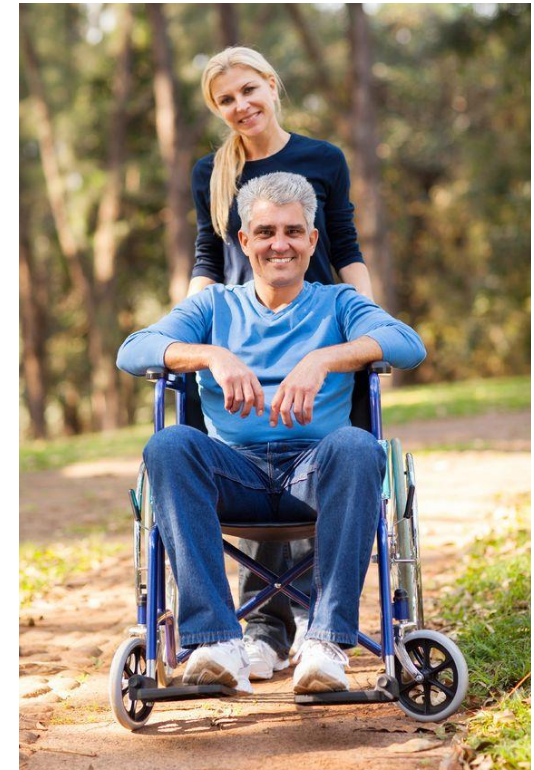
Managing Leave Issues While Navigating the Overlap Between FMLA, ADA, GINA, Workers Compensation and Leave Policies

We Will Cover the Overlap Between:

- FMLA
- ADA
- GINA
- Workers Compensation
- Leave Policies

Family and Medical Leave Act

- Eligible employees:
  - 12 months; 1250 hours in past year; and work at location with 50 employees in 75-mile radius
- Qualifying Reasons
- Advance Notice and Medical Certification
- Job Benefits and Protection
- Period of Leave
- Returning to Work from FMLA Leave
- Intermittent Leave or Reduced Schedule
- Note: States and municipalities adopting paid family leave laws



Marshall v The Rawlings Company LLC

- **Pro Employee: Cat's Paw v. Honest Belief**
- Cat's paw liability applies to FMLA retaliation claims. The employer was not entitled to summary judgment on plaintiff's FMLA retaliation claim.
- There were genuine issues of material fact regarding whether lower-level supervisors were biased against the plaintiff for taking FMLA leave for her mental health, and whether that bias had infected the ultimate decision-maker's decision relating to the plaintiff
- The court reconciled the honest belief rule with the cat's paw theory, holding that the "honesty or sincerity" of a decision-maker's belief is irrelevant if that belief is based on the influence of a biased lower-level supervisor.

Brown v Excelda Manufacturing Company, Inc.

- **Pro Employer: Written Warnings are not adverse Action**
- The plaintiff filed an action alleging that the employer unlawfully retaliated against her for taking FMLA leave. Her claim was based on the cat's paw theory of liability. She alleged that her supervisor completed a Coaching and Corrective Action Notice recommending that the plaintiff be issued a written warning.
- The court granted summary judgment for the employer, holding that the plaintiff failed to produce evidence that the supervisor intended to have the plaintiff fired. Moreover, the plaintiff failed to present authority to rebut previous case law holding that a written warning is not an adverse employment action.

Severson v Heartland Woodcraft, Inc.

- **Pro Employer: ADA is not open-end FMLA**
- The court rejected the EEOC's argument that "a long-term medical leave of absence should qualify as a reasonable accommodation when the leave is (1) of a definite, time-limited duration; (2) requested in advance; and (3) likely to enable the employee to perform the essential job functions when he returns."
- The court held that, "If as the EEOC argues, employers are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical leave statute – in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term "reasonable accommodation."

Fatemi v White

- *Fatemi v White.* Expanding examples of reasons to terminate after the fact is not "pretext."

Curly v City of North Las Vegas

- *Curly v City of North Las Vegas.* Tolerating misconduct for years does not show pretext when employer ultimately decides to terminate.

Burton v Freescale Semi-Conductor, Inc.

- *Burton v Freescale Semiconductor, Inc.* A sudden and unprecedented campaign to document a specific employee's deficiencies in effort to justify a decision that has already been made could raise an inference of pretext.

Yazdin v Conmet Endoscopic Technologies, Inc.

- *Yazdin v Conmet Endoscopic Technologies, Inc.* The honest belief rule is inapplicable when the employer fails to make a reasonable informed and considered decision.

Sklyarsky v Means-Knaus US Partners

- *Sklyarsky v Means-Knaus US Partners.* The employee's opinion about his work performance is irrelevant. Employer won on summary judgment when the decision maker honestly believed the plaintiff was performing poorly.

Americans with Disabilities Act

- Disability Accommodation
- Equal Employment Opportunity
- Employee Conduct
- Telecommuting / Flextime
- Leave of Absence Without Pay / FMLA
- Reduced Work Schedule (Non-FMLA)

Americans with Disabilities Act

Acker v General Motors, LLC

- **Pro Employer: FMLA Requests alone don't Trigger ADA**
- Request for FMLA alone was not a request for an ADA accommodation.
- He asserted that he had a serious health condition that made him unable to perform the essential functions of his job.
- A request for an ADA accommodation would be to assert that he was able to perform the essential functions of his job with a reasonable accommodation.

Americans with Disabilities Act

EEOC v Dolgencorp, LLC

- **Pro Employer: Don't Steal and Sue**
- An employee was terminated after violating the employer's anti-grazing policy by eating the employer's product, Little Debbie snacks, while on the job without paying for them.
- The employee filed a lawsuit alleging that her termination was unlawful disability discrimination because she was simply trying to prevent a hypoglycemic episode.
- If the jury believed that the termination decision was made based on the employer's honest belief that the employee violated the anti-grazing policy, the disability would not have been the "but for" cause of the termination.

Gender Identity Disorder

Blatt v Cabela's Retail, Inc.

- **Pro Employee: Listen to Doctor's Orders**
- Even though the ADA excludes "gender identity disorders," the plaintiff's gender dysphoria claim was allowed to proceed.
- The plaintiff's gender dysphoria (a/k/a Gender Identity Disorder) was a disability because, as her doctor attested, it substantially limited her major life activities, including interacting with others, reproducing, and social and occupational functioning. It did not merely affect how she identified herself sexually.

Pregnancy Discrimination

Kubik v Central Michigan University Board of Trustees

- **Pro Employer: If decision was made before Pregnancy = No Claim & 5 Month Gap**
- The court ruled that in the context of pregnancy-discrimination claims, a plaintiff has the burden to show that "(1) she was pregnant, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision."
- The plaintiff did not present sufficient evidence to show the required nexus between her pregnancy and the departmental votes against her reappointment.

Americans with Disabilities Act

EEOC v. Kroger

- *EEOC v. Kroger.* The jury gets to decide whether an employee that has a serious back injury is capable of performing essential lifting functions.

Keith v. County of Oakland

- *Keith v. County of Oakland.* The jury gets to decide if a deaf lifeguard is unable to do marginal or essential job functions.

Gleed v. AT&T Mobility Services

- *Gleed v. AT&T Mobility Services.* Employee that was not allowed to sit at work to accommodate a disability was a question for the jury since a pregnant woman was allowed a chair.

Acker v General Motors, LLC

- *Acker v General Motors, LLC.* FMLA requests alone don't trigger ADA. A request for an ADA accommodation would be to assert that he was able to perform the essential functions of his job with a reasonable accommodation.

Additional Protected Classifications Under Michigan Law and Local Laws*

Marital Status

Familial Status

GINA

- **Genetic Information Nondiscrimination Act (GINA)**
- GINA is a federal law that protects people from genetic discrimination in health insurance and employment. Genetic discrimination is the misuse of genetic information.

Genetic Information

What is Genetic Information?

- Genetic information includes any health conditions and risk for developing certain health conditions.
- Among other obligations, GINA requires employers who seek medical certifications in support of leave or accommodation requests- including FMLA leave- to affirmatively notify employees of GINA's limitations on requests for genetic information.

What Employers are Subject to GINA?

- Employers with fewer than 15 employees are not included in GINA.
- GINA's employment protections do not apply to US Military and Federal Employees.

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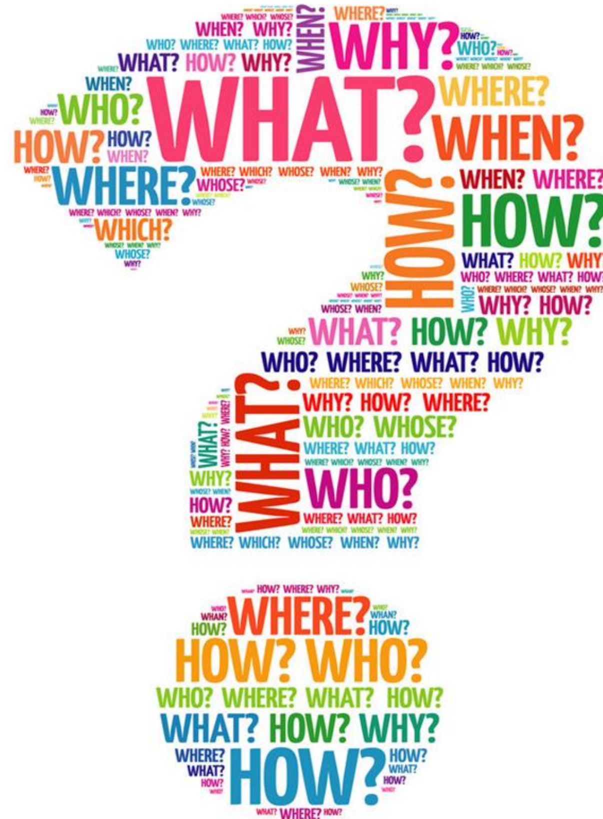
Lowe v. Atlas Logistics Group Retail Services, LLC, (N.D.Ga. May 5, 2015)

- Held that an employer violated the Genetic Information Nondiscrimination Act ("GINA") by obtaining DNA samples from two employees it suspected of repeatedly defecating in a company warehouse.
- Last week, a jury awarded the plaintiffs in that case $2.23 million in damages, consisting of $475,000 in emotional distress damages and $1.75 million in punitive damages based on the employer's reckless indifference to their federally protected rights.
- GINA also prohibits a wide range of less invasive activities, such as internet searches, eavesdropping, searching personal belongings and asking health-related questions that are likely to elicit genetic information about an employee.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