PIERCE ATWOOD LLP

Annual Discrimination Update & Pitfalls of Third Party Medical Opinions

April 12, 2018

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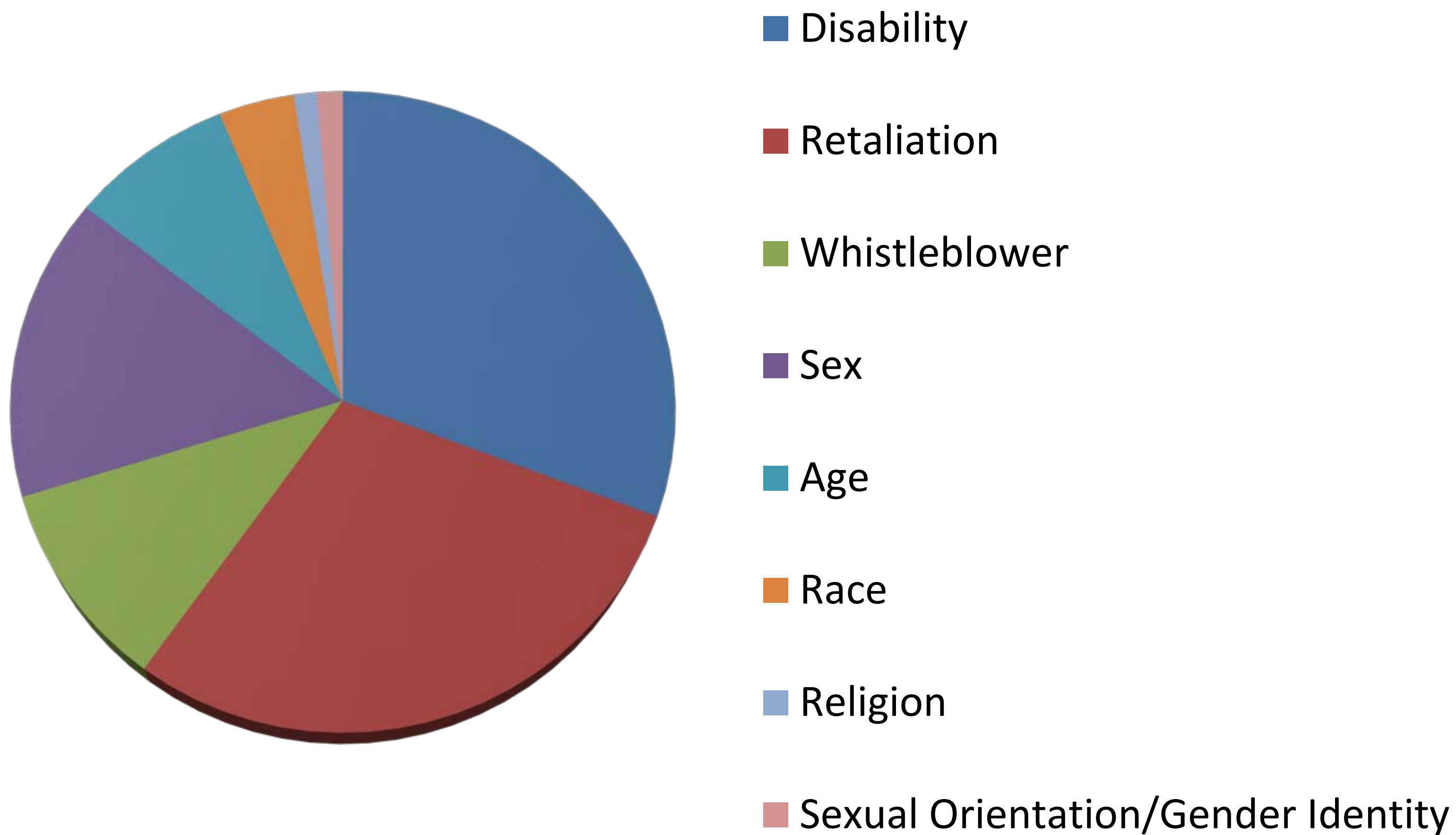
Agenda

- 2017 Year In Review
- Disability Discrimination & Accommodation
  - Leave as an Accommodation
  - Pregnant and Lactating Employees
  - Accommodating Substance Abuse
- Third Party Medical Opinions

2017 Year In Review

MHRC Update – FY 2017



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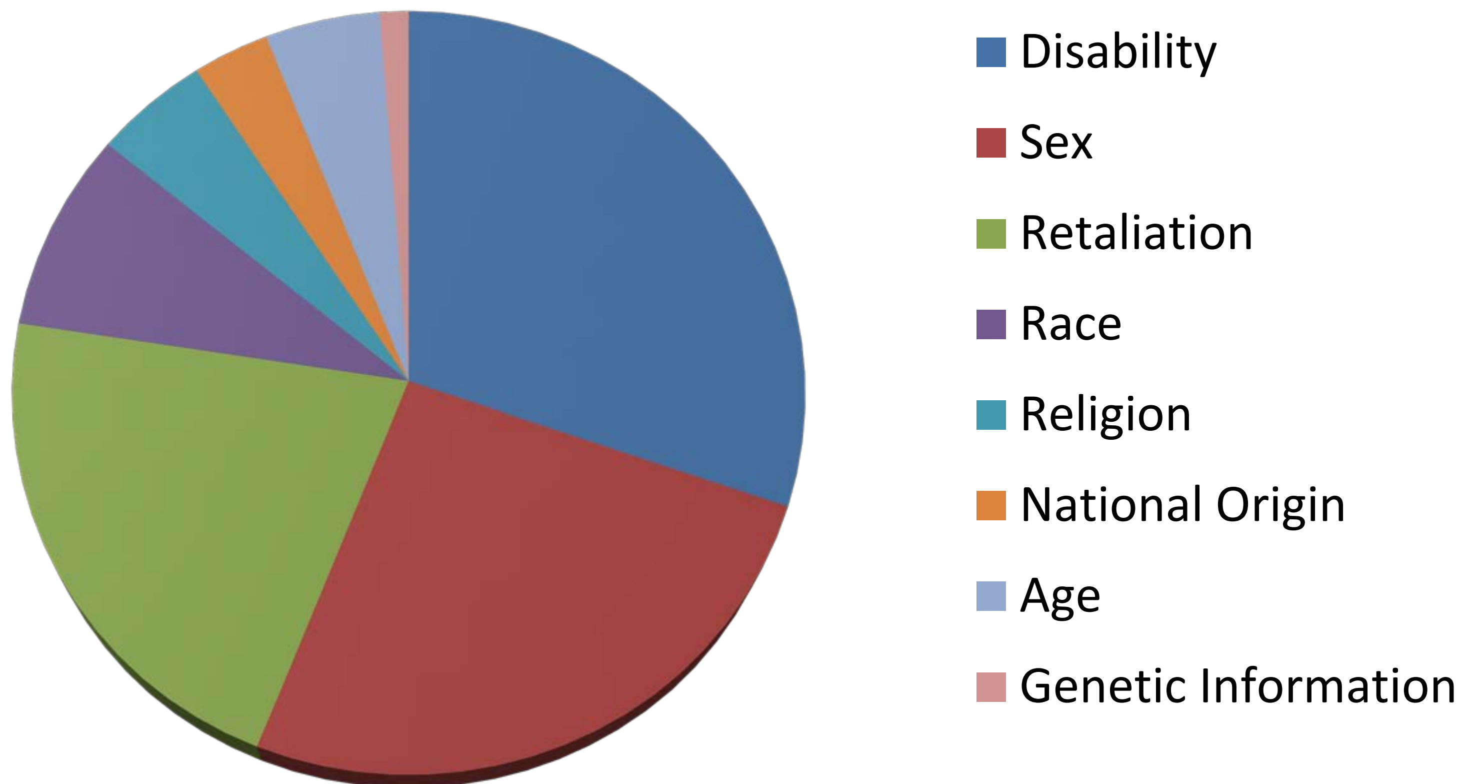
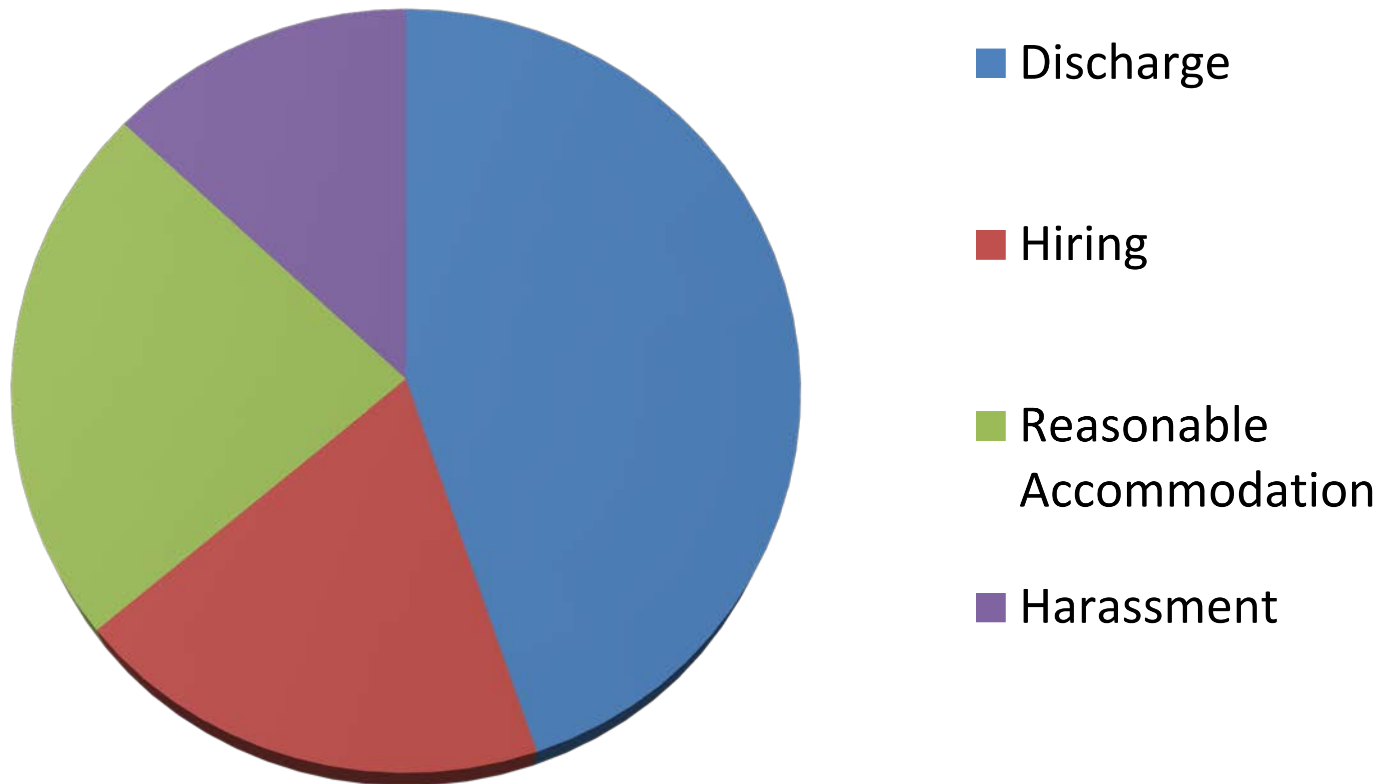
EEOC Update – FY 2017



EEOC Update – FY 2017



Disability Discrimination

Leave as an Accommodation

EEOC's Position:

- An employer covered by the ADA must seriously explore leave requests even if the employer does not provide leave benefits or the employee has exhausted/is not eligible for leave (including FMLA).
- Leave must be granted unless another reasonable accommodation option would be effective or if the leave would cause the employer undue hardship.
- Indefinite leave will likely constitute an undue burden.

Delgado-Echevarria v. AstraZeneca
(1st Cir. 2017)

- After 5 month leave of absence, Plaintiff stated her medical condition would probably last "more than a year."
- Argued that employer was required to provide her a 12-month leave of absence as a reasonable accommodation.
- First Circuit disagreed.
  - Employer had no reason to believe additional year of leave would likely enable Plaintiff to recover sufficiently to return to work.
  - Request for additional year of leave was unreasonable as a matter of law.

Billups v. Emerald Coast Utilities

(11th Cir. 2017)

- Plaintiff was utility service technician.
- Injured his shoulder on the job and was given physical therapy and advised not to lift more than five pounds.
- Took FMLA leave with an expected duration of one month.
- After month leave, surgeon scheduled surgery to repair bicep tear. Surgery had to be rescheduled several times. Meanwhile, Plaintiff's FMLA leave expired. As a company policy, he was entitled to 26 weeks of leave because he was injured on the job.
- While out on leave, supervisor sent email to HR stating he did not plan to keep Plaintiff employed because his past employment record was "not good" and that this was his "last chance" with the company.

Billups v. Emerald Coast Utilities

(11th Cir. 2017)

- Surgery finally went ahead 4 months after leave began. Surgeon stated it would take six months for him to recover and return to work without restriction.
- 11th Circuit affirmed summary judgment for employer because Plaintiff could not show that his requested accommodation would have allowed him to return to work "in the present or in the immediate future."
- Employer not required to change essential functions or a position or to create a light-duty position.

See also

- *Severson v. Heartland Woodcraft* (7th Cir. 2017): "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." Long-term leaves of absence are the "domain of the FMLA," not the ADA.

- *Carnicella v. Mercy Hospital* (2017 ME 161): The MHRA does not require employers to provide employees who are unable to work with leave as a reasonable accommodation.

Leave Accommodation Tips

- Assessment of undue hardship required under ADA.
- Assessment likely will depend on the size of the employer and its ability to maintain productivity despite an employee's absence.
- For intermittent leave requests, be prepared to explain why regular attendance is an essential function and reference in attendance policy
- Be patient; give employee an opportunity to get better. However, indefinite leave of long duration likely not required.

Accommodating Pregnant Employees

ADA?

FMLA?

PDA?

FMLA: Pregnancy and Childbirth

- Bonding time in first 12 months post birth
- Both birth mother and spouse eligible (male or female)
- Could be entitled to leave pre-birth for pregnancy complications and appointments
- Spouse could need leave to care for incapacitated pregnant wife

Pregnancy Discrimination Act

- An employer may not discriminate on the basis of pregnancy, childbirth, or related medical conditions; and
- "Women affected by pregnancy, childbirth or related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work."

Hicks v. City of Tuscaloosa, Alabama
(11th Cir. 2017)

- Plaintiff working as police officer on narcotics task force became pregnant.
- At trial, supervisor testified that it bothered her that Plaintiff was allowed to avoid "on call" duty and told Plaintiff more than once that she should only take six weeks of FMLA leave.
- Plaintiff took 12 weeks of leave following birth of child. Immediately upon return, supervisor wrote her up
- City claimed that Plaintiff declined to meet with informant after hours because she had to pick up child from daycare, and chose not to attend a drug bust on a Saturday.
- Supervisor requested Plaintiff be reassigned to patrol duty, eight days after her return from leave.

Hicks v. City of Tuscaloosa, Alabama

(11th Cir. 2017)

- As a result of transfer, Plaintiff would have different job duties (including wearing ballistic vest all day) and receive pay cut.
- Before beginning new assignment, was diagnosed with Post Partum Depression and took some additional leave.
- Physician also wrote note stating vest could lead to breast infections that lead to inability to breastfeed.
- Plaintiff requested assignment to desk job where she would not be required to wear vest, but was offered only the option not to wear vest or to wear loose-fitting vest, which Plaintiff rejected because it was too dangerous.
- Plaintiff tendered her resignation.
- Awarded $374,000 by jury

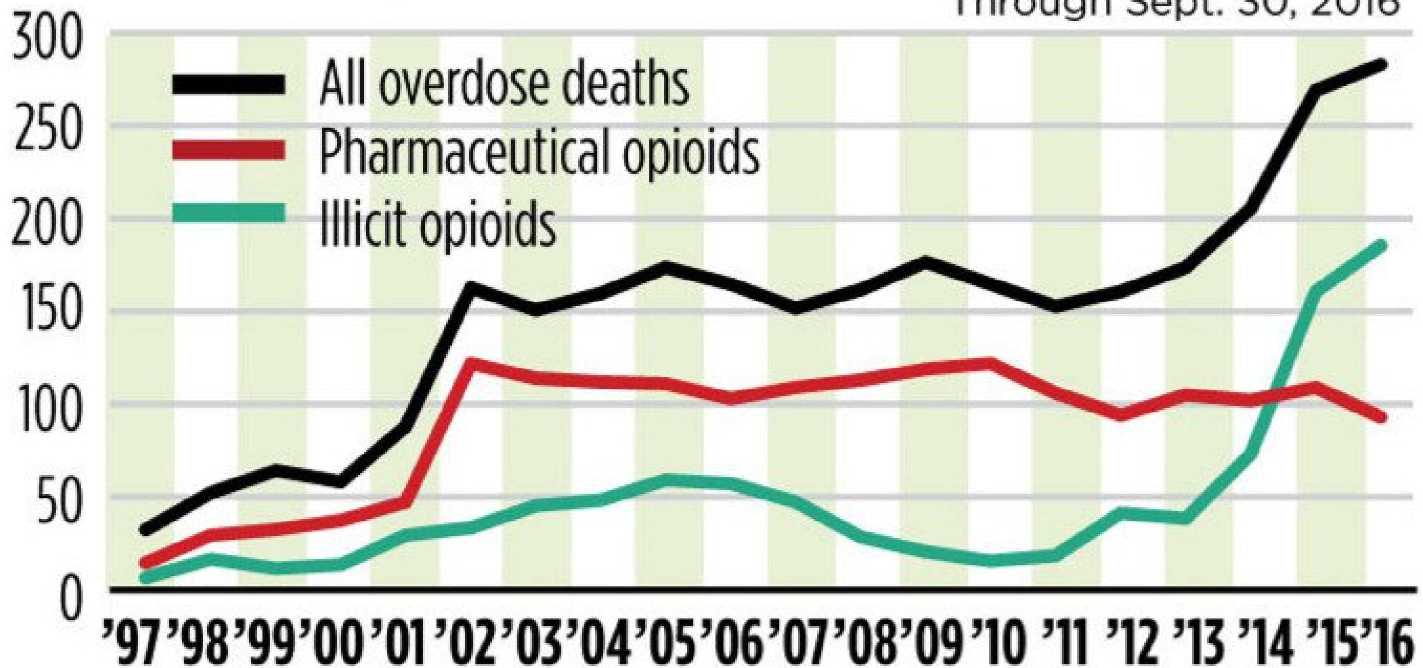
Substance Abuse and Addiction

- Current users of illegal drugs are not "qualified" individuals with a disability (even if addicted), except users seeking treatment are protected under state law.

- Employees who have successfully completed or are participating in a drug rehab program and are no longer using are protected.

- Employees who are erroneously regarded as using drugs or being addicted are protected.

Maine Opioid Addiction Crisis



Marijuana Legalization in Maine

Non-Discrimination Provision

As of February 2, 2018, Employers Cannot:

- Refuse to Employ; or
- "Otherwise Penalize" a Person over 21 Solely for Off-Property Consumption

Marijuana Legalization in Maine

- May need to treat marijuana like any other prescription drug, but not insure it.
- Positive applicant test may not necessarily be disqualifying.
- In fact, disqualifying employees for failure of pre-employment test likely violates the recreational use statute.

Parker v. Comcast Cable

(N.D. Cal. 2017)

- Plaintiff was terminated from job as sales consultant after excessive no call/no shows.
- She had told supervisors that she was "stressed" due to personal situation and submitted doctor notes excusing her from work for a few of the days.
- Evidence submitted in litigation showed she was also instructed to attend daily treatment for marijuana use around that time. She never told supervisor about this, but supervisor knew she had been arrested for a DUI once, a month earlier.
- Court granted summary judgment for employer.
- No disability discrimination because employer did not know about any mental health or substance abuse issue.

Third Party Medical Opinions

Occasions for Medical Exams

Post-offer, pre-employment

- To assess whether employee can perform essential functions with or without reasonable accommodation
- To obtain a DOT medical card

During employment

- Fitness for duty

"Job related and consistent with business necessity"

- Employer has a reasonable belief, based on objective evidence, that:
  - Employee's ability to perform essential functions will be impaired by a medical condition; or
  - Employee will pose a direct threat due to a medical condition.
- Follow up on a request for accommodation when disability or need unknown

Reasonable belief / objective evidence

- Employer has observed performance problems, reasonably attributable to medical condition;
- Employer is given reliable information by a credible third party;
- Employer observes symptoms indicating employee may have a medical condition that will impair ability to work or pose direct threat.

Individualized Assessment Required

- Absent special authority (DOT requirements, for example) it is <u>not</u> lawful to require every employee returning from a medical leave to undergo a fitness for duty exam.

- Decision to send individual for a fitness for duty must be based on information or observations specific to the employee, not assumptions.

Requests for Accommodation

- If employee requests accommodation, may request verification of disability and need for accommodation, not unrelated documentation.
- May only send employee to health care provider of employer's choice if employee provides insufficient documentation from his/her own physician.

Concerns About Fitness for Duty

- Employers may send employee to medical professional of employer's choice.
- Determination that employee poses a direct threat must be based on individualized assessment of employee's ability to safely do the job at issue.
- Must be based on reasonable medical judgment.

ADA Creates Non-Delegable Duty

- Employers cannot delegate ADA compliance to third party medical providers.
- Employer will be liable for ADA violations committed by provider (*e.g.* requesting medical information beyond the scope).
- Employer will be liable if it relies on third party medical provider's assessment of fitness, and medical provider is
  - Wrong or
  - Applies incorrect standard.

Common Mistakes

- Role confusion:
  - Third party provider acting as treating physician
  - Opinion that employee "shouldn't" lift because she "might" hurt herself;
  - Assessing what employee should and should not do, rather than what employee is physically capable of doing (with or without accommodation).

Common Mistakes

- <u>Failing to appreciate definition of "direct threat"</u>:
  - "Direct threat" is a high standard (and the employer's burden to prove);
  - Means "a significant risk of substantial harm to the health or safety of that employee or others, which cannot be eliminated or reduced by reasonable accommodation."
  - Must consider duration of risk; nature and severity of potential harm; likelihood it will occur; and imminence.

Common Mistakes

- Provider failing to limit inquiry to the medical condition at issue:

  - Requesting employee's complete medical records from another provider;

  - Inquiring about employee's complete medical history, when not relevant to cause of questions about fitness.

Common Mistakes

- Delegation of ultimate question to the third party medical provider:
  - Provider's role is to assess physical capacity and need for accommodation.
  - Employer's role is to take that information, process it, and make a decision:
    - Are the functions the employee can't do essential?
    - Is the accommodation proposed reasonable / an undue hardship?

Tips to Avoid Liability

- Communicate with the third party medical provider.

  - Ensure they know what you are asking them to do.
  - Ensure they know what the limits of the exam are, under the ADA.
  - Ensure they know something about the job, and what tasks they need to consider in their assessment.

Tips to Avoid Liability

- Understand why the provider concluded as it did.
  - It's not only ok to ask questions, you must.
  - If provider says employee can't lift more than 10 pounds, find out why. Did they test the employee's lifting capacity? Or are they saying employee "might" hurt his back if he lifts more than 10 pounds?

Tips to Avoid Liability

- <u>Do not defer to provider's conclusions about effect of medical condition on ability to do the job.</u>

  - If provider says employee isn't "cleared," don't stop there.
  - Questions for provider are what employee can and can't do, why, and what will happen if they do it anyway.
  - <u>You</u> decide the impact the answers have on employment.

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