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## Washington Public Employer Hit with \$1.8 Million Judgment for Failing to Accommodate Prescription Drug User

BY JENNIFER MORA AND VANESSA LEE

Last month, a Washington federal district court judge ordered an employer to pay a terminated employee a little over \$1.8 million in damages for failing to accommodate the employee's use of opioids that had been prescribed to treat her migraines, and for terminating her for a positive drug test result.<sup>1</sup> Although employers typically have a right to implement and enforce clear drug-testing policies so as to maintain a safe and productive work environment, the decision underscores the importance of engaging in an interactive process with job applicants and employees and providing reasonable accommodations to those taking prescription drugs for medical conditions.

### The Plaintiff Tests Positive for Prescribed Opioids

The plaintiff worked as a customer service representative for the employer for over 20 years. For most of her adult life, she suffered from chronic and debilitating migraines. At times, she was able to treat her migraines with non-prescription drugs, but when those failed, she took the narcotic, Dilaudid, which had been prescribed by her doctor. Left untreated, the plaintiff's migraines prevented her from functioning or working for a period of two or three days. As a result, she would periodically take time off from work to get Dilaudid injections. Although the Dilaudid sometimes caused the plaintiff to experience side effects such as confusion, sleepiness, slurred speech and an itchy feeling, her doctor advised that she could return to work a few hours after receiving an injection. Side effects from the Dilaudid were, of course, in addition to those she experienced when hit with a migraine, such as pale skin and droopy eyes.

The employer's "fitness for duty" policy prohibited employees from working under the influence of drugs or alcohol and advised of the

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<sup>1</sup> *Stewart v. Snohomish County PUD No. 1*, Case No. C16-0020-JCC (W.D. Wash. June 21, 2017).

possibility that an employee may have to submit to a drug test if a manager had reasonable suspicion to believe the employee was impaired by drugs or alcohol. The policy made no exception, however, for employees who take prescription medications to treat their disabilities.

Although the plaintiff's co-workers had a practice of covering for the plaintiff during her absences for treatment, the plaintiff's supervisor began expressing and documenting frustration with her attendance and her informal requests for time off. That supervisor admittedly spoke with the plaintiff about his concerns and told her that "all this time off is a problem." Shortly after, that same supervisor and another supervisor met with the plaintiff to discuss her attendance and the informal nature of her requests for time off. They advised that if she continued her pattern of unacceptable attendance, they would have to "rethink their structure of the ... schedule." The plaintiff then formalized her request for time off by applying for intermittent medical leave under the Family Medical Leave Act (FMLA). The employer approved this request.

As the months progressed, her supervisors began to suspect that the plaintiff was abusing her FMLA leave. One day, after she returned to work following an injection, her supervisor reprimanded her for an unexcused absence the previous day. When the plaintiff became upset and started to cry, her supervisor sent her back to her desk to work. Because the supervisor concluded that the plaintiff was impaired, he referred her for a reasonable suspicion drug test. While the court accepted the employer's testimony that the plaintiff exhibited signs of impairment at work, it found that there was no evidence the impairment prevented the plaintiff from doing her work that day. Indeed, the court noted that the employer told the plaintiff to continue to work even after concluding she was impaired and had decided to send her for a drug test.

Shortly after the drug test, the plaintiff's doctor sent a letter to the employer and explained the need for the plaintiff to receive injections for her migraines and that "if she is able to rest after her shot, she is not impaired and is able to work without restrictions."

A week later, the employer asked the plaintiff about the suspicious timing of her absences (which is what caused the employer to believe that she was abusing her intermittent leave requests), her medications and her health condition. The plaintiff explained that she had been receiving injections for her migraines for several years and did not feel impaired after waiting a short while after taking them before returning to work.

That same day, the testing laboratory's Medical Review Officer issued his final evaluation, which stated that the plaintiff's test revealed the opioid hydromorphone in her system and further noted a "safety sensitive warning for potentially sedating medication." The plaintiff did not work in a safety-sensitive position and, according to the court, the employer did not contact the lab to discuss the results or how they should be interpreted.

Although the plaintiff's doctor completed FMLA forms explaining the need for the prescription and that the plaintiff might test positive for drugs which would not necessarily mean the plaintiff was impaired, the employer required the plaintiff to sign a return to work agreement as a condition of continued employment and placed her on a forced leave of absence to undergo a substance abuse professional (SAP) evaluation and another drug test. (The SAP concluded the plaintiff did not have a drug abuse problem.) The agreement contained no exception for the medications the employer knew the plaintiff took to treat her migraines, but warned that another positive test for "potentially job-impairing medications" result would result in termination of her employment.

The employer eventually terminated the plaintiff's employment after she, again, tested positive for opioids. As with the first test, the employer did not contact the MRO to discuss the results. Employer witnesses admitted at trial that termination was the only option discussed after receiving another positive test result.

## The Court Finds the Employer Failed to Treat the Plaintiff Like “An Employee with a Medical Condition”

After concluding the plaintiff had a protected disability under the Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination (WLAD), the court considered, among others, her claim that the employer failed to reasonably accommodate her. The court easily dispensed with the first three requirements for such a claim: the plaintiff had a protected disability, she was qualified to perform the essential functions of her position and the employer had notice of her disability and its limitations. The question that remained was whether the employer failed to affirmatively adopt measures that were available to it and medically necessary to accommodate her medical condition.

The court concluded the employer failed to reasonably accommodate the plaintiff. It noted the employer “chose to address [the plaintiff’s] medication symptoms through a disciplinary process, rather than an interactive one aimed at finding a reasonable accommodation that would allow [her] to work and seek treatment for her disability.” Specifically, despite having knowledge of the plaintiff’s migraines and her use of prescription medication to treat her condition, the employer drug tested the plaintiff, placed her on forced administrative leave, and required that she sign a return to work agreement, which prohibited her from working while “impaired” and stated that she would be fired if she ever tested positive for “potentially job-impairing medications.” Although the employer modified the plaintiff’s FMLA certification to reflect a four-hour post-injection period, it did not consider alternatives (when it became apparent that four hours may not be enough) before firing the plaintiff. According to the court, the employer’s actions “fell far short of the [employer]’s duty to affirmatively adopt reasonable accommodation.”

The court rejected the employer’s argument that the plaintiff failed to engage in the interactive process by not communicating about the accommodations she required. According to the court, the plaintiff communicated clearly about her need for intermittent leave, but then had to defend herself against an accusation that she was abusing drugs and her choice to return to work. The court recognized that “while it is not always incumbent on the employer to steer the accommodation discussion, given the facts in this case, [the employer] should have done more.” Indeed, the court stated that alternative accommodations were “not difficult to conjure” and provided a list of possible accommodations that could have been offered, including allowing the plaintiff to remain at home the rest of the day after receiving an injection or sending her home if she returned to work and appeared impaired and unable to perform the essential functions of her position. “In short, it could have treated her as an employee with a medical condition, rather than a drug abuser.”

Ultimately, the court awarded the plaintiff approximately \$1.8 million in economic damages and \$10,000 in emotional distress damages. Of course, these amounts do not include plaintiff’s attorneys’ fees and costs, which the court will address at a later date. It remains to be seen whether the employer will appeal the decision to the Ninth Circuit Court of Appeals.

## Employer Considerations

Prescription drug use in workplaces presents many legal and human resource management issues. Indeed, the Equal Employment Opportunity Commission recently filed two lawsuits against employers challenging their actions taken against prescription drug users.<sup>2</sup> Alcoholism in the workplace also can create a dilemma for employers.<sup>3</sup>

Employers can lawfully test applicants and employees for illegal drug use, which would include use of any controlled substance not prescribed to the individual taking the substance or using prescription drugs in a

<sup>2</sup> See Jennifer Mora and Christina Cila, [EEOC Increases Scrutiny of Employer Actions Taken Against Prescription Drug Users](#), Littler Insight (Dec. 5, 2016).

<sup>3</sup> See Jennifer Mora, [Protecting Alcoholics, Preventing Alcohol Misuse and Distinguishing Between the Two](#), Littler Insight (Mar. 30, 2016).

manner inconsistent with the prescription. The ADA specifically states that tests for illegal drug use are not medical examinations and are not evidence of discrimination against recovering drug abusers when used to ensure the individual has not resumed the illegal drug use. If an employee uses a prescription drug that is not prescribed to him or her, this is considered illegal drug use and the employer can impose discipline for violating its policy against illegal drug use.

That said, this case serves as a reminder that employers should avoid making adverse decisions based on misperceptions or a lack of information about the effect of lawful prescription drug use on the employees' ability to perform their job duties. In general, employees have a protected right to use prescribed controlled substances and come to work unless such use creates an undue risk of harm or safety issue. Moreover, employers should take precautions before implementing blanket drug-testing policies that do not account for the need under the ADA to engage in an interactive process with individuals taking prescription medications and, if necessary, provide reasonable accommodations. One other important take-away from this case is the need for robust Medical Review Officer engagement in the workplace drug-testing results review process.

Correctly navigating federal and state discrimination and leave laws is crucial not only for helping avoid litigation but also for ensuring a safe environment for all employees. Consider consulting experienced counsel in making employment decisions regarding employees using prescription drugs and in devising drug and alcohol screening programs.