

ILLINOIS EMPLOYER TO PAY 1.7 MILLION FOR DISCRIMINATORY ATTENDANCE POLICY

By: Joette S. Doran

On November 5, 2015, the Chicago District Office of the Equal Employment Opportunity Commission (EEOC) announced that Pactiv LLC, an Illinois-based provider of advanced packing solutions to customers around the world, will pay \$1.7 million to conciliate a disability discrimination charge filed with the EEOC under Americans With Disabilities Act (ADA). The EEOC alleges that that the company discriminated against employees who needed time off from work for medically related reasons under the company's strict attendance and leave policies.

According to the EEOC, "The agreement results from an EEOC investigation which found reasonable cause to believe that Pactiv discriminated against individuals with disabilities by disciplining and discharging them according to its nationwide policies to issue attendance points for medical-related absences; not allowing intermittent leave as a reasonable accommodation and not allowing leave or an extension of leave as a reasonable accommodation."

The EEOC announced, "The settlement provides monetary relief to those who have already been discriminated against, and also ensures the company will take proactive measures to prevent discrimination from occurring. According to the agreement, Pactiv will conduct ADA training at each of its locations nationwide; revise and distribute its ADA policy and procedures, including those related to providing reasonable accommodations to employees; and revise and distribute nationwide its new attendance policy that will not assess points for disability-related absences."

EEOC Chicago District Director Julianne Bowman, stated, "Employers need to get this message: Inflexible, strictly enforced leave policies can violate federal law. As an employer, make sure you have exceptions for people with disabilities and assess each situation individually. We are pleased that Pactiv has agreed to change its attendance policies at all its facilities to ensure it provides reasonable accommodations where required by the ADA."

In a pending case, the EEOC filed suit against AutoZone, Inc. in U.S. District Court for the Northern District of Illinois in 2014 alleging that it violated federal law when it implemented a nationwide attendance policy that failed to accommodate certain disability-related absences. According to the EEOC's complaint, from 2009 to at least 2011, AutoZone assessed employees "points" for absences, without permitting any general exception for disability-related absences in which twelve points resulted in an employee's termination. The complaint alleges, qualified employees with disabilities with even modest numbers of disability-related absences were fired.

These cases follow a 2011 federal case in which the EEOC filed suit in U.S. District Court for the District of Maryland. In that case, the EEOC entered into a consent decree with Verizon Communications for \$20 million, the largest disability discrimination settlement in a single lawsuit in EEOC history. The EEOC charged that Verizon violated the ADA by refusing to make exceptions to its "no fault" attendance plans to accommodate employees with disabilities. According to the EEOC, "Under the challenged attendance plans, if an employee accumulated a designated number of "chargeable absences," Verizon placed the employee on a disciplinary plan which could ultimately result in more serious disciplinary consequences, including termination. said the company unlawfully denied reasonable accommodations to hundreds of employees and disciplined and/or fired them pursuant to Verizon's "no fault" attendance plans."

The EEOC asserted that Verizon failed to provide reasonable accommodations for people with disabilities, such as making an exception to its attendance plans for individuals whose "chargeable absences" were caused by their disabilities. Instead, the EEOC said, "The company disciplined or terminated employees who needed such accommodations. The ADA prohibits discrimination based on disability. The law also requires an employer to provide a reasonable accommodation, such as paid or unpaid leave, to an employee with a disability, unless doing so would cause significant difficulty or expense for the employer."

In addition to the \$20 million in monetary relief, the three-year decree included injunctions against engaging in any discrimination or retaliation based on disability, and required the company to revise its attendance plans, policies and ADA policy to include reasonable accommodations for persons with disabilities, including excusing certain absences.

“Flexibility on leave can enable a worker with a disability to remain employed and productive -- a win for the worker, the employer and the economy,” said EEOC Chair Jacqueline A. Berrien. “By contrast, an inflexible leave policy may deny workers with disabilities a reasonable accommodation to which they’re entitled by law – with devastating effects.”

Spencer H. Lewis, Jr., Director of the EEOC’s Philadelphia District Office, stated that, “This settlement demonstrates the need for employers to have attendance policies which take into account the need for paid or unpaid leave as a reasonable accommodation for employees with disabilities.”

These cases make clear that employers should make sure the company’s attendance and leave policies take into account whether an individual may qualify as disabled and need a reasonable accommodation. Employers that fail to engage in an individualized interactive process with disabled employees may find themselves in an expensive battle with the EEOC. As such, before disciplining or discharging an employee for an absence due to a disability, the employer should engage in dialogue with the employee regarding the expected date of return to employment and then make an individualized assessment as to whether some additional amount of time off or other accommodation would be a reasonable under the ADA.

Joette S. Doran has her law practice in Hoffman Estates. She concentrates in employment law and handles employment law actions in state and federal administrative agencies and courts. She was a former Co-Chair of the NWSBA Employment Law Committee and is a Member of the Board of Governors. For more information please visit her website at www.joettedoran.com.