



RIGHTS STUFF

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Another Court Says That Indefinite Leave is Not a Reasonable Accommodation

Diane Boileau began working for Green Bank as its head teller in 2007. As the head teller, she handled customer accounts, created work schedules for other tellers, handled customer complaints, balanced the vault and resolved problems with the ATM.

She was diagnosed with lupus, a disease which made her miss work unpredictably for indefinite periods of time. She was off work under the Family and Medical Leave Act (FMLA) from May 9, 2011 until May 31. She returned to work on June 1, but from that time until December, she was on intermittent leave.

On January 2, 2012, she told Capital Bank (which had acquired Green Bank) that she needed to be off under FMLA from January 2 until January 17. On January 18, her doctor informed the bank that Boileau was incapacitated and could not return to work until April 2, 2012. Her doctor certified that she could be incapacitated due to her lymphadenopathy for six to twelve months and that she would be incapacitated every two to four weeks for periods of one to seven days. About two weeks later, he certified that she would be incapacitated due to her lupus every one to two months, for eight to twelve weeks at a time, and that these episodes would continue for the rest of her life.

In March, Green Bank terminated Boileau's employment. She sued, alleging that the bank had violated the FMLA and

the Americans with Disabilities Act (ADA). She lost.

The Court said that the FMLA entitles eligible employees to as many as twelve weeks of leave during any twelve-month period if they have a serious health condition. No one disputed that Boileau has a serious health condition. But there was no evidence that the bank terminated her because she had used up her FMLA time. She was terminated because of her doctor's certification about her need for extended absences in the future.

The Court also said that Boileau was not a qualified individual under the ADA. Regular attendance is an essential part of a head teller's job functions, and she could not fulfill that essential duty, with or without a reasonable accommodation.

The concurring opinion said that "this is a sad case." But, "When an employee simply cannot perform the basic work required for her job, as in this case, neither the Family and Medical Leave Act nor the Americans with Disabilities Act is designed to require the employer to employ her anyway."

The case is Boileau v. Capital Bank Financial Corp., 2016 WL 1622349 (6th Cir. 2016).

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Employees Must Give Notice to Employers, Even if They Have Malaria in Ethiopia and No Cell Phone

Taju Sherif began working for the University of Maryland Medical Center in 2011 as a medical technologist. He asked for and received permission to take a 20-day vacation, from 2/26 to 3/24, 2014, so that he could visit family in Ethiopia.

On or about March 23, he contracted malaria. He visited a clinic in his family's village and was referred to a larger clinic the next day. Sherif said he called his employer on March 25 and told his supervisor that he could not return to work until he recovered. He said he called his supervisor again on March 26 and said he was being tested for malaria, and that he would provide an update soon. He tried to call on March 27, but the call was dropped. His supervisor tried several times to call him on his cell phone and at his home number, but never could contact Sherif. On March 29, Sherif lost his phone, and because of his remote location, was unable to access the internet or make international telephone calls.

In early April, the university made several more attempts to contact Sherif, including sending Family and Medical Leave Act paperwork to his home address. On April 15, they sent him a letter saying that his employment may be in jeopardy due to his supervisor's inability to contact him. When further attempts to reach him were unsuccessful, the university

terminated his employment on April 28, deeming it a "voluntary resignation."

By April 30, Sherif had recovered sufficiently that he planned to return to the United States. But, he said, "violent demonstrations" prevented him from leaving. On May 5, he received a note from his doctor saying that he had been treated for malaria from March 26 to May 5. Meanwhile, the university had advertised his position and was in the process of reviewing applications.

Sherif returned to the United States on May 12, and within a day or two, contacted his supervisor and said he was back and wanted to return to work. He was told to contact human resources. Human Resources told him he had been fired because he had not given the university information about his status. He explained that he had been sick with malaria. HR told him that his termination was final and not appealable. He applied for his old position, but by the time he did so, the university was no longer accepting applications.

He sued, arguing that the university had violated his rights under the Family and Medical Leave Act, and lost. As the Court noted, employees have to provide adequate notice to their employers when they require FMLA leave. If the employer

needs more information to determine the employee's need for leave, the employee is required to provide it. In this case, all the university knew was that Sherif thought he had malaria. Until he returned to the United States, he didn't confirm that he had malaria, how long it was expected he would be sick or when he could likely return to work. Sherif did not respond to his employer's repeated requests for information and even though he failed to communicate with the university only because he lost his cell phone, "the employer is not required to be clairvoyant." The Court said, "Sherif's situation may have been unfortunate, and perhaps beyond his control, but the issue here is whether UMMC has violated the FMLA." given the lack of information from Sherif," the Court concluded that UMMC did not violate the law.

Sherif also argued that by rejecting his application, UNMC retaliated against him. The Court said that the university provided legitimate reasons for not considering him for the job: he failed to communicate with them while he was out of the country, and by the time he applied, it had already received several qualified applications and had decided not to consider any more. The case is Sherif v. University of Maryland Medical Center, 2015 WL 5083469 (D. MD 2015).



Department of Justice Sues School District

The Department of Justice (DOJ) is suing the Gates-Chili Central School District in New York for alleging violating the Americans with Disabilities Act (ADA). According to the law suit, filed in September, 2015, a girl referred to as D.P. is a student in this school district. She has a number of disabilities, including epilepsy, asthma, hypotonia and Angelman Syndrome. Angelman Syndrome manifests itself through developmental delays, lack of speech, seizures and walking or balance disorders. Hypotonia means decreased muscle tone. D.P.'s autism affects her ability to perceive danger and sometimes causes her to wander away.

In January of 2011, D.P. acquired a service dog. Her dog has been trained to meet her needs. It

can detect seizures before humans can. By sitting down when D.P. has the leash, it helps prevent her from wandering. It supports her core body when walking. Before she had the dog, she had to get to the school bus by using a wheelchair or by being carried. With the dog, she can walk to the bus herself, holding on to the dog's harness. She spends most of the day connected to her dog by a tether.

During the 2011-12 school year, when D.P. was in preschool, her service dog attended school with her. School staff helped her with verbal commands and tethered and untethered the dog as necessary, such as when she needed to use the restroom or participate in gym class. D.P. needed tethering assistance about 15 times or fewer a day; each time takes three seconds.

But beginning with kindergarten, the school district said it would no longer allow staff to assist her with her service dog. Instead, her parents would have to provide a separate, adult handler. The parents objected, to no avail, so they hired a handler at considerable expense. They filed a complaint with the Department of Justice, alleging that the school system had discriminated against D.P. on the basis of her disability, in violation of the ADA. DOJ tried to negotiate a settlement, and when it could not, filed a lawsuit.

DOJ is seeking an order requiring the school district to allow its staff to act as the service dog's handler, comply with the ADA and pay appropriate damages to the family.

Lawyer Loses ADA Suit Against Former Client

Brenda Sconiers hired Andrew U.D. Straw to represent her in a sexual harassment complaint. Straw missed a filing deadline, so Sconiers found another lawyer to sue Straw for legal malpractice.

Straw's response: he has bipolar disorder, and to accommodate his disorder, he does not take cases to court. Therefore, he alleged, Sconiers' lawsuit against him was a violation of the Americans with Disabilities Act (ADA). He argued that the ADA required that the Court dismiss

the malpractice case because his disorder prevented him from being able to represent himself in court.

The Court did not agree. The ADA prohibits discrimination in employment, public accommodations, governmental services and telecommunications. A former client does not fall into any of those categories. And Straw provided no precedent that would lead to Court to conclude that it had to dismiss the

malpractice case because of his alleged disorder, particularly when he had an attorney representing him in the matter who presumably felt capable of handling courtroom appearances.

The case is Straw v. Sconiers, 2014 WL 7404065 (N.D. IN 2014). If you have questions about the ADA, please contact the BHRC.



BHRC Seeks Award Nominations

The BHRC is seeking nominations for its annual Human Rights Award. Nominees should be individuals or groups who have made specific, significant contributions to improving civil rights, human relations or civility in our community. The BHRC especially welcomes nominations demonstrating success in ensuring equal access to housing, employment or education, in ensuring equal access to community life for people with disabilities and nominations of people or organizations who have done exemplary work and advocacy

in increasing civility and tolerance.

Past recipients include Bloomington High School North, Bloomington United, Dick McKaig, the Study Circles Project, Daniel Soto, John Clower, Clarence and Frances Gilliam, the Rev. Ernie Butler, the Council for Community Accessibility, Frank McCloskey, the Bill of Rights Defense Committee, WFHB Radio, Doug Bauder, Lillian Casillas, Helen Harrell, Voices & Visions, New Leaf/New Life, Charlie Dupree and Virginia Hall for their work

with Trinity Episcopal Church, Guy Loftman, David Metheny, the Rev. Bill Breeden and the BPD Resource Officers.

The recipients will be honored at a public ceremony. Nominations are due by 5 p.m. on Friday, November 18, 2016. For a nomination form, or for more information, call the Bloomington Human Rights Commission, 812-349-3429. Or send an email message to human.rights@bloomington.in.gov. The nomination form is also available on the City's web page, www.bloomington.in.gov.

DOJ Sues Harris County, Texas Over Inaccessible Polling Places

As Election Day approaches, it's important that counties make sure that their polling places, both for early voting and Election Day voting, are accessible to voters with disabilities. The Department of Justice announced in August, 2016, that it was suing Harris County, Texas, because some of its polling places are not accessible. The Americans with Disabilities Act (ADA) requires that such locations be accessible to voters with disabilities.

According to the complaint, Harris County, which is more than 1700 square miles, has about 775 Election Day polling sites and 37 early voting polling

places. In September, 2014, representatives of the U.S. government conducted architectural surveys of 86 polling places, including seven early voting polling places and 79 Election Day voting places. Only 29 of those places were accessible to voters with disabilities. They found that five of the places were not accessible and could not be made accessible without permanent, architectural modifications. The other 52 places could be made accessible for voting with temporary measures such as portable ramps.

In May, 2016, investigators looked at 18 of the county's 32 Election Day polling places for a

special election that did not cover the entire county. Most of them were found to be inaccessible because of steep curb ramps, gaps in sidewalks and walkways and locked gates along the route barring pedestrian access. Harris County continued to use some of the inaccessible sites identified by the September, 2014 survey.

The lawsuit asks the judge to enjoin the county from violating the ADA in the future, to develop a plan to fully and completely remedy the violations within 30 days, to award compensatory damages to any aggrieved person and to order any other appropriate relief.

DON'T FORGET TO VOTE ON NOVEMBER 8TH!!