Bullying Based on a Disability is an Invitation to a Lawsuit

Most people know better than to mock someone because of an obvious physical disability. Unfortunately, the same cannot always be said for disabilities with behavioral symptoms, such as nervous system disorders or emotional or mental disabilities.

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Comments like "he's got a screw loose" or "she's three bricks short of a full load" are not uncommon. But this type of commentary, if severe and pervasive, may give rise to a hostile work environment claim under the Americans with Disabilities Act (ADA).

For example, the Second Circuit recently revived a Costco employee's suit in which he alleged that he was bullied for having Tourette Syndrome. *Fox v. Costco Wholesale Corporation*, 918 F. 3d 65 (2nd Cir. 2019). Tourette's is a nervous system disorder characterized by repetitive, involuntary movements or sounds known as tics.

In *Fox*, the employee asserted a hostile work environment claim under the ADA, claiming that his coworkers mocked him when he experienced tics caused by his Tourette syndrome. Specifically, the employee alleged that his coworkers ridiculed him for grunting in an attempt to avoid using profanity involuntarily when he experienced a verbal tic. His coworkers would yell "hut-hut-hike," a phrase made by football quarterbacks, when the tic occurred. These comments were heard by managers and persisted for months. Although the lower court granted summary judgment in favor of Costco on all claims, the Second Circuit reversed the judgment. Joining the Fourth, Fifth, Eighth and Tenth Circuits, the Second Circuit explicitly held that hostile work environment claims could be made under the ADA. The Court further reasoned that the district court demanded too much from the employee when it found that he had to present evidence showing the number of times the comments were made per shift. The Second Circuit concluded that the employee's deposition testimony that the comments occurred every time he grunted and persisted for "months and months" was sufficient to show that they were pervasive enough to support a hostile work environment claim.

Moreover, an employee can sustain a hostile work environment claim under the ADA for harassment on the basis of a perceived mental illness. In 2014, a federal district court in Florida found that a former county sheriff office employee alleged harassment of a sufficiently severe nature to support a claim for a hostile work environment under the ADA. *Flamberg v. Israel*, No. 13-62698-CIV, 2014 WL 1600313 (S.D. Fla. Apr. 21, 2014).

In *Flamberg*, the employee took leave under the Family & Medical Leave Act (FMLA) to seek treatment for lymphoma. After he returned to work, the employee alleged that he suffered harassment by his supervisors and colleagues because they regarded him as having a mental disability that could manifest in violent tendencies. The employee alleged that, in one

instance, a colleague joked that if the employee went nuts, he would shoot another coworker. Moreover, the employee alleged that his coworkers fabricated statements made by the employee with regard to workplace violence that ultimately led to his termination.

In a motion for summary judgment, his employer argued that the harassment alleged was limited to isolated incidents of pranks, jokes and mere inconveniences that did not rise to the level of severe and pervasive misconduct. However, the Court found that the hostility allegedly faced by the employee went far beyond what a reasonable individual would consider to be a mere joke. The Court held that the alleged harassment was sufficiently severe to support a hostile work environment claim under the ADA.

Bullying based on any type of disability—whether the disability is actual or perceived, or is associated with physical or behavioral symptoms—should not be tolerated. Taking prompt corrective action to curb outdated comments like "his lights are on but no one's home" not only prevents the situation from escalating into a hostile work environment claim, but also fosters a more inclusive work environment. If you receive a discrimination or hostile work environment complaint, or are interested in Diversity and Inclusion training for your organization, please contact a member of Warner's Labor and Employment Practice Group to assist you.

Curbing FMLA Abuse in the Summertime

Now that frigid temperatures are behind us, many people are looking forward to sunny weather and outdoor fun. With beach days, backyard barbecues, and bar crawls on the horizon, so is FMLA abuse.

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Employers have often used Facebook and other social media sites to investigate whether an employee is in fact using FMLA leave for its intended purpose. Employers should tread lightly before relying on such information, however, because courts are making it increasingly difficult for employers to prove their employees are committing FMLA fraud.

For example, in *Brady v. Bath Iron Works Corporation*, the United States District Court for the District of Maine denied an employer's motion to dismiss a former carpenter's FMLA retaliation case where the employer suspended and later terminated the carpenter's employment after he was spotted at a local bar having a beer while on FMLA leave. The carpenter claimed to have suffered from "chronic, serious mental health conditions, including depression and anxiety," caused in part from work-related stress. When the employer discovered the carpenter at the bar, it sought clarification from the carpenter's physician on his medical certification. Notably, however, the employer suspended the carpenter before the physician could respond.

In denying the employer's motion to dismiss the case, the Court concluded that the carpenter's having a beer at a local bar was "not a situation

where an employee has been caught 'red-handed' engaging in an activity clearly inconsistent with the intended purpose of leave." Stated differently, spending time away from work to enjoy a cold one might not be inconsistent with taking leave from work for anxiety or depression.

In *Jones v. Gulf Coast Health Care*, the employee was certified to take 12 weeks of FMLA leave for shoulder surgery. The medical certification received by the employer stated that the employee was unable to work during this period, and that he needed physical therapy to recover from his surgery. While out on leave, however, the employer discovered Facebook photos which showed the employee vacationing in St. Martin. The employer suspended the employee immediately upon his return to work, and terminated his employment a few days later.

Clear cut case of fraud, right? Not according to the Eleventh Circuit Court of Appeals. It found that the short amount of time between the employee's return to work and his termination and the lack of clear documentation of the reason for the termination created a genuine issue of fact regarding the employer's motivation for terminating the employee. With respect to the employee's Facebook photos, the Eleventh Circuit found the evidence "murky at best" to show inconsistency with his medical condition. For example, the employer was unable to prove that the employee missed any physical therapy treatments as a result of the vacation.

So, can employees use FMLA leave as a means to vacation or enjoy a cold one? Not exactly, but these cases make it clear that relying on a stray Facebook post is not generally going to be sufficient to prove fraud. If you do find social media pictures or other evidence of behavior that seems inconsistent with the leave, gather the photos and any other evidence you can of the suspected fraud. Then, bring the employee in for questioning, offering the employee an opportunity to provide a formal statement regarding his or her time on leave. Oftentimes, an employee who has been out partying while s/he is supposed to be "home sick" will make false statements about what s/he has been up to. You can then terminate the employee for dishonesty rather than FMLA fraud, which is generally a better legal position to take. If you cannot prove dishonesty, you can still compare the evidence you've gathered to the certification form to see if it is consistent. If, at the end of the day, you don't have enough evidence to prove fraud, at least you'll have saved yourself from an expensive lawsuit. You might also decide to seek clarification and second opinions on the next request that comes in.

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As these cases demonstrate, employers should thoroughly assess the circumstances surrounding an employee's FMLA leave before deciding to discipline or terminate the employee for suspected FMLA abuse. In each case, you should consult with your Warner labor and employment attorney to determine the best avenue to combat and prevent such abuse.

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