

**K**AMER  
**Z**UCKER  
**&**  
**A**BBOTT  
ATTORNEYS AT LAW

*5<sup>th</sup>* ANNUAL  
**LABOR &  
EMPLOYMENT**  
**SEMINAR**



**Friday, October 4, 2002**

# **ADA and FMLA Update 2002**

Scott M. Abbott

# ADA Developments: Supreme Court

- *Chevron USA, Inc. v. Echazabal* (2002)
- *U.S. Airways v. Barnett* (2002)
- *Toyota Motors v. Williams* (2002)

# *Echazabal:*

- “Direct threat” defense
- Expanded to include threat to employee’s own safety/health
- Reversal of Ninth Circuit Court

## *Barnett:*

- Reasonableness of accommodation
- Priority of seniority system
- Employee expectations
- Ordinarily trumps accommodation
- “Special circumstances” analysis

## *Williams:*

- Narrows definition of disability
- Inquiry: performing manual tasks
- Includes tasks central to daily living

# LESSON:

Supreme Court Continues to  
Limit Reach of the ADA

# ADA: the Ninth Circuit

- *Hernandez v. Hughes Missile (2002)*
  - ◆ Penalty result of facially-neutral policy
  - ◆ Drugs/alcohol issue



# ADA: the Ninth Circuit

- *Brown v. Lucky Stores (2001)*
  - ◆ Another drugs/alcohol case
  - ◆ Extent of protection for addiction

# FMLA Developments:

- *Ragsdale v. Wolverine Worldwide*
  - ◆ Supreme Court 2002
  - ◆ Lack of designation of leave
  - ◆ Invalidates penalty imposed by DOL regulation

# FMLA Developments:

- *Rowe v. Laidlaw Transit*

- ◆ Ninth Circuit 2001
- ◆ FMLA vs. FLSA
- ◆ FMLA leave does not jeopardize salary exempt status

# The ABC's of the ADA

- Physical/mental impairment
- Substantially Limits
- Major life activities
- Qualified individual with a disability
- Essential functions
- Reasonable accommodation
- Interactive Process
- Undue hardship

# The ABC's of the FMLA

- Covered employer
- Eligible employee
- 12-Week Annual Entitlement
- Birth/care of child
- Serious health condition
- Intermittent or reduced leave
- Medical certification
- Benefit continuation
- Job restoration

# The Dueling Statutes

- Extent of obligation owed:
  - ◆ FMLA: limited to 12 weeks
  - ◆ ADA: continuing efforts

# The Dueling Statutes

- Sufficiency of underlying condition:
  - ◆ FMLA: serious health condition
  - ◆ ADA: disability

# The Dueling Statutes

- Foreseeable leave:
  - ◆ FMLA: availability of intermittent or reduced leave
  - ◆ ADA: indefinite leave not reasonable



# The Dueling Statutes

- Certification/documentation:
  - ◆ FMLA: Expressly permitted
  - ◆ ADA: Severely limited

# The Dueling Statutes

- Confidentiality:

- ◆ FMLA: No express provision
- ◆ ADA: Separate medical file

# ADA Accommodation Strategies

## ■ OK:

- ◆ Modify work schedule
- ◆ Job restructuring
- ◆ Unpaid leave
- ◆ Reassignment to vacant job
- ◆ Demotion/transfer

# ADA Accommodation Strategies

- Not OK:

- ◆ Creation of new job
- ◆ Promotion
- ◆ Violation of CBA
- ◆ Furnishing assistant



# **PRACTICAL EXERCISES**

# #1: Sally

- Data entry employee
- Employed for 3 years
- Recently diagnosed with cancer
- Needs leave time

# #1: Sally

- Policy allows up to 6 months of medical leave
- Approved 2 months of leave, extended up to 6 months
- Sally now wants 1 more month
- Leave never designated as FMLA
- Leave denied; Sally terminated

# #1: Sally

- Does the ADA apply here?
- Was Sally's termination proper?
- Can you count Sally's leave as FMLA?



# #1: Sally

- Does the ADA apply here?
  - ◆ YES, as long as the condition substantially limits a major life activity. Cancer usually is considered a disability.

# #1: Sally

- Was Sally's termination proper?
  - ◆ NO, most likely because of the ADA's application.
  - ◆ Leave for an additional month is reasonable accommodation.

# #1: Sally

■ Can you count Sally's leave as FMLA?

- ◆ YES, although designation must usually be done up front, failure to designate as FMLA leave not an automatic penalty against employers

## #2: Joe

- Porter
- Worker's comp shoulder injury
- Off work 8 weeks
- Another 3 weeks granted for Joe to have surgery, recover and return
- While on leave, you realize Joe's services not that vital – want to terminate

## #2: Joe

- Can you terminate Joe?
- Do you have any ADA obligations?
- What if surgery does not improve Joe's condition?

## #2: Joe

- Can you terminate Joe?

- ◆ NO. Joe is protected by the FMLA and has the right to return to work within his 12 weeks of leave entitlement.

## #2: Joe

- Do you have any ADA obligations?
  - ◆ NO, assuming that Joe will be able to return to work at the end of his leave. If so, his condition is temporary and therefore not covered by the ADA.

## #2: Joe

- What if surgery does not improve Joe's condition?
  - ◆ Depending upon his limitations, Joe may then have an ADA-covered condition which may require accommodation.



## #3: Beth

- Payroll manager
- Excellent, vital employee
- Needs leave to care for pregnant daughter having complications
- Granted FMLA leave – “but we really need her back”
- Terminate Beth and replace

## #3: Beth

- Is the termination problematic?
- Does Beth's daughter have a disability?
- Must you accommodate Beth under the ADA?

## #3: Beth

- Is the termination problematic?
  - ◆ YES. Beth's leave is protected under the FMLA to care for a family member with a serious health condition.

## #3: Beth

- Does Beth's daughter have a disability?
  - ◆ YES. While the ADA normally excludes pregnancy as a disability, it can be if complications result in a substantial limitation.

## #3: Beth

- Must you accommodate Beth under the ADA?
  - ◆ NO. The ADA only requires accommodation of an employee's disability, not that of a family member.

## #4: Kevin

- Department manager
- Absenteeism problem
- Progressive discipline issued
- Last and final warning given
- Absent again and informs of his diagnosis of depression
- Wants leave

## #4: Kevin

- How should you respond to Kevin's request?
- What certification can you require?
- Can you still proceed with termination?

## #4: Kevin

- How should you respond to Kevin's request?
  - ◆ Very carefully. This condition could be covered under both FMLA and ADA.



## #4: Kevin

- What certification can you require?
  - ◆ Under FMLA, can request certification by health care provider. Also OK under ADA to inquire as to ability to perform job-related functions.

## #4: Kevin

- Can you still proceed with termination?
  - ◆ Probably not, particularly if the basis (absenteeism) is the result of his condition.



Thank You