption or foster care.
  - In order to care for the spouse, son, daughter or parent of the employee, if such spouse, son, daughter or parent has a serious health condition.
  - Because of any qualifying exigency (short notice deployment) arising out of the fact that the employee's spouse, son, daughter or parent is on active covered duty, or has been notified of an impending call or order to covered active duty, in the armed forces.
- "An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform one or more of the essential functions of the employee's position with the meaning of the Americans With Disabilities Act … and the regulations at 29 CFR 1630.2(n)." 29 C.F.R. §825.123(a).

The FMLA – Qualifying Reasons and Length of Leave

- An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of unpaid job-protected leave during a 12-month period to care for the servicemember. 29 U.S.C. §2612(a)(3); 29 C.F.R. §825.112(a)(6).
- A "covered servicemember" is a member of the Armed Forces who has suffered a serious injury or illness while on active duty that renders him or her unable to perform the duties of his/her office, grade, rank or rating and for which he/she is:
  - Undergoing medical treatment, recuperation or therapy;
  - On outpatient status; or
  - On the temporary disability retired list.
- 29 U.S.C. §2611(15); 29 C.F.R. §825.127(b).
- The leave is based on a single 12-month period (beginning with the first day the leave is taken) and may not exceed 26 weeks during the 12-month period when combined with other FMLA-qualifying leave. 29 U.S.C. §2612(a)(4); 29 C.F.R. §825.200(f), (g).

The FMLA – Serious Health Condition

- A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves:
  - Inpatient care in a hospital, hospice, or residential medical care facility; or
  - Continuing treatment by a health care provider.
- 29 U.S.C. §2611(11); 29 C.F.R. §825.113(a).
- WH-380-E: Certification of Health Care Provider for Employee's Serious Health Condition.
- WH-380-F: Certification of Health Care Provider for Family Member's Serious Health Condition.

The FMLA – Serious Health Condition

- "Inpatient care" means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity. 29 C.F.R. §825.114.

- "Period of incapacity" means an inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom. 29 C.F.R. §825.113(b).

The FMLA – Serious Health Condition

- 29 C.F.R. §825.115: A serious health condition involving "continuing treatment by a health care provider" includes any one or more of the following:
- A period of incapacity which lasts more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves: (a) Treatment with seven days of the first day of incapacity and at least one more treatments within 30 days of the first day of incapacity by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider; or (b) treatment by a health care provider on at least one occasion within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of a health care provider. 29 C.F.R. §825.115(a).
- Any period of incapacity due to pregnancy or for prenatal care. 29 C.F.R. §825.115(b).

The FMLA – Serious Health Condition

- Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. 29 C.F.R. §825.115(c). A chronic serious health condition is one which: (a) Requires periodic visits (at least twice per year) for treatment by a health care provider or by a nurse under the direct supervision of a health care provider; (b) continues over an extended period of time; and (c) may cause episodic rather than a continuing period of incapacity (*e.g.*, diabetes, asthma, epilepsy).

- A period of incapacity which is permanent or long-term and for which treatment may not be effective (*e.g.*, Alzheimer's, severe stroke, or the terminal stages of a disease). 29 C.F.R. §825.115(d).

- Any period of absence to receive multiple treatments by a health care provider or by a provider of health care services under orders from, or on referral by, a health care provider, for (a) restorative surgery after an accident or other injury, or (b) a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment (*e.g.*, cancer requiring chemotherapy, kidney disease requiring dialysis). 29 C.F.R. §825.115(e).

The FMLA and Substance Abuse

- 29 C.F.R. §825.119
  - Substance abuse is a serious health condition if it meets the statutory definition.
  - FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. FMLA leave may not be taken for absences caused by an employee's substance abuse.
  - An employee may be terminated for substance abuse in accordance with a uniformly applied policy that allows for termination for substance abuse and has been communicated to all employees, even if the employee is taking FMLA leave for treatment.
  - An employee may take FMLA leave to care for a family member who is receiving treatment for substance abuse.

The FMLA Requires Employers to be Proactive

- When FMLA leave needed for a serious health condition is foreseeable, the employee must provide notice to the employer at least 30 days before the leave is to begin (or as soon as practicable if 30 days notice is not possible). 29 U.S.C. §2612(e)(2)(B); 29 C.F.R. §825.302(a). When the need for leave is not foreseeable, the employee must provide notice as soon as practicable. 29 C.F.R. §825.302(a).

- HOWEVER, under certain circumstances, the procedures set forth in the FMLA regulations can require an employer to act even if the employee has not expressly requested FMLA leave.

The FMLA Requires Employers to be Proactive

- The "eligibility notice": "When an employee requests FMLA leave, or ***when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason***, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances." 29 C.F.R. §825.300(b). (WH-381 – eligibility notice form)
- The "designation notice": "The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. ***When the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason*** (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances." 29 C.F.R. §825.300(d). (WH-382 – designation notice form)

The FMLA Requires Employers to be Proactive

- "In any circumstances where the employer does not have sufficient information about the reason for an employee's use of leave, ***the employer should inquire further of the employee*** or the [employee's] spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for an FMLA-qualifying reason, the employer must notify the employee as provided in §825.300(d)." §825.301(a).

- "Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of the exercise of an employee's FMLA rights." §825.300(e).

The FMLA Requires Employers to be Proactive

- The test for whether an employee's notice is sufficient to trigger the employer's obligation to inquire further is whether the information the employee conveyed was reasonably adequate to apprise the employer that an FMLA-qualifying event has occurred. *Miles v. Nashville Electric Service*, 525 Fed. Appx. 382 (6th Cir. 2013).

- *Barrett v. Detroit Heading, LLC*, 311 Fed. Appx. 779 (6th Cir. 2009) (affirming jury verdict in employee's favor on FMLA interference claim based on his termination, consistent with the employer's attendance policy, for missing one day of work because he felt ill due to high blood pressure; the employee's notice was sufficient to trigger employer's obligation to inquire further to determine whether the condition was FMLA-qualifying in light of its awareness of the employee's hypertension due to previous incidents; 29 C.F.R. §825.301(a) quoted).

The FMLA Requires Employers to be Proactive

- *DeCesare v. Niles City School Dist. Bd. Of Educ.*, 154 Ohio App.3d 644 (11th Dist. App. 2003), *app. denied*, 101 Ohio St.3d 1468 (2004) (employee's request to be excused from teaching first period class because she had leukemia constituted request for FMLA-qualifying leave, even though she did not ask for FMLA leave, which triggered employer's obligation to give her notice of her FMLA rights; summary judgment in employee's favor affirmed on lack of notice issue, although reversed on FMLA interference claim asserting denial of FMLA leave time).
- John works for ABC Company and his attendance has been spotty. He has been written up for absenteeism a couple times within the last year. ABC Company has an FMLA policy that complies with the FMLA's requirements. Among other things, the policy informs employees of their obligation to provide notice of the need for FMLA leave as soon as practicable. John does not show up for work one day and does not contact anyone at ABC Company, which is no surprise because this has happened in the past. John does not show up for work or call in for another two days, but on the third day his wife informs the company he was in a car accident. ABC Company has a three-day no-call/no-show rule, and terminates his employment. John sues ABC Company for interference with his FMLA rights, based on its failure to grant him FMLA leave and its termination of his employment. Does John have a valid claim?

Two Types of FMLA Claims – Interference and Retaliation (aka Discrimination)

- FMLA interference:
  - "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]." 29 U.S.C. §2615(a)(1). *See also* 29 C.F.R. §825.220(a).

- FMLA retaliation/discrimination:
  - "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA]." 29 U.S.C. §2615(a)(2). *See also* 29 C.F.R. §825.220(a). Employers "cannot use the taking of FMLA leave as a negative factor in employment actions[.]" 29 C.F.R. §825.220(c).
  - Retaliation for filing an administrative or court complaint or for participating in a proceeding is also prohibited. 29 U.S.C. §2615(b); 29 C.F.R. §825.220(a)(3).

FMLA Interference Claims

- If an employer interferes with an employee's right to take FMLA or to be reinstated upon expiration of the leave, a violation has occurred, regardless of the employer's intent. *Wallner v. J.J.B. Hilliard*, 590 Fed. Appx. 546 (6th Cir. 2014); *Seeger v. Cincinnati Bell Telephone Co.*, 681 F.3d 274 (6th Cir. 2012); *Randolph v. Grange Mutual Casualty Co.*, 185 Ohio App.3d 589 (10th Dist. App. 2009).

- The burden-shifting proof scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which applies to Title VII claims, applies to FMLA interference claims. *Mullendore v. City of Belding*, 872 F.3d 322 (6th Cir. 2017); *Demyanovich v. Cadon Plating & Coatings, LLC*, 747 F.3d 419 (6th Cir. 2014); *Donald v. Sybra*, 667 F.3d 757 (6th Cir. 2012).

FMLA Interference Claims

- The *McDonnell Douglas* proof scheme:
  - The employee must establish a *prima facie* case by showing: (1) he/she was eligible for FMLA leave; (2) the employer is covered under the FMLA; (3) he/she was entitled to take FMLA leave; (4) he/she notified the employer of his/her intent to take FMLA leave; and (5) the employer denied him/her benefits to which he/she was entitled under the FMLA.
  - The employer must articulate a legitimately, nondiscriminatory reason for its action.
  - The employee must establish the employer's reason is a pretext for FMLA interference by showing it (1) has no basis in fact; (2) did not actually motivate the employer's action; or (3) was insufficient to motivate the action.
- *Mullendore v. City of Belding*, 872 F.3d 322 (6th cir. 2017); *Demyanovich v. Cadon Plating & Coatings, LLC*, 747 F.3d 419 (6th Cir. 2014).

FMLA Interference Claims

- The employer's intent is integral to establishing FMLA retaliation claims. *Seeger v. Cincinnati Bell Telephone Co.*, 681 F.3d 274 (6th Cir. 2012); *Randolph v. Grange Mutual Casualty Co.*, 185 Ohio App.3d 589 (10th Dist. App. 2009).
- The *McDonnell Douglas* standard also applies to FMLA retaliation claims. *LaBelle v. Cleveland Cliffs, Inc.*, 2019 -- Fed. Appx. --, 2019 WL 4389145 (6th Cir. Sept. 13, 2019); *Millen v. Oxford Bank*, 745 Fed. Appx. 609 (6th Cir. 2018); *Donald v. Sybra*, 667 F.3d 757 (6th Cir. 2012).
  - The employee must establish a *prima facie* case by showing: (1) he/she was engaged in activity protected by the FMLA; (2) the employer knew he/she was exercising FMLA rights; (3) the employer took an adverse employment action against the employee; and (4) there was a causal connection between the protected activity and the adverse employment action.
  - The employer must articulate a legitimately, nondiscriminatory reason for the adverse employment action.
  - The employee must establish the employer's reason is a pretext for a retaliatory motive by proving it (1) has no basis in fact; (2) did not actually motivate the action, or (3) was insufficient to motivate the action.
- *LaBelle v. Cleveland Cliffs, Inc.*; *Donald v. Sybra*.

FMLA Retaliation Claims

- The "mixed motive" standard enunciated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applies on account of 29 C.F.R. §825.220(c), which provides that employers "cannot use the taking of FMLA leave as ***a*** negative factor in employment actions" (emphasis added). *Wallner v. J.J.B. Hilliard*, 590 Fed. Appx. 546 (6th Cir. 2014); *Hunter v. Valley View Local Schools*, 579 F.3d 688 (6th Cir. 2009).
- If the plaintiff presents evidence to establish his or her exercise of FMLA rights played ***a*** motivating part in the employment decision, the defendant may avoid liability only by proving it would have made the same decision even if it had not taken the plaintiff's exercise of FMLA rights into account. *Wallner v. J.J.B. Hilliard* (reversing summary judgment in employer's favor on FMLA retaliation claim because, although the employer had a non-retaliatory reason for discharging the plaintiff, she presented evidence that her FMLA leave was also a motivating factor); *Tilley v. Kalamazoo Cty. Road Commission*, 654 Fed. Appx. 675 (6th Cir. 2016) (same result).

FMLA Interference and Retaliation

- In employment termination cases, is there really a distinction between interference and retaliation?
  - An FMLA interference claim arises if an employee's discharge is based, in whole or in part, on the fact he or she takes FMLA leave, because this constitutes a denial of an FMLA benefit to which the employee is entitled. *Mullendore v. City of Belding*, 872 F.3d 322 (6th cir. 2017) (affirming summary judgment in employer's favor on FMLA interference claim based on employee's termination while she was on leave, because the employee failed to prove the employer's "non-discriminatory" reason for the discharge was pretextual).
  - *LaBelle v. Cleveland Cliffs, Inc.*, 2019 -- Fed. Appx. --, 2019 WL 4389145 (6th Cir. Sept. 13, 2019) (district court properly merged FMLA interference and retaliation claims and applied the retaliation standard to both claims, because the employee received all the FMLA leave to which he was entitled).

THE ADA (and O.R.C. Ch. 4112) – Definition of "Qualified Individual"

- A qualified individual with a disability is an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the position, and, ***with or without reasonable accommodation***, can perform the essential functions of the position. 42 U.S.C. §12111(8); 29 C.F.R. §1630.2(m) (emphasis added).
  - Consideration shall be given to the employer's judgment as to what functions of the job are essential, and written job descriptions shall be considered as evidence of what job functions are essential. 42 U.S.C. §12111(8).

- O.A.C. §4112-5-08(A): "No ***qualified disabled person*** shall, on the basis of disability, be subjected to discrimination in employment." (Emphasis added).

THE ADA (and O.R.C. Ch. 4112) – Definition of "Disability"

- According to 42 U.S.C. §12102(1), a "disability" is:
  - A ***physical or mental impairment*** that ***substantially limits*** one or more ***major life activities*** (*i.e.*, an actual disability) or
  - A *record* of such impairment; or
  - Being *regarded as* having such an impairment.
- O.R.C. §4112.01(A)(13): Nearly identical to ADA definition.

THE ADA (and O.R.C. Ch. 4112) – Actual Disability

- A "physical or mental impairment"
  - 29 C.F.R. §1630.2(h) – a physical or mental impairment is:
    - Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
    - Any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
- O.R.C. §4112.01(A)(13) – nearly identical to ADA, and adds "diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, intellectual disability, emotional illness, drug addiction, and alcoholism."

THE ADA (and O.R.C. Ch. 4112) – Actual Disability

- "Substantially limits"
  - An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as comparted to most people in the general population. 29 C.F.R. §1630.2(j)(1)(ii)
  - The 2008 ADAAA on the "substantially limits" prong of the definition (42 U.S.C. §12102(4) (2008); 29 C.F.R. §1630.2(j)(1) (2011)):
    - Construe "substantially limits" broadly in favor of coverage and consistently with the purposes of the ADAAA.
    - An impairment need not prevent or severely restrict an individual from performing a major life activity in order to be considered substantially limiting.
    - An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; the definition should be interpreted so as to require a degree of functional limitation that is lower than the standard that applied pre-ADAAA.

THE ADA (and O.R.C. Ch. 4112) – Actual Disability

- The determination of whether an impairment is substantially limiting should be made without regard to the ameliorative effects of mitigating measures.
- The focus should be on whether employers have complied with their obligations and whether discrimination has occurred; therefore, whether an impairment substantially limits a major life activity should not require extensive analysis.
- The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in §1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong). The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

- "We have yet to comprehensively discuss the scope of temporary impairments under the broadened definition." *Hunt v. Monro Muffler Brake, Inc.*, 769 Fed. Appx. 253, 257 (6th Cir. 2019) (but declining to discuss the new standard because the employee could not demonstrate his employer's reason for terminating him was pretextual).

THE ADA (and O.R.C. Ch. 4112) – Actual Disability

- "Major life activities"
  - 42 U.S.C. §12102(2), 29 C.F.R. §1630.2(i)(1):
    - Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
    - A major life activity also includes the operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
      - The operation of a major bodily function also includes the operation of an individual organ within a body system. 29 C.F.R. §1630.2(i)(1)(ii)
  - O.R.C. § 4112.01(A)(13) – Major life activities include the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

THE ADA (and O.R.C. Ch. 4112) – A "Record of" a Disability

- A "record of" an impairment that substantially limits one or more major life activities.
  - 29 C.F.R. §1630.2(k)(1) – An individual has a record of a disability if he or she has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
  - The principles of the ADAAA, as stated in 29 C.F.R. §1630.2(j)(1), apply. 29 C.F.R. §1630.2(k)(2).
  - An individual with a record of a disability may be entitled to an accommodation if needed and related to the past disability (*e.g.*, leave or schedule change to permit follow-up appointments with his or her provider). 29 C.F.R. §1630.2(k)(3).

THE ADA (and O.R.C. Ch. 4112) – A "Regarded as" Disability

- Being "regarded as" having a physical or mental impairment

  - An individual meets this definition if he or she has been subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. 42 U.S.C. §12102(3)(A); 29 C.F.R. §1630.2(l)(1).
  - However, an employee will not meet this definition if his or her impairment is "transitory and minor," *i.e.*, an impairment with an actual or expected duration of six months or less. 42 U.S.C. §12102(3)(B).
  - An individual is regarded as having an impairment any time an employer takes a prohibited action against him or her, even if the employer asserts or ultimately establishes a defense to the employee's claim. 29 C.F.R. §1630.2(l)(2).

THE ADA vs. O.R.C. Ch. 4112 on the Meaning of an Actual Disability

- The Ohio General Assembly has not amended O.R.C. Ch. 4112 to conform with the ADAAA. *Barber v. Chestnut Land Co.*, 7th Dist. App. No. 15-MA-39, 2016-Ohio-2926.

- "Ohio courts can, but need not, apply federal cases and regulations interpreting terms used in Ohio law. Most notable, the Ohio statute was not changed to instruct on a lesser standard. Even where federal material is viewed, the positions espoused therein is [sic] only adopted where the statutes are similar. … The Ohio Supreme used prior federal regulations and cases interpreting the term "substantially limits" as requiring a significant restriction. The fact that a federal statute changed prior to the termination directing the federal regulations to be modified to a lesser standard than 'significantly restricted' does not mandate state courts to change their own interpretation of a certain term, especially in cases involving discharges that occurred prior to the enactment of the new regulations." *Barber v. Chestnut Land Co.*, ¶85. *See also Neumann v. Plastipak Packaging, Inc.*, 2011 WL 5360705 (N.D. Ohio Oct. 31, 2011) (applying more restrictive standard to Ohio's definition of "disability" to case involving an employment discharge occurring after the 2008 ADAAA amendment (but before 2011 regulations were enacted)).

THE ADA vs. O.R.C. Ch. 4112 on the Meaning of an Actual Disability

- Ohio courts may look to federal regulations and case law interpreting the ADA, but only when the terms of the federal statute are consistent with Ohio law or when O.R.C. Ch. 4112 leaves a term undefined. *Carnahan v. Morton Buildings, Inc.*, 3rd Dist. App. No. 11-14-04, 2015-Ohio-3528; *Dalton v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. App. No. 13AP-827, 2014-Ohio-2658; *Scalia v. Aldi, Inc.*, 9th Dist. App. No. 25436.

THE ADA vs. O.R.C. Ch. 4112 on the Meaning of an Actual Disability

- "The touchstone of [this] analysis is whether the impairment severely restricts the individual from doing activities that are of central importance to most people's daily lives." *House v. Kirtland Capital Partners*, 158 Ohio App.3d 68, 78 (11th Dist. 2004), *app. denied*, 104 Ohio St.3d 1409 (2004). *See also Barber v. Chestnut Land Co.*, 7th Dist. App. No. 15-MA-39, 2016-Ohio 2926; *Bibee v. General Revenue Corp.*, 1st Dist. App. No. C-120577, 2013-Ohio-1753, *app. denied*, 136 Ohio St.3d 1510 (2013); *Eifert v. Sample Machining, Inc.*, 2nd Dist. App. No. 23123, 2009-Ohio-6012; *Canady v. Rekau & Rekau, Inc.*, 10th Dist. App. No. 09AP-32, 2009-Ohio-4974; *Parrot v. A.R.E., Inc.*, 5th Dist. App. No. 2006CA00005, 2006-Ohio-4527; *Maracz v. United Parcel Service*, 8th Dist. App. No. 83432, 2004-Ohio-6851, *app. denied*, 105 Ohio St.3d 1545 (2005); *Neumann v. Plastipak Packaging, Inc.*, 2011 WL 5360705 (N.D. Ohio Oct. 31, 2011) (construing O.R.C. Ch. 4112).

- "Temporary impairments, with little or no long-term or permanent impact, are usually not disabilities." *Canady v. Rekau & Rekau, Inc.*, 10th Dist. App. No. 09AP-32, 2009-Ohio-4974.

THE ADA vs. O.R.C. Ch. 4112 on the Meaning of an Actual Disability

- *Slane v. MetaMateria Partners, LLC*, 176 Ohio App.3d 459 (10th Dist. 2008).
  - The employee had sinus cancer and underwent surgery to remove the cancerous mass, and needed 90 days off for the surgery, recuperation, and radiation treatment.
  - The surgery was successful, although it removed a large part of the employee's jaw, and the employee was able to return to work with only minor limitations at the end of the recuperation period.
  - However, during his recuperation, the employee was terminated because the company had a maximum 60-day leave policy, and the employee brought a Ch. 4112 disability discrimination action.
  - The court held the employee did not have a "disability." "Other courts that have looked at this issue have concluded that cancer survivors who do not suffer from any substantially limiting impairment of a significant duration were not disabled." *Id.*, at 466.
- *See also Hammercheck v. Coldwell Banker First Place Real Estate*, 11th Dist. App. No. 2007-T-0024, 2007-Ohio-7127 ("A diagnosis of cancer, however, does not automatically mean one has a disability under the statute").

THE ADA vs. O.R.C. Ch. 4112 on the Meaning of an Actual Disability

- *But see Bracken v. Dasco Home Medical Equipment, Inc.*, 2014 WL 4388261 (S.D. Ohio Sept. 5, 2014) (applying more liberal ADAAA definition of "disability" to disability discrimination claim premised on O.R.C. Ch. 4112, and denying defendant's motion for summary judgment on issue of whether the plaintiff had a disability); *Welch v. IAC Huron, LLC*, 2013 WL 4817591 (N.D. Ohio Sept. 10, 2013) (denying defendant's motion for summary judgment on O.R.C. Ch. 4112 disability discrimination claim and rejecting defendant's argument that the plaintiff's condition was not a disability because it was only temporary, based on the ADAAA standard). *Cf. Canady v. Rekau & Rekau, Inc.*, *supra* (recognizing the ADAAA altered the meaning of "disability," but declining to apply its standard "[b]ecause all the allegedly discriminatory conduct at issue here occurred before January 1, 2009"). *Cf. Thomas v. PNC Bank, N.A.*, 8th Dist. App. No. 106548, 2018-Ohio-4000 (applying ADAAA "transitory and minor" standard to O.R.C. Ch. 4112 "regarded as" disability discrimination claim).

THE ADA vs. O.R.C. Ch. 4112 on the Meaning of an Actual Disability

- *Neely v. Benchmark Family Services*, 640 Fed. Appx. 429 (6th Cir. 2016) (affirming summary judgment in employer's favor on claim based on sleep apnea that limited the plaintiff's restful sleep to 2-3 hours per night, caused extreme difficulty breathing while sleeping, and caused him to fall asleep during the day).

- "Though the 2008 amendments undoubtedly eased the burden required for plaintiffs to establish disability, we note that Congress expressly chose to retain the 'substantially limits' modifier for 'one or more major life activities.' … A lesser burden is a burden nonetheless, and on that Neely failed to carry." *Id.*, at 434-435.

Types of ADA Claims

- Discrimination.
  - The standard of proof differs on whether the claim depends on direct evidence or indirect evidence. Generally, direct evidence claims involve an employer's reliance on an employee's disability's effect on his or her ability to do his/her job in making employment decisions, without exploring potential reasonable accommodations; whereas indirect evidence claims involve employment decisions based on asserted factors that have nothing to do with the employee's disability. *Ferrari v. Ford Motor Co.*, 826 F.3d 885 (6th Cir. 2016), *overruled on other grounds*, *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308 (2019). The *McDonnell Douglas* standard applies to indirect evidence cases.
  - Unlike Title VII, the employee must establish "but for" causation, *i.e.*, that but for the employee's disability, the employee would not have been terminated. The "mixed motive" theory cannot be used. *Babb v. Maryville Anesthesiologists P.C.*, *supra*; *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*). Ohio courts apply the "but for" standard to discrimination claims. *Beckloff v. Amcor Rigid Plastics USA, LLC*, 6th Dist. App. No. S-16-041, 2017-Ohio-4467; *Morrissette v. DFS Services, LLC*, 10th Dist. App. No. 12AP-611, 2013-Ohio-4336; *Miller v. Potash Corp. of Saskatchewan, Inc.*, 3rd Dist. Atpp. No. 1-09-58, 2010-Ohio-4291; *Davis v. Goodwill Industries of Miami Valley*, 2nd Dist. App. No. 23238, 2009-Ohio-6133 (all age discrimination cases).

Types of ADA Claims

- Failure to Accommodate.
  - Discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." 42 U.S.C. §12112(b)(5).
  - Elements – the employee must show (1) he or she had a disability; (2) he/she was otherwise qualified for the position, with or without reasonable accommodation; (3) the employer knew or had reason to know about the disability; (4) he/she requested an accommodation; and (5) the employer failed to provide the necessary accommodation. *Brumley v. United Parcel Service*, 909 F.3d 834 (6th Cir. 2018); *Barber v. Chestnut Land Co.*, 7th Dist. App. No. 15-MA-39, 2016-Ohio-39.
  - The employee must propose a ***reasonable*** accommodation. *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (*en banc*); *Johnson v. Cleveland City School Dist.*, 443 Fed. Appx. 974 (6th Cir. 2011) (construing ADA and O.R.C. Ch. 4112); *Maracz v. United Parcel Service*, 8th Dist. App. No. 83432, 2004-Ohio-6851, *app. denied*, 105 Ohio St.3d 1545 (2005).

The ADA (and O.R.C. Ch. 4112) – Reasonable Accommodation

- "Reasonable accommodation": (a) Modifications or adjustments to the work environment, or the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (b) modifications or adjustments that enable a disabled employee to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. 29 C.F.R. §1630.2(o)(1).

- Examples: "Job restructuring, part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; ***and other similar accommodations for individuals with disabilities***." 42 U.S.C. §12111(9)(B); 29 C.F.R. §1630.2(o)(2)(ii). *See also* O.A.C. §4112-5-08(E).

The ADA (and O.R.C. Ch. 4112) – Reasonable Accommodation

- The duty to engage in an interactive accommodation process.
  - Employers are required to engage in an interactive accommodation process: "To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the individual with the individual with a disability in need of an accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. §1630.2(o)(3). *See Barber v. Chestnut Land Co.*, 7th Dist. App. No. 15-MA-39, 2016-Ohio-2926 (interactive accommodation duty applies under O.R.C. Ch. 4112).
  - *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA*: "An employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

The ADA (and O.R.C. Ch. 4112) – Reasonable Accommodation

- Are employers required to:
  - Eliminate essential job functions?
    - No. *Bush v. Compass Group USA, Inc.*, 683 Fed. Appx. 440 (6th Cir. 2017); *EEOC v. Ford Motor Co.*, 782 F.3d 753 (2015); *Price v. Carter Lumber Co.*, 9th Dist. App. No. 27289, 2015-Ohio-1522; *DeBolt v. Eastman Kodak Co.*, 146 Ohio App.3d 474 (10th Dist. App. 2001).
  - Create a position for a disabled employee, such as a permanent light duty position?
    - No. *Meade v. AT&T Corp.*, 657 Fed. Appx. 391 (6th Cir. 2016); *Brown v. Chase Brass & Copper Co., Inc.*, 14 Fed. Appx. 482 (6th Cir. 2001); *Kleiber v. Honda of America Mfg., Inc.*, 420 F.Supp.2d 809 (N.D. Ohio 2006), *affirmed*, 485 F.3d 862 (6th Cir. 2007); *DeBolt v. Eastman Kodak Co.*, 146 Ohio App.3d 474 (10th Dist. App. 2001).
  - Reassign a disabled employee's essential job duties to co-workers or hire others to perform those duties?
    - No. *Bush v. Compass Group USA, Inc.*, 683 Fed. Appx. 440 (6th Cir. 2017); *Meade v. AT&T Corp.*, 657 Fed. Appx. 391, 397 (6th Cir. 2016); *Steward v. New Chrysler*, 415 Fed. Appx. 632, 642 (6th Cir. 2011); *Williams-Belhouane v. Cuyahoga Cty.*, 2012 WL 5378725 (N.D. Ohio Oct. 31, 2012); *Huberty v. Esber Beverage Co.*, 5th Dist. App. No. 2001-CA-00202, 2001-Ohio-7048, *app. denied*, 95 Ohio St.3d 1438 (2002); *Miller v. Premier Industrial Corp.*, 136 Ohio App.3d 662 (8th Dist. App. 2000) .

The ADA – Telecommuting As an Accommodation

- *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (2002):

- "An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship. Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home…."

The ADA – Telecommuting As an Accommodation

- *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (*en banc*).
  - The employee sought permission to work from home on an as-needed basis, up to four days per week, due to her irritable bowel syndrome. Ford Motor Co. denied this request, deeming regular and predictable on-site attendance to be essential to the employee's highly interactive job. The district court granted summary judgment in the employer's favor, holding the requested accommodation was not reasonable, and a Sixth Circuit panel reversed this ruling. *EEOC v. ford Motor Co.*, 752 F.3d 634 (6th Cir. 2014).
  - In an 8-5 *en banc* ruling, the Sixth Circuit overruled the panel and affirmed the district court's ruling. The *en banc* court held that regular and predictable on-site job attendance is an essential function of the employee's job. Therefore, the work-from-home request was not reasonable, since it would have required Ford to eliminate this essential job function.

The ADA – Telecommuting As an Accommodation

- *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (*en banc*).
  - "A sometimes-forgotten guide likewise supports the general rule: common sense. … Non-lawyers would readily understand that regular on-site attendance is required for interactive jobs. … Better to follow the commonsense notion that non-judges … hold: Regular, in-person attendance is an essential function – and a prerequisite to essential functions – of most jobs, especially the interactive ones." *Id.* at 763.
  - However, the court made it clear that regular on-site attendance might not be an essential job function under other circumstances not presented here. *Id.*, at 765-766.

The ADA – Telecommuting As an Accommodation

- *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595 (6th Cir. 2018) (affirming jury verdict in favor of employee who claimed employer failed to reasonably accommodate her by allowing her to work from home for ten weeks while she was on bedrest due to complications from pregnancy, and holding *EEOC v. Ford Motor Co.* was materially distinguishable because in-person attendance at worksite was not an essential function of the employee's job).

- *See also Boltz v. United Process Controls*, 2017 WL 2153921 (S.D. Ohio May 17, 2017) (denying employer's motion for summary judgment on issue of whether working from home was a reasonable accommodation, because the record demonstrated a genuine issue of material fact as to whether on-site attendance was an essential job function).

The ADA (and O.R.C. 4112) – Leave of Absence As an Accommodation

- *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (2002):
  - Unpaid leave is a reasonable accommodation, to be permitted after paid leave is exhausted.
  - An employer must provide leave to a disabled employee beyond the maximum amount permitted under its policy, unless there is another effective accommodation that would enable the employee to perform the essential functions of his or her position or granting additional leave would cause an undue hardship.
  - The employer must continue the employee's health insurance coverage during the leave period only if it does so for other employees in a similar leave status.
  - A disabled employee who is granted leave as a reasonable accommodation is entitled to return to his/her position, unless holding the position open would impose an undue hardship.
  - Continued leave of absence upon the expiration of FMLA leave is required unless doing so imposes an undue hardship.
  - If the employee cannot perform his or her essential job function when FMLA leave expires, the employer must consider reasonable accommodations that would enable the employee to perform those functions (including reassignment to a vacant position for which the employee is qualified).

The ADA (and O.R.C. 4112) – Leave of Absence As an Accommodation

- *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998) (leave of absence is a form of reasonable accommodation under the ADA; summary judgment in employer's favor reversed in case where employee was terminated after taking three months of leave for not completing paperwork to extend her leave under employer's policy, which allowed for up to 180 days of leave time, and employee's doctor provided definite return date).

- *Cleveland v. Federal Express Corp.*, 83 Fed. Appx 74 (6th Cir. 2003) (summary judgment in employer's favor reversed in ADA and O.R.C. Ch. 4112 case where employee was terminated after being released to return to work after seven months of leave; the court notes "the ADA does not always require that an employer allow indefinite leave"; but declines to "adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation").

The ADA (and O.R.C. 4112) – Leave of Absence As an Accommodation

- *Melange v. City of Center Line*, 482 Fed. Appx. 81 (6th Cir. 2012) (summary judgment in employer's favor affirmed in case involving employee's termination after taking one year of leave because he was not cleared to return to work and did not request a reasonable accommodation at that time, thereby excusing employer from engaging in interactive accommodation process).

- *Maat v. County of Ottawa, Mich.*, 657 Fed. Appx. 404 (6th Cir. 2016) (affirming summary judgment in employer's favor on ADA claim involving employee's request for a six-week leave after exhausting FMLA leave, and distinguishing *Cehrs* and *Cleveland*, because the request was essentially one for indefinite leave given the employee's doctor did not indicate the duration of her condition and she admitted the estimated return date was uncertain; "where an employer has already provided an employee with a lengthy period of medical leave, an extension to that leave can be a reasonable accommodation only when its duration is definite").

The ADA (and O.R.C. 4112) – Leave of Absence As an Accommodation

- *Williams v. AT&T Mobility Services LLC*, 847 F.3d 384 (6th Cir. 2017) (summary judgment in employer's favor affirmed on ADA claim in case involving employee's termination after being provided with several periods of leave time; "An employer is not required to keep an employee's job open indefinitely … A physician's estimate of a return date alone does not necessarily indicate a clear prospect for recovery, especially where an employee has repeatedly taken leaves of unspecified duration and has not demonstrated that additional leave will remedy her condition. … Williams submitted an evaluation from Thompson that provided a return to work date of August 15, 2014, but Thompson sated that this date was only an estimate. Given that Williams had a history of taking leaves, that her condition failed to improve during those leaves, and that she repeatedly failed to return to work by dates on which her treatment providers had previously estimated that she would be able to return, requiring AT&T to grant further leave as an accommodation would be unreasonable.").

The ADA (and O.R.C. 4112) – Leave of Absence As an Accommodation

- *Cooley v. East Tennessee Human Resources Agency, Inc.*, 720 Fed. Appx. 734 (6th Cir. 2017) (summary judgment in employer's favor affirmed on ADA claim in case involving employee's termination after her FMLA leave expired; additional leave was not required because the employee provided no clear return-to-work date; "Thus, for an additional leave of absence to be a reasonable accommodation under the ADA, the employee must, at a minimum, provide the employer with an estimated, credible date when she can resume her essential job duties"; *Cehrs* is inapposite because the employee's request there was supported by a doctor's note stating she could return on a definite date).

The ADA (and O.R.C. 4112) – Leave of Absence As an Accommodation

- Ohio court decisions are consistent with Sixth Circuit law.

  - A leave of absence can be a reasonable accommodation under O.R.C. Ch. 4112. *Matasy v. Youngstown Ohio Hosp. Co., LLC*, 7th Dist. App. No. 16-MA-0136, 2017-Ohio-7159; *Foster v. Jackson County Broadcasting, Inc.*, 4th Dist. App. No. 07CA4, 2008-Ohio-70.
  - However, the reasonable accommodation obligation does not require the employer to wait indefinitely for the employee to return to work. *Foster*, *supra* (summary judgment in employer's favor affirmed in case involving employee's termination after repeated extensions of leave after never providing a return to work date; "Moreover, a request for an indefinite leave of absence at the time of Foster's termination would have been an unreasonable accommodation").

The ADA (and O.R.C. 4112) – Leave of Absence As an Accommodation

- *The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities* (2008). The EEOC's view regarding indefinite leave is generally consistent with court decisions, although the EEOC brings undue hardship into the equation:
  - 21. Do employers have to grant indefinite medical leave as a reasonable accommodation?
    - No. Although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration. Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations. Indefinite leave is different from leave requests that give an approximate date of return (e.g., a doctor's note says that the employee is expected to return around the beginning of March) or give a time period for return (e.g., a doctor's note says that the employee will return some time between March 1 and April 1). If the approximate date of return or the estimated time period turns out to be incorrect, the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request for leave has become one for leave of indefinite duration.

The ADA (and O.R.C. Ch. 4112) and Drug Use

- Drug addiction can be a disability under the ADA. *Johnson v. City of Columbus*, 2001 WL 605040 (S.D. Ohio May 29, 2001).
- However, the terms "disability" and "qualified individual with a disability" do not include individuals currently engaging in the illegal use of drugs, when the employer acts on the basis of such use. 42 U.S.C. §12114(a); 29 C.F.R. §1630.3(a).
  - "Drug" means a controlled substance as defined in schedules I-IV of the Controlled Substances Act (21 U.S.C. §812). 29 C.F.R. §1630.3(a)(1).
  - "Illegal use of drugs" means the use of drugs the possession or distribution of which is unlawful under the Controlled Substances Act, but does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorization by the Controlled Substances Act or other provisions of federal law. 29 C.F.R. §1630.3(a)(2).

The ADA (and O.R.C. Ch. 4112) and Drug Use

- Safe harbor: Nothing in the ADA shall be construed to exclude, as a qualified individual with a disability, an individual who:

  - Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs; or
  - Is participating in a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs; or
  - Is erroneously regarded as engaging in illegal drug use, but is not engaging n such use.

- 42 U.S.C. §12114(b); 29 C.F.R. §1630.3(b).

The ADA (and O.R.C. Ch. 4112) and Drug Use

- An employer may:
  - Prohibit the illegal use of drugs at the workplace by all employees;
  - Require that employees not be under the influence of or engaging in the illegal use of drugs at the workplace;
  - Hold an employee who engages in the illegal use of drugs to the same qualification standards for employment or job performance and behavior to which the employer holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use.
- 29 C.F.R. §1630.16(b).
- A test to determine the illegal use of drugs is not considered a medical examination under the ADA. 42 U.S.C. §12114(b); 29 C.F.R. §1630.16(d)(1).

The ADA (and O.R.C. Ch. 4112) and Drug Use

- O.R.C. §4112.02(o)(1)(a): A disability does not include ***any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance*** by an employee, if the employer acts on the basis of that illegal use.
  - "Controlled substance" has the same meaning as in O.R.C. §3719.01. Marijuana falls within this definition.
- Safe harbor: This exception to the definition of "disability" does not apply to:
  - An employee who has successfully completed a supervised drug rehabilitation program and is no longer is engaging in the illegal use of any controlled substance, ***or who has otherwise successfully been rehabilitated and no longer is engaging in such use***.
  - An employee who is participating in a supervised drug rehabilitation program and is no longer engaging in the illegal use of any controlled substance.
  - An employee who is erroneously regarded as engaging in the illegal use of any controlled substance, but is not engaging in such use.
- O.R.C. §4112.02(O)(1)(b).

The ADA (and O.R.C. Ch. 4112) and Drug Use

- An employer is not prohibited from:
  - ***Adopting or administering reasonable policies or procedures, including testing for the illegal use of any controlled substance, that are designed to ensure that a successfully rehabilitated employee is no longer is engaging in the illegal use of any controlled substance;***
  - Prohibiting the illegal use of controlled substances at the workplace by all employees;
  - Requiring that employees not be engaged in the illegal use of any controlled substance at the workplace;
  - Holding an employee who engages in the illegal use of any controlled substance to the same qualification standards for employment or job performance, and the same behavior, to which the employer holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance; and
  - ***Exercising other authority recognized in the ADA, including but not limited to, requiring employees to comply with any applicable federal standards.***
- O.R.C. §4112.02(O)(2).
- A test to determine the illegal use of a controlled substance does not include a medical examination. O.R.C. §4112.02(O)(3).

The ADA (and O.R.C. Ch. 4112) and Drug Use

- Under Ohio law, drug addiction is expressly included as a condition that is a physical or mental impairment. O.R.C. §4112.01(A)(16)(a)(iii)). However, it is not a disability unless it substantially limits at least one major life activity at the time the employer's adverse employment action is taken. *Rhoads v. Board of Educ. of Mad River Local School Dist.*, 103 Fed. Appx. 888 (6th Cir. 2004) (O.R.C. Ch. 4112 claim) (holding employee who was a recovering marijuana addict who was no longer using did not have a disability because there was no evidence she was substantially limited in any major life activity when her application for re-hire was rejected two months after she resigned on account of a positive drug test).

The ADA (and O.R.C. Ch. 4112) and Drug Use

- Courts within the Sixth Circuit have come to the same conclusion regarding ADA claims. *Hutcheson v. General Motors Corp.*, 2013 WL 6799954 (W.D. Mich. Dec. 20, 2013) (granting defendant's motion to dismiss the complaint of a recovering drug addict asserting ADA discriminatory discharge claim because the plaintiff "does not allege that his … drug addiction had an impact on his work or otherwise limited a major life activity"); *Peters v. Interstate Warehousing, Inc.*, 2012 WL 10609 (M.D. Tenn. Jan. 3, 2012) (granting summary judgment in employer's favor on plaintiff's ADA claim alleging he was terminated because he was a recovering drug addict because he presented no evidence he was substantially limited in any major life activity); *Gardull v. Perstorp Polyols, Inc.*, 382 F.Supp.2d 960 (N.D. Ohio 2005) (granting summary judgment in employer's favor on ADA and O.R.C. Ch. 4112 claims because "Gardull has failed to present evidence that his drug addiction substantially limited a major life activity"); *Johnson v. City of Columbus*, 2001 WL 605040 (S.D. Ohio May 21, 2001) (granting summary judgment in employer's favor on ADA and O.R.C. Ch. 4112 claims because "Johnson has never claimed that his addiction to marijuana substantially limited any of his major life activities").

The ADA (and O.R.C. Ch. 4112) – What About Medical Marijuana?

- Ohio's medical marijuana law, O.R.C. §3796.01 *et seq.* – does little more than give qualified users a defense against criminal charges for using or possessing marijuana.
- Nothing in this law:
  - Requires an employer to permit or accommodate an employee's use, possession, or distribution of medical marijuana;
  - Prohibits an employer from refusing to hire, discharging, disciplining, or otherwise taking adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's use, possession, or distribution of medical marijuana;
  - Prohibits an employer from establishing and enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy;
  - Permits a person to commence a cause of action against an employer for refusing to hire, discharging, disciplining, discriminating, retaliating, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment related to medical marijuana.
- O.R.C. §3796.28(A).

The ADA (and O.R.C. Ch. 4112) – What About Medical Marijuana?

- *James v. City of Costa Meca*, 700 F.3d 394 (9th Cir. 2012), *cert. denied*, 569 U.S. 994 (2013):
  - Title II (public accommodation) ADA case – Medical marijuana users sued two cities because they passed ordinances outlawing medical marijuana dispensaries.
  - Holding: The ADA does not protect against discrimination on the basis of medical marijuana use, even if the use is supervised by a licensed health care professional.
    - The plaintiff's medical marijuana use constitutes the "illegal use of drugs" under the ADA because the federal Controlled Substances Act includes it as an illegal controlled substance.
    - "Supervised use" exception to the ADA's definition of the "illegal use of drugs" applies only to marijuana use authorized by federal law, not use authorized by state law.
    - "We hold that doctor-recommended marijuana use permitted by state law, but prohibited by federal law, is an illegal use of drugs for purposes of the ADA, and that the plaintiffs' federally proscribed medical marijuana use therefore brings them within the ADA's illegal drug use exclusion." *Id.*, at 405.

The ADA (and O.R.C. Ch. 4112) – What About Medical Marijuana?

- The same reasoning has been applied in the context of ADA and state law disability employment discrimination claims. An employee's lawful use of medical marijuana under state law is not protected by the ADA and similar state discrimination laws because using marijuana is illegal under the federal Controlled Substances Act, and discrimination laws such as the ADA exclude persons who use illegal controlled substances from the protection of these laws. Consequently, subject to applicable safe harbor provisions, an employer does not violate the ADA or similar state laws by taking an adverse employment action against an employee because of his or her medical marijuana use, and there is no duty to accommodate such use. *Cotto v. Ardagh Glass Packing, Inc.*, 2018 WL 3814278 (D.N.J. Aug. 10, 2018) (New Jersey law); *Lambdin v. Marriott Resorts Hospitality Corp.*, 2017 WL 4079718 (D. Hawaii Sept. 14, 2017) (ADA); *Barber v. Gonzales*, 2005 WL 1607189 (E.D. Wash. July 1, 2005) (ADA); *Steele v. Stallion Rockies Ltd.*, 106 F.Supp.3d 1205 (D. Colo. 2015) (ADA); *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. S.Ct. 2015) (Colorado law); *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518 (Oregon S.Ct. 2010) (Oregon law); *Garcia c. Tractor Supply Co.*, 154 F.Supp.3d 1225 (D.N.M. 2010) (New Mexico law); *Ross v. Ragingwire Telecommunications, Inc.*, 174 P.3d 200 (Cal. S.Ct. 2008) (California law).

The ADA (and O.R.C. Ch. 4112) – What About Medical Marijuana?

- *Cf. Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012) (involving Michigan Medical Marihuana Act).
  - The employee used medical marijuana only at home during non-work hours.
  - He twisted his knee at work while moving a cart, then was drug tested in accordance with the employer's policy regarding workplace injuries.
  - He showed the employer is medical marijuana registry card.
  - He tested positive, and his employment was terminated.
- The court dismissed the employee's public policy wrongful discharge claim, premised on the public policy embodied in the Michigan Medical Marihuana Act, because MMMA did not regulate private employment, and so employees are not protected from disciplinary action as a result of their use of medical marijuana and employers are not required to accommodate the use of medical marijuana in the workplace.

Questions?

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