SEPTEMBER 10, 2019

SHRA
Seacoast Human Resources Association

LEAVES OF ABSENCE

MANAGING THE UNMANAGEABLE

Presented By:
Debra Weiss Ford
Office Managing Principal - Portsmouth
Jackson Lewis P.C.
debra.ford@jacksonlewis.com
603.559.2727 | Direct

jackson|lewis®

POLLING VIA TEXT OR THE WEB

Text Voting

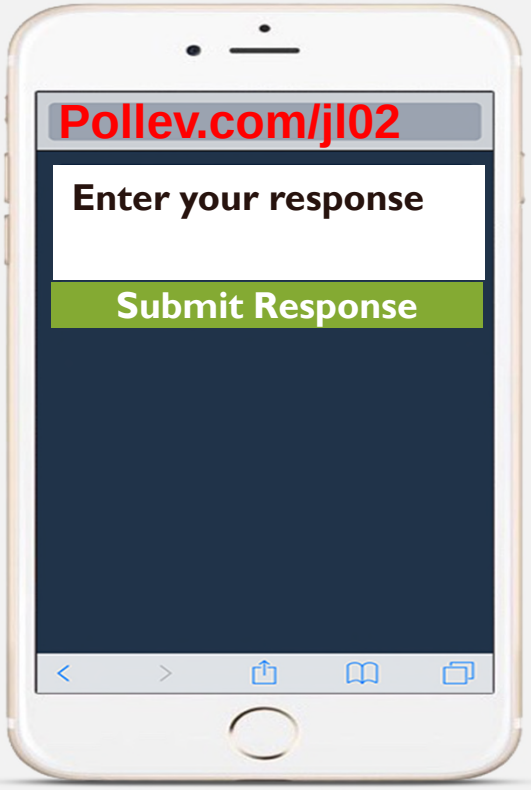
Step 1: Text **JL02** to **22333** once to join

Step 2: Text only response (A, B, etc.)

Web Voting

Step 1: Enter url **Pollev.com/JL02** to join

Step 2: Select your response



What workplace issue keeps you up at night?

THE FMLA

10 THINGS YOU NEED TO KNOW

1. WHAT IS A "SERIOUS HEALTH CONDITION"?

Injury, illness, impairment, or physical or mental condition that involves:

- Inpatient care and subsequent treatment OR
- Incapacity of >3 consecutive days and subsequent treatment (ex. physical therapy)
  - Incapacity due to pregnancy or for prenatal care
  - Incapacity due to chronic condition (ex. asthma)
  - Permanent or long-term incapacity
  - Absence to receive multiple treatments (physical therapy)

2. CERTIFICATIONS

Medical certification to support need for leave due to a serious health condition must normally be provided within 15 days after request for leave

- Employer must:
  - Advise employee if certification is incomplete/ insufficient and must state in writing what other information is needed
    - Provide employee with 7 calendar days to cure deficiency
  - Employer should:
    - Use US DOL FMLA Forms

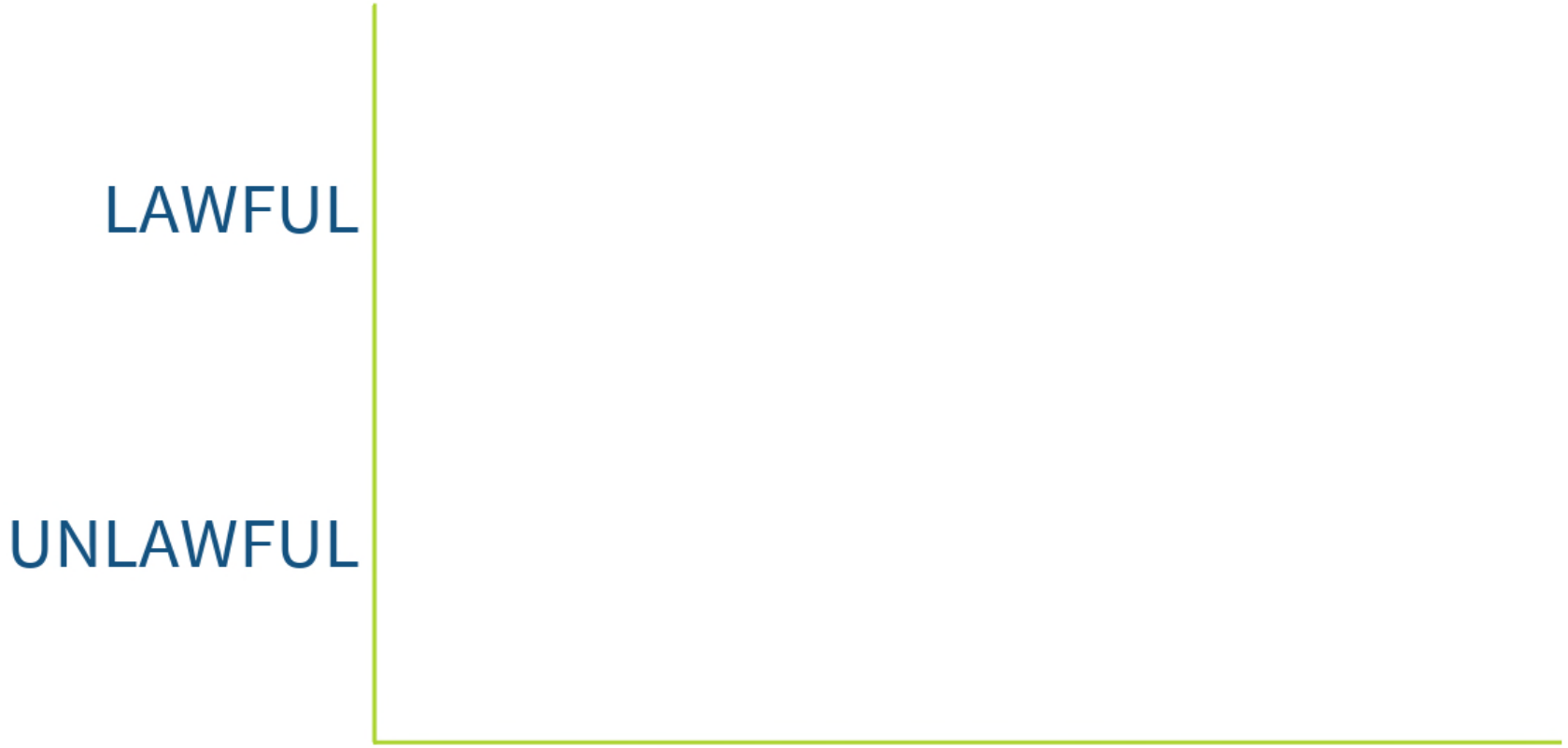
PROPOSED REVISIONS TO US DOL FMLA FORMS

- 08/05/2019 US DOL published proposed changes to 7 FMLA forms:
  - Fewer questions requiring written responses; replaced by statements that can be verified by simply checking a box
  - Layout/style changes to reduce blank space/improve readability; color-coded sections specific to employees, employers, health care providers;
  - Reorganization of medical certification forms to more quickly determine if a medical condition is a "serious health condition"
  - Clarifications to reduce the demand on health care providers for follow-up information
  - More information on notification forms to better communicate specific information about leave conditions to employees
  - Changes to qualifying exigency certification forms to provide clarity to employees about what information is required
  - Changes to military caregiver leave forms to improve consistency and ease of use
- Public comment period is open through 10/04/2019

NEGATIVE CERTIFICATION

- The Employee submitted a request for intermittent FMLA leave for 2 days a week for an approximate 1-month period. Her medical certification did not identify her "serious health condition" or its expected duration.
- The Employer denied the leave request. The Employee took the time off anyway and was terminated for excessive absences. After her termination, the Employee was diagnosed with diabetes and hypertension.
- The Employee brought suit alleging interference with her FMLA rights, on the grounds that she was terminated without being given the opportunity to cure the deficiencies in the medical certification.

Was the Employer's denial of the Employee's FMLA leave lawful or unlawful?



Start the presentation to see live content. Still no live content? Install the app or get help at **PollEv.com/app**

UNLAWFUL

- The 3rd Circ. Court of Appeals found that although the medical certification was "insufficient" it was not "negative" on its face and the Employee was entitled to the opportunity to cure it before being terminated.
- The Court found that the fact that the Employee did not have a medical diagnosis at the time of her request for leave was irrelevant.

Hansler v. Lehigh Valley Health Network (June 2015)

WHAT IS A "NEGATIVE CERTIFICATION"?

- A certification that is complete but that on its face demonstrates that the absence was not FMLA-qualifying
- **PRACTICAL TIP:** If certification is deficient (incomplete, insufficient) – provide employee opportunity (7 days) to cure the deficiency – *even if the information provided appears to render it a negative certification*

3. MEDICAL CERTIFICATIONS & RECERTIFICATIONS

MEDICAL CERTIFICATIONS

- Employers may request new Medical Certification **annually** if condition extends beyond a single leave year, e.g., for chronic conditions

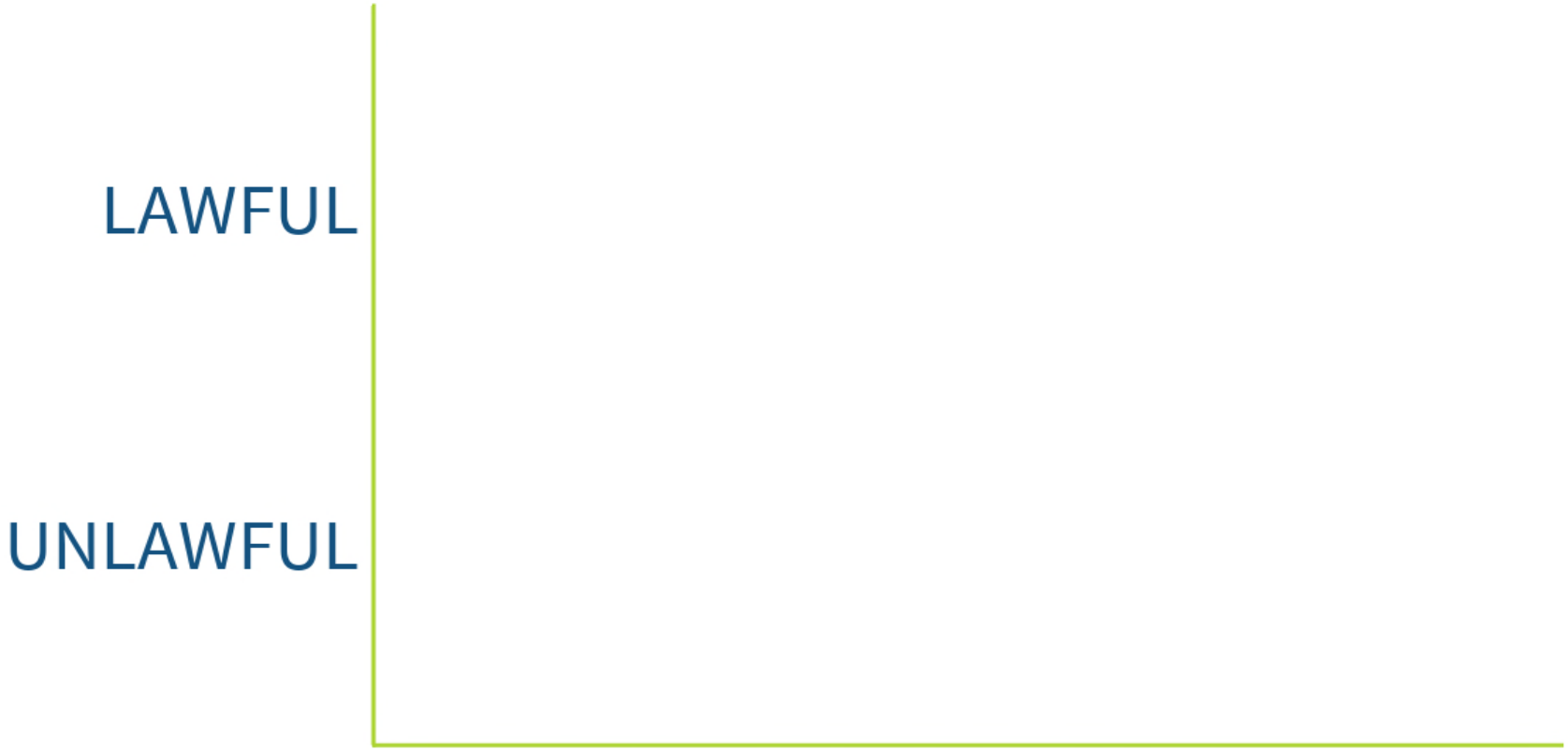
MEDICAL RECERTIFICATIONS

- Employers may request Recertification for continuing, open-ended conditions **every 6 months**

FMLA-CHRONIC MEDICAL CONDITION

- The Employee, a military veteran who suffers from PTSD, worked as an employment specialist for a rehabilitation service. She was the victim of a drive-by shooting, which exacerbated her PTSD symptoms.
- A year later, performance issues started to surface at work. The Employee was given disciplinary warnings but failed to improve. She failed to report to work one day, claiming she had a mental health emergency. She provided a note from her physician stating she was being treated for PTSD symptoms and would return to work the following day, but she did not.
- Thereafter, she remained absent with only sporadic intermittent attendance and she was terminated for job abandonment.
- She then brought suit alleging interference with her FMLA rights, alleging that the Employer failed to provide her with the FMLA benefits to which she was entitled.

Was the Employee's termination lawful or unlawful?



Start the presentation to see live content. Still no live content? Install the app or get help at **PollEv.com/app**

LAWFUL

- The Court granted summary judgment to the Employer, finding that the Employee could produce no evidence that she had a serious health condition entitling her to FMLA leave. Since the Employee was never hospitalized and never received inpatient treatment for PTSD, she had to show she was receiving "continuing treatment" for her chronic health condition—meaning periodic doctor's visits occurring at least twice a year—but she could not do so. Although she had been in treatment with her doctor for 7 years and had initially seen him regularly, her visits had tapered off and now only occurred on an as-needed basis.

Watkins v. Blind & Vision Rehab. Svc. (Sept. 2018)

PRACTICAL TIP: When an employee requests FMLA leave for a chronic health condition, review the certification form carefully. Does the provider identify a period of hospitalization or recent dates of treatment? Does the provider confirm that the employee will need period visits at least twice a year? If not, the employee may well not qualify for FMLA leave.

4. 2ND AND 3RD OPINIONS

2nd Opinion

- If a complete & sufficient medical certification is submitted but there is reason to doubt its validity
- Employer chooses provider (don't select provider Employer regularly/routinely employs)

3rd Opinion

- If Second Opinion differs from original
- Both Employer and Employee choose provider
- Third Opinion is final

Employer pays for 2nd & 3rd opinions

- Including reasonable travel expenses for employee/family member

Employee provisionally entitled to FMLA leave while waiting for 2nd & 3rd opinions

5. FITNESS-FOR-DUTY (FFD) CERTIFICATION

Employers may demand more than a "simple statement" of ability to return to work

Employer may require employee's healthcare provider to certify that employee can perform his/her essential job duties only if:

- Employer gives employee **with the FMLA-leave Designation Notice**:
  - A list of essential job duties; and
  - Advises employee that the certification must address employee's ability to perform the essential job functions

No 2nd or 3rd opinions allowed for FFD certifications

6. FMLA LEAVE ABUSE

- 3 of Chicago's police communications officers took intermittent FMLA leave in July 2017 to take a Caribbean cruise—booked a year in advance.
- 2 of the officers took a combined 10 cruises using sick and/or FMLA leave dating as far back as 2010.
- The officers attended night clubs, toured the islands, went horseback riding, rode jet skis and even went on a "booze cruise."
- Another officer used 19 days of intermittent FMLA leave to take 2 cruises in 2014 and 2017.
- At least one of the officers got a doctor's note excusing him from work, and another submitted a time-off slip indicating he intended to have surgery.
- 3 of the employees were terminated, 1 resigned.
- The abuse had gone unchecked for nearly a decade in part because the City still used a paper time-keeping system, and had little oversight of employee absences.

WHAT IF YOU SUSPECT FMLA ABUSE?

- An employer's **honest belief** that an employee misused FMLA leave can defeat a retaliation claim
- Absolute certainty is not required
- Belief should be in **good faith**
- Conduct a proper investigation
  - Don't presume or pre-judge
- Give employee an opportunity to explain
- Courts apply the "honest belief" defense differently
  - Some require the employer show the belief is not only honest but also reasonably based on the particular facts of the case

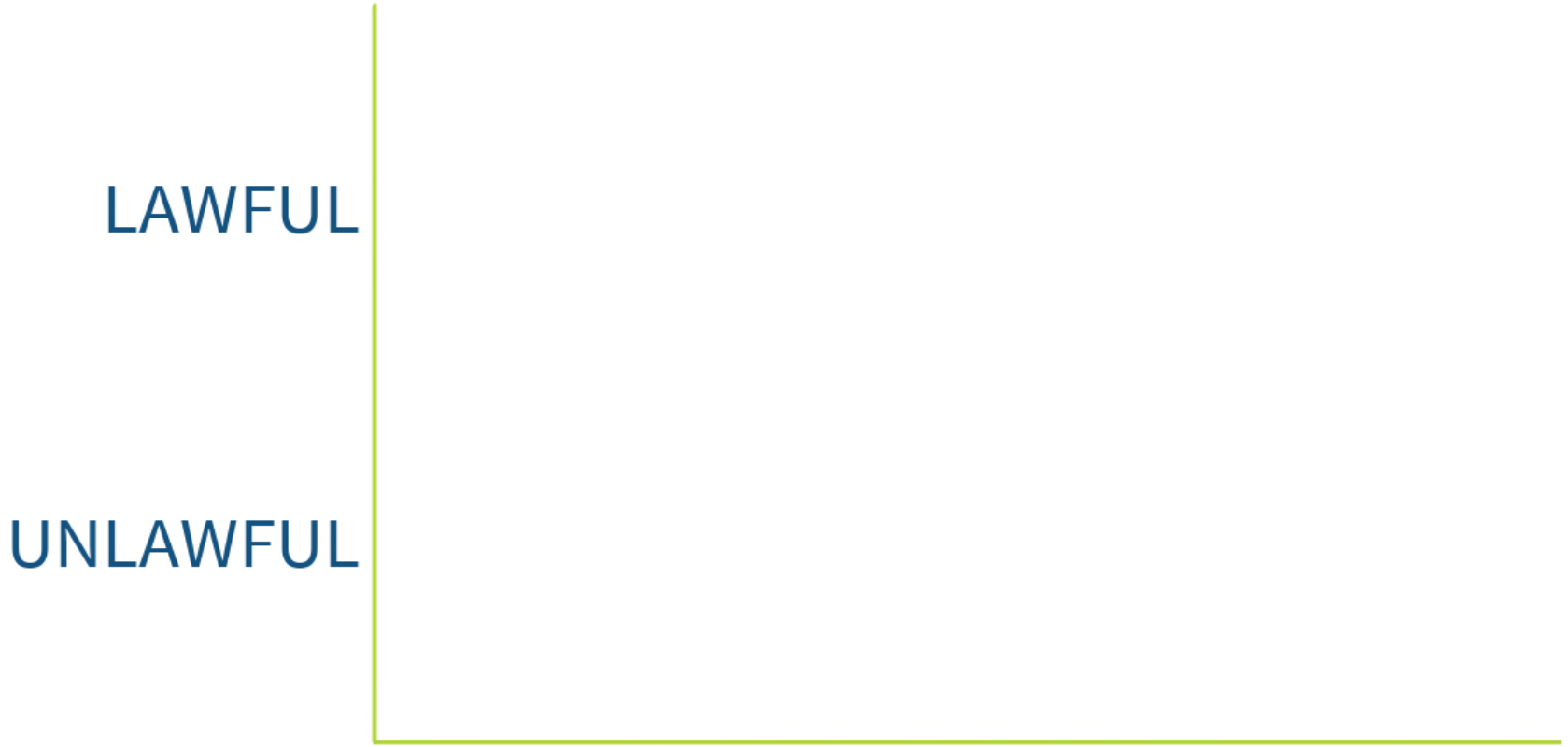
HOW DO YOU CURB FMLA LEAVE ABUSE?

- Don't approve non-qualifying reasons
- Require complete health care certification
- Utilize second/third opinions when appropriate
- Require recertification where permitted
- Run leaves concurrently
- Require substitution of paid leave where permissible
- Have clear, consistent call out procedures – and enforce them
- Clearly communicate expectations of employees on leave

FMLA LEAVE ABUSE

- The Employee, a long-time data resource manager for the Massachusetts Water Resources Authority, was granted FMLA leave for foot surgery. Employee's surgeon reported that Employee would need 4 to 6 weeks' leave while his foot gradually improved.
- However, the Employee had long-standing plans for an annual family vacation in Mexico which overlapped part of his recovery period. The Employee's doctor cleared him to go to Mexico and the Employee told Employer.
- When the Employee returned from leave, he was suspended and then terminated for "mispresenting" his injury.
- The Employee brought claims under the FMLA and Massachusetts anti-discrimination laws.

Was the Employee's termination lawful or unlawful?



UNLAWFUL

- The Massachusetts Supreme Judicial Court affirmed a jury verdict in favor of the Employee for nearly $2 million in actual damages, punitive damages, and attorneys' fees.
- The jury believed the Employer didn't investigate in good faith because it started its fact-finding with a "presumption of wrongdoing."

DePrato v. Mass. Water Resources Auth. (June 2019)

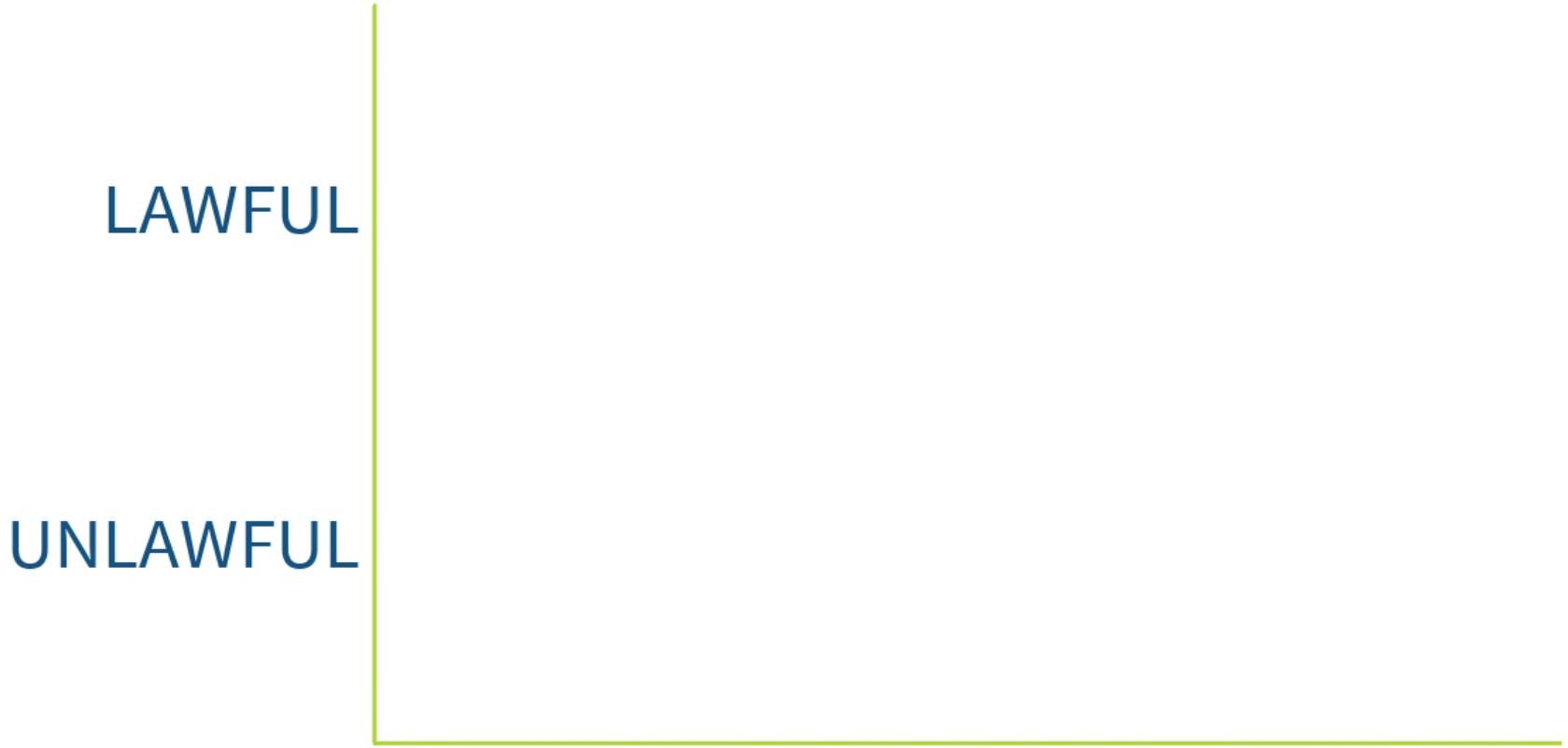
7. ACTIVITIES WHILE ON FMLA LEAVE

- What are employees on FMLA leave allowed to do?
  - Vacation?
  - Travel?
  - Work at another job?

ACTIVITIES WHILE ON FMLA LEAVE

- Employee was a railroad mechanic. He was granted intermittent FMLA leave due to a hiatal hernia and GERD.
- After seeing an urgent care physician, Employee submitted a note stating he required intermittent leave for 4 days. He called the Company hotline daily to report each of these absences.
- During this time, on a day when he was not scheduled to work, Employee went on a preplanned fishing trip during which he "fished, but mostly sat and stood."
- That evening, he called the hotline to report he would be on FMLA leave for his next shift.
- After learning about the fishing trip, the Employer opened an investigation. The Employer found that Employee was "using FMLA in a manner that was not consistent with the serious medical condition for which he received FMLA and being dishonest when he requested FMLA." Employee was terminated.
- Employee sued alleging, among other things, FMLA interference.

Was the Employee's termination lawful or unlawful?



LAWFUL

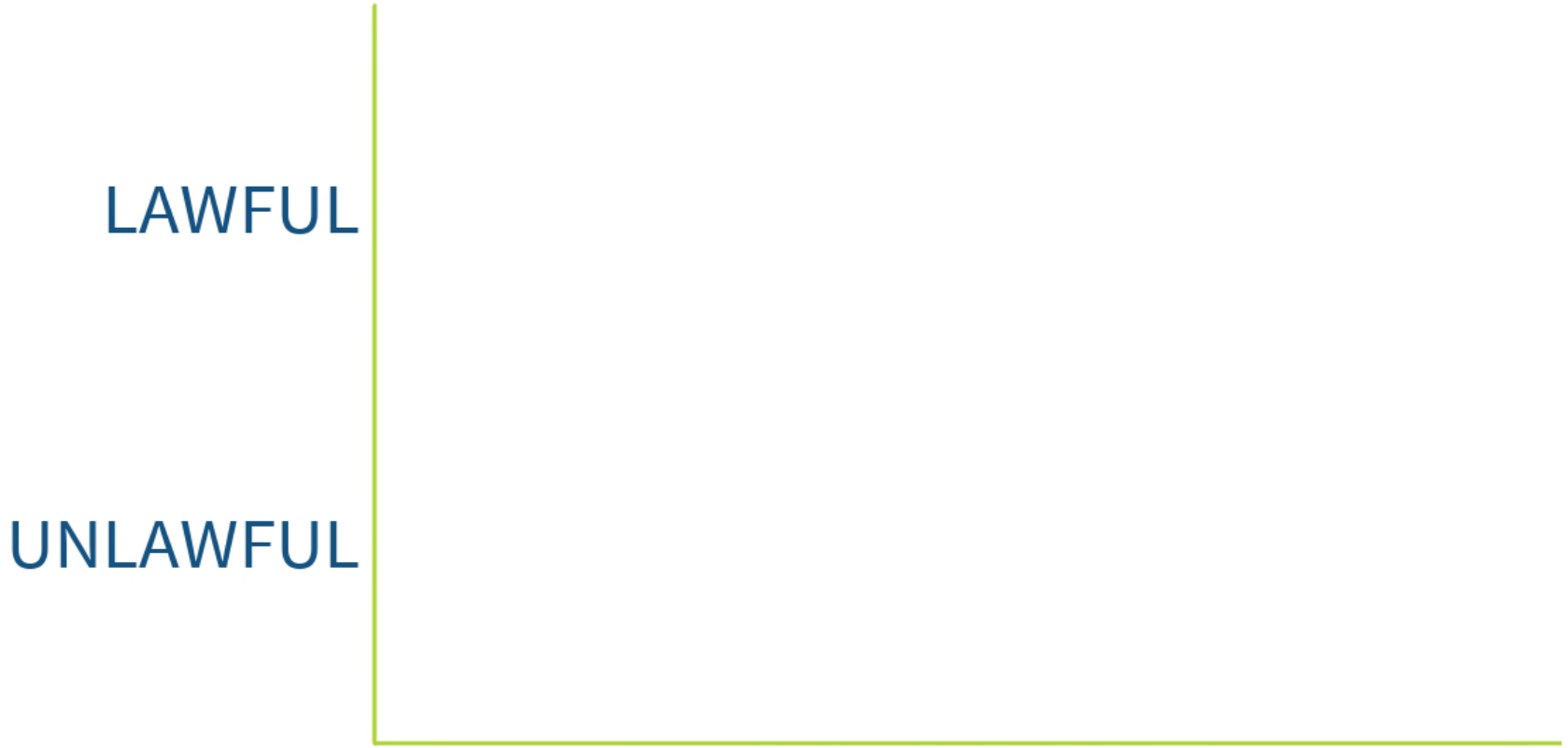
- The Court granted Defendant's motion for summary judgment on FMLA interference, upholding the legality of the termination.
- The Court held that the railroad "presented evidence that it terminated Plaintiff because he acted in a manner that was inconsistent with his serious medical condition and was dishonest in requesting FMLA leave."

Dunger v. Union Pac. R.R. Co. (June 2019)

ACTIVITIES WHILE ON FMLA LEAVE

- Employee was a training director at a company that offered CPR, first aid and similar certification courses.
- While employed, she started her own competing business and took some of the Employer's supplies and equipment for her own use.
- After sustaining a head injury in a bike accident, Employee was placed on FMLA leave. While Employee was on leave, the Employer found out about her intent to use the equipment and other violations of the parties' non-compete agreement. The Employer sent a letter requesting the Employee to explain her actions within 10 days.
- Employee replied a day late, stating only that she was retaining legal counsel. She was informed that her response was insufficient and she was terminated, 6 days before her FMLA leave was set to expire.
- The Employee sued for FMLA interference, claiming that the Employer's request for a response within 10 days placed unreasonable performance expectations on her, due to the medical restrictions pursuant to her FMLA certification.

Was the Employee's termination lawful or unlawful?



LAWFUL

- The Court found that while employers can't generally require employees on FMLA leave to be on call or to continue working, the statute does not provide any right to be "left alone."
- Therefore, because the Employee was terminated for failing to timely and meaningfully respond to a discrete inquiry unrelated to the exercise of her FMLA rights, there was no FMLA interference.
- Being on FMLA leave doesn't insulate employees from legitimate discipline, including termination, but employers should be mindful of timing, and ensure that any discipline is largely unrelated to the leave itself.

Reagan v Centre Lifelink Emerg. Med. Svc. (May 2019)

BEST PRACTICE

- Adopt written FMLA policies prohibiting employees on FMLA leave from engaging in certain activities, such as travel, vacations, working at home, taking another job.

8. INTERMITTENT LEAVE FOR BIRTH/ADOPTION

Intermittent/Reduced Schedule Leave Must be Granted:

- If medically necessary or medical need best accommodated through intermittent/reduced schedule due to pregnancy, serious health condition, serious illness/injury of covered servicemember

Intermittent/Reduced Schedule Leave Subject to Employer Approval For:

- Birth of a child, to bond with newborn child
- Placement for adoption/foster care of a child, to bond with newly placed child

9. KEEP EMPLOYEES ADVISED OF FMLA USAGE

- FMLA regulations require employers to notify employees at the time an absence is designated as FMLA leave, of how many hours, days or weeks will be counted against the employee's FMLA leave entitlement, *if the amount of leave needed is known.*
- If it is not possible to do so—for example, if the employee took unforeseen intermittent leave—then the employer must tell the employee how much time off it counted against the employee's FMLA leave entitlement upon the employee's request.
- Courts have considered failure to advise employees on leave of how much FMLA leave time they have used and how much they have available to be unlawful interference with their FMLA rights.

10. INTERPLAY OF FMLA, STD & W/C

Employees only entitled to unpaid leave BUT

- Employee may elect OR employer may require employee to use accrued paid leave for some/all of FMLA-leave period
- Employers cannot require employees to use paid leave if employee is on paid leave through, e.g., w/c workers' compensation or short-term disability (STD)

DEPARTMENT OF LABOR
DEVELOPMENTS

DOL OPINION LETTER – FMLA (08/08/2019)

- What counts as "caring for" a family member under the FMLA? An employee requested intermittent FMLA leave to attend meetings related to her children's individualized education programs (IEP).
- The IEP meetings occured 4 times/year and included participation by professionals including a speech pathologist, school psychologist, physical therapist and/or occupational therapist, as well as teachers and school administrators.
- While the employer approved FMLA leave to allow the employee to attend her children's medical appointments, it denied the request for FMLA leave to attend the IEP meetings.
- The DOL concluded the meetings constitute "care" for a family member under the FMLA, which includes "both physical and psychological care" and "mak[ing] arrangements for changes in care…" 29 CFR § 825.124(a)-(b).
- Thus, the employee was entitled to FMLA leave, because the purpose of the employee's attendance at the IEP meetings was, in part, to help participants make decisions concerning her children's medically-prescribed speech, physical, and occupational therapy.
- **TAKEAWAY:** Employers should carefully assess, and potentially seek guidance from legal counsel, before denying requests for FMLA leave involving less common forms of "care", including planning meetings wherein arrangements for a family member's care may be discussed.

THE ADA
10 THINGS YOU NEED TO KNOW

1. WHAT IS A REASONABLE ACCOMMODATION?

- Workplace modifications
- Physical/software aid (Dragon software)
- Alterations to equipment (e.g. keyboards)
- Modified job duties (e.g. limited travel)
- Modified hours (e.g. shorter shifts)
- Job restructuring of marginal job functions
- Temporary exemption from rules (e.g. attendance)
- Leaves of absence (reasonable time but not indefinite)
- Reassignment/transfer to vacant position (same shift and pay)

WHAT IS NOT A REASONABLE ACCOMMODATION?

- Removing essential job functions
- Diluting uniformly enforced productivity standards
- Excusing or forgiving past misconduct or poor performance
- Promotion
- Bumping an employee from a job
- Creating another position or job
- Changing an employee's supervisor
- Stress-free work environment

WHAT IS "UNDUE HARDSHIP"?

- An "undue hardship" is "an action requiring significant difficulty or expense," when considering various factors, such as:
  - nature and cost of the accommodation
  - employer's financial resources
  - size of employer's workforce
  - impact of the accommodation on employer's business operations (operational impact generally most important factor)
- A reasonable accommodation should be the least disruptive change to the business that allows the employee to do the job

CONSIDERATIONS

- Employer does not have to choose the best or most expensive option
- No need to eliminate essential functions as an accommodation
- Need not cause others to work harder or longer
- If employee rejects reasonable accommodation, employer has no obligation to continue interactive process

EXTENDED LEAVE AS AN ACCOMMODATION

EEOC Enforcement Guidance

"If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its 'no-fault' leave policy to provide the employee with the additional leave, unless it can show that:

1. there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or
2. granting additional leave would cause an undue hardship.

Modifying workplace policies, including leave policies, is a form of reasonable accommodation."

EXTENDED LEAVE AS AN ACCOMMODATION

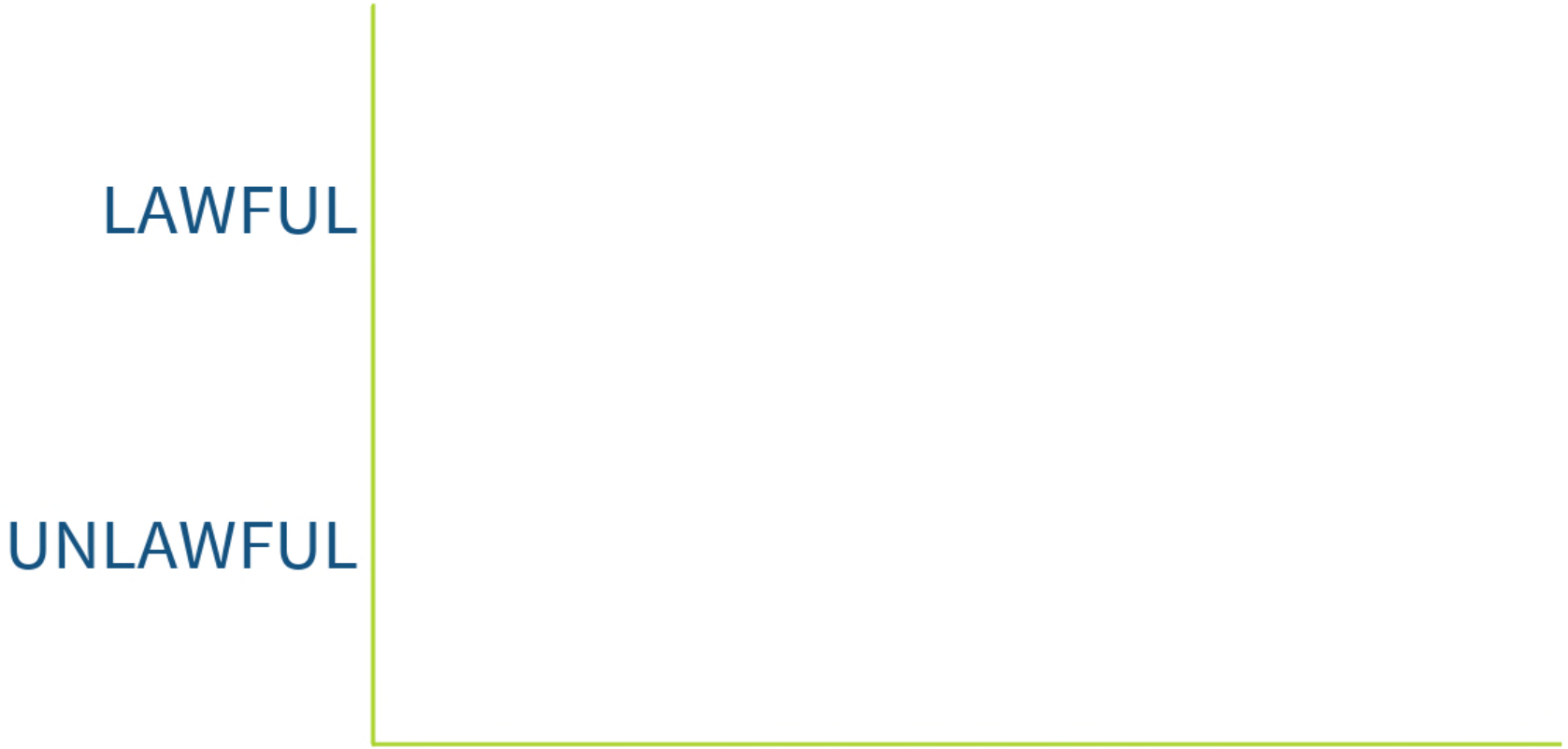
EEOC Enforcement Guidance:

- "Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation"
- "However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave"
  - BUT NOTE: "an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return"

EXTENDED LEAVE AS AN ACCOMMODATION

- The employee worked a very physically demanding job. He took 12 weeks of FMLA leave for back pain.
- On his last day of leave, he underwent back surgery and requested an additional 2 to 3 months of leave for recovery.
- The employer denied the request and terminated the employee's employment, inviting him to re-apply when medically cleared.

Was the Employee's termination lawful or unlawful?



LAWFUL

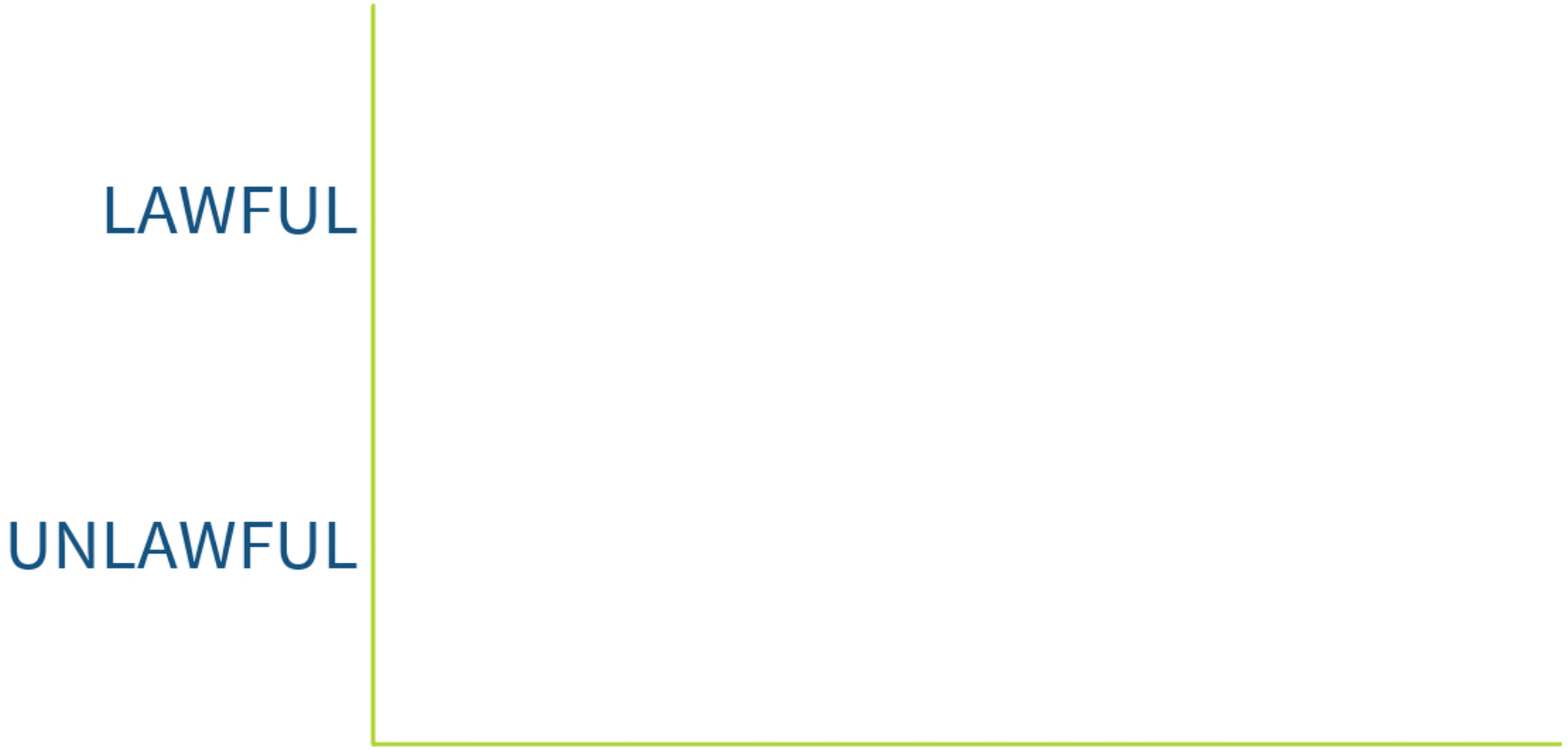
- September 2017 – The Court held that the termination was lawful because "a long-term leave of absence cannot be a reasonable accommodation," because not working is not a means to perform the job's essential functions.
  - "Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working."
  - According to the Court, a "reasonable accommodation is expressly limited to those measures that will enable an employee to work."
- April 2018 – the U.S. Supreme Court declined to review the ruling.

Severson v. Heartland Woodcraft, Inc. (7th Cir.)

EXTENDED LEAVE AS AN ACCOMMODATION

- The Employee, a utilities technician, injured his right shoulder on the job in December. He went on FMLA and tried conservative treatment but ultimately underwent surgery in April of the following year, a month after his FMLA leave expired.
- In early June, the Employer informed the Employee he had been out of work for nearly 6 months and would likely be terminated soon due to his continuing inability to perform the essential functions of his position.
- The Employee provided a doctor's note stating that he "might" be cleared for duty in mid-July. The Employer asked for a more definite statement from the Employer's medical care providers but they were unable to provide it and the Employee was terminated.
- The Employee brought suit alleging violation of the ADA for failure to provide a reasonable accommodation, i.e., continued leave.

Was the Employee's termination lawful or unlawful?



LAWFUL

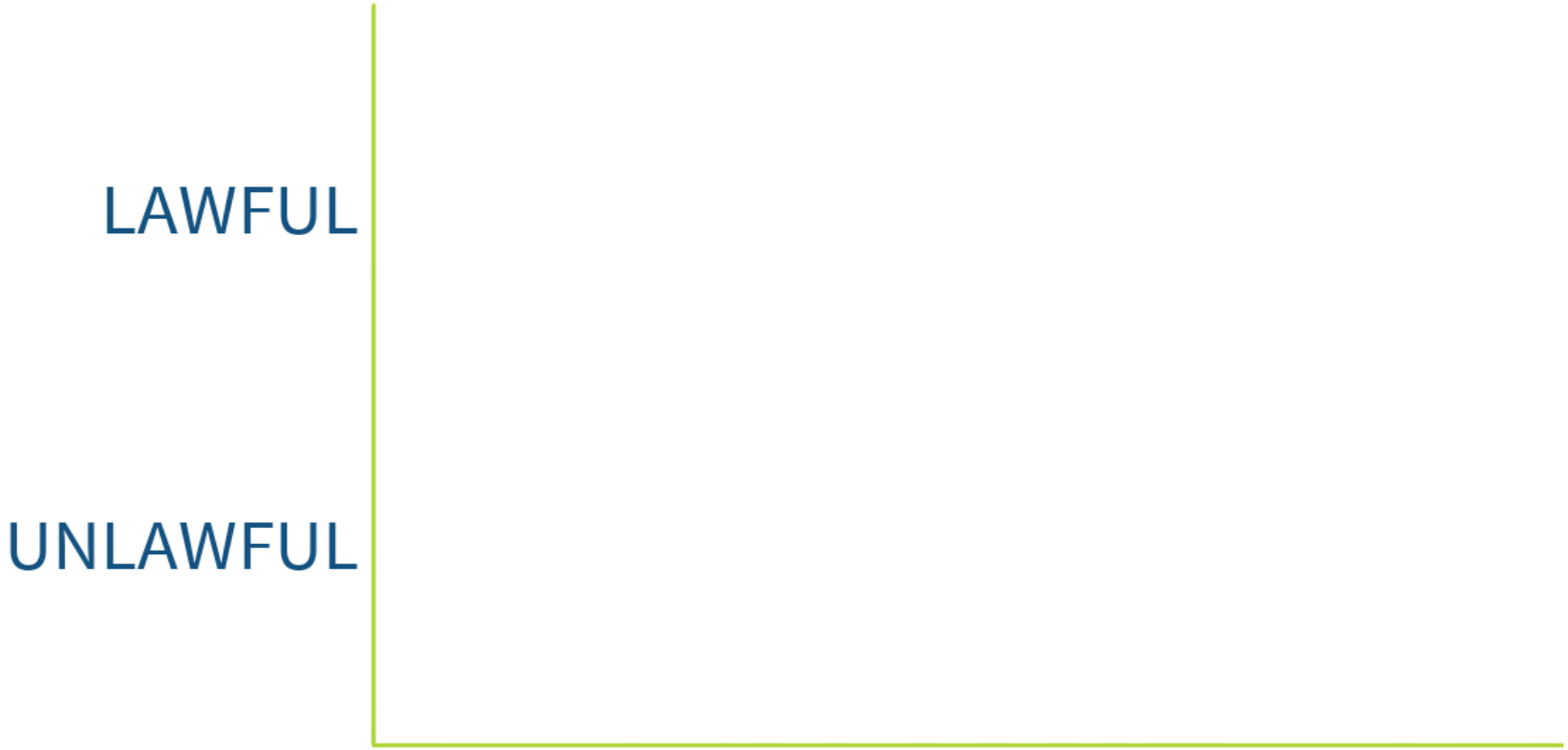
- The court granted summary judgment to the Employer, finding that the Employee had not identified a reasonable accommodation that would have allowed him to perform the essential functions of his position.
- The Court noted that the accommodation language of the ADA is written in the present tense – that is, whether an employee "can", not "will be able to", perform his job duties. Thus, an employee seeking an accommodation must show that it would allow him to return to work in the present/immediate future and an accommodation is unreasonable if it would only allow an employee to return to work at some uncertain point in the future.
- Here, because of the lack of certainty surrounding the Employee's return to work, the request was effectively a request for open-ended leave, which was not reasonable.

Billups v. Emerald Coast Utilities Authority (Oct. 2017)

EXTENDED LEAVE AS AN ACCOMMODATION

- The Employee, a hospital nurse, took FMLA leave for several months for issues with her esophagus making her unable to speak.
- She was unable to return to work when expected and was granted an additional week of personal leave.
- The Employee's doctor submitted a note stating the Employee was "unable to perform her current line of work for an indefinite amount of time." The Employee requested additional leave until she was able to return, presumably some point after an appointment with a specialist scheduled in 20 days.
- The Employer denied the Employee's request for additional leave and terminated her because it needed to fill the position.

Was the Employee's termination lawful or unlawful?



LAWFUL

- The Court ruled in favor of the Employer because indefinite leave is not a reasonable accommodation.
- The Court held that even if the Employee's request for additional leave could be construed as request for leave for a finite period (i.e., until her medical specialist appointment and no longer), the request was still not reasonable because the Employee could not establish that this proposed accommodation was reasonably likely to enable her to return to work.

Easter v. Arkansas Children's Hospital (Oct. 2018)

2. ADA AGREEMENT

- Keep a log of all communications with an employee regarding interactive process
- Memorialize all agreed-upon, trial, temporary reasonable accommodations with an agreement
  - Confirming restrictions
  - Dates/content of interactive process discussions
  - Description of accommodations provided
  - Beginning/end dates
  - Affirm accommodations are temporary and subject to discontinuation/change if Employee is unable to adequately perform job, or Employer's needs not met.

3. WHAT IS A "DISABILITY" UNDER THE ADA?

A person with a physical or mental impairment that substantially limits one or more "major life activities"

A person who has a record of such an impairment

- Past history of a genuine disability
- Misclassified as having a disability

A person who is regarded as having such an impairment

- Past history of a genuine disability
- Misclassified as having a disability
- Has an impairment but does not substantially limit a major life activity
- Does not have an impairment, but is treated as having one

WHAT ARE "MAJOR LIFE ACTIVITIES"?

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Walking
- Breathing
- Learning
- Speaking
- Working
- Eating
- Sleeping
- Bending
- Reading
- Lifting
- Concentrating
- Thinking
- Communicating
- Standing
- Major Bodily Functions

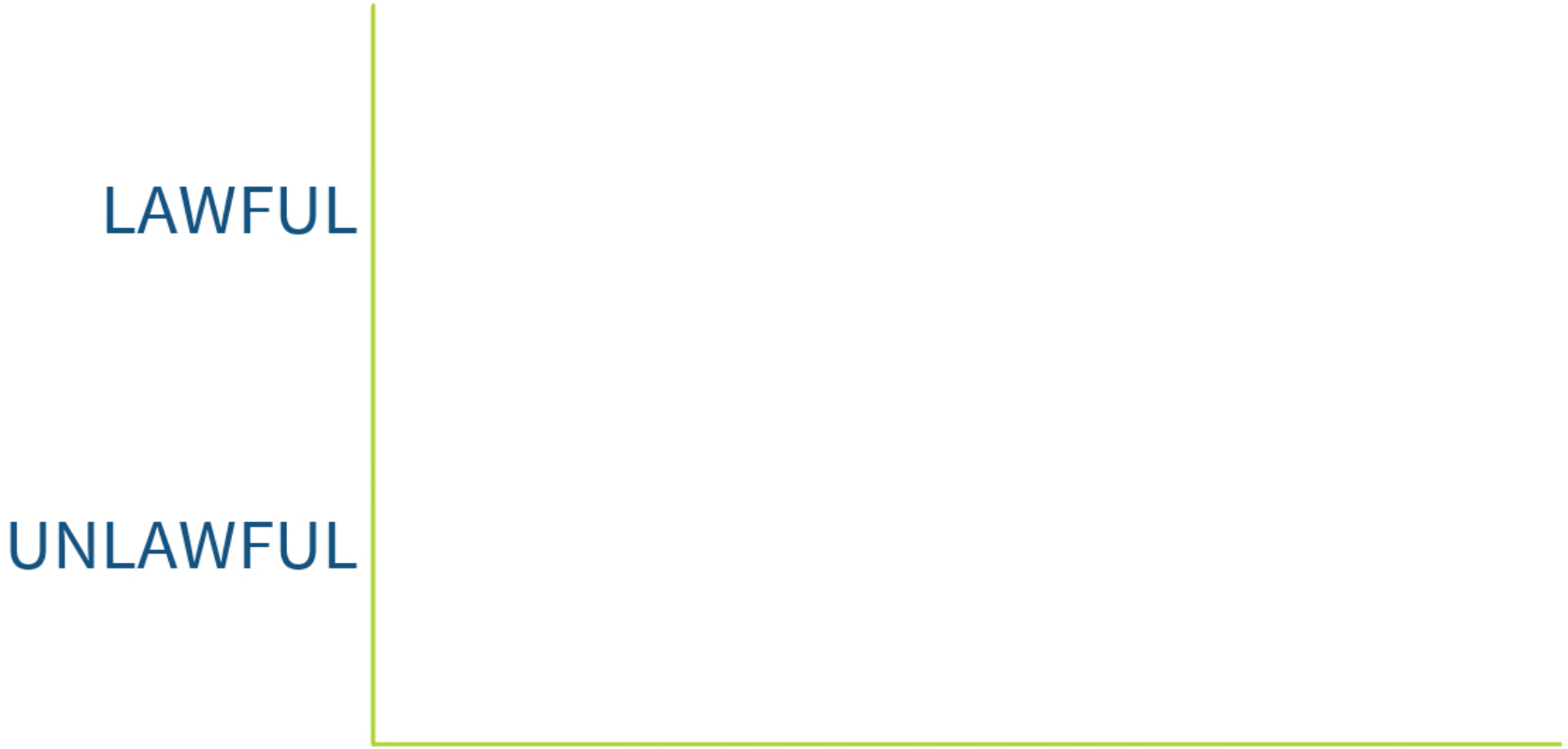
WHAT ARE "MAJOR BODILY FUNCTIONS"

- Immune System (Ex. Lupus, HIV/AIDS)
- Normal Cell Growth (Ex. Cancer)
- Digestive (Ex. Crohn's disease)
- Bowel (Ex. Ulcerative colitis)
- Bladder (Ex. Kidney disease)
- Neurological (Ex. Epilepsy, multiple sclerosis)
- Brain (Ex. Schizophrenia)
- Respiratory (Ex. Asthma)
- Circulatory (Ex. Hypertension)
- Endocrine (Ex. Diabetes)
- Reproductive

4. OBESITY AS AN IMPAIRMENT

- The Employee, who weighed over 400 pounds, worked as a bus operator for the city transit authority for over a decade.
- After returning from a lengthy leave due to a flu-like illness, the Employee was placed in a Temporary Medical Disability Area ("Area 605") for employees found medically unfit to work.
- After several months, the Employee underwent a driving performance test to determine whether he could safely perform standard bus-operating procedures.
- The Employer concluded it would be unsafe for the Employee to operate a bus due to his size. He was transferred back to Area 605 and remained on inactive status for 2 years until he was terminated when he failed to submit medical documentation necessary to extend his status by another year.
- The Employee brought suit alleging his extreme obesity met the definition of a "physical impairment" and therefore constituted a disability under the ADA.

Was the Employee's removal from active status and ultimate termination lawful or unlawful?



Start the presentation to see live content. Still no live content? Install the app or get help at **PollEv.com/app**

LAWFUL

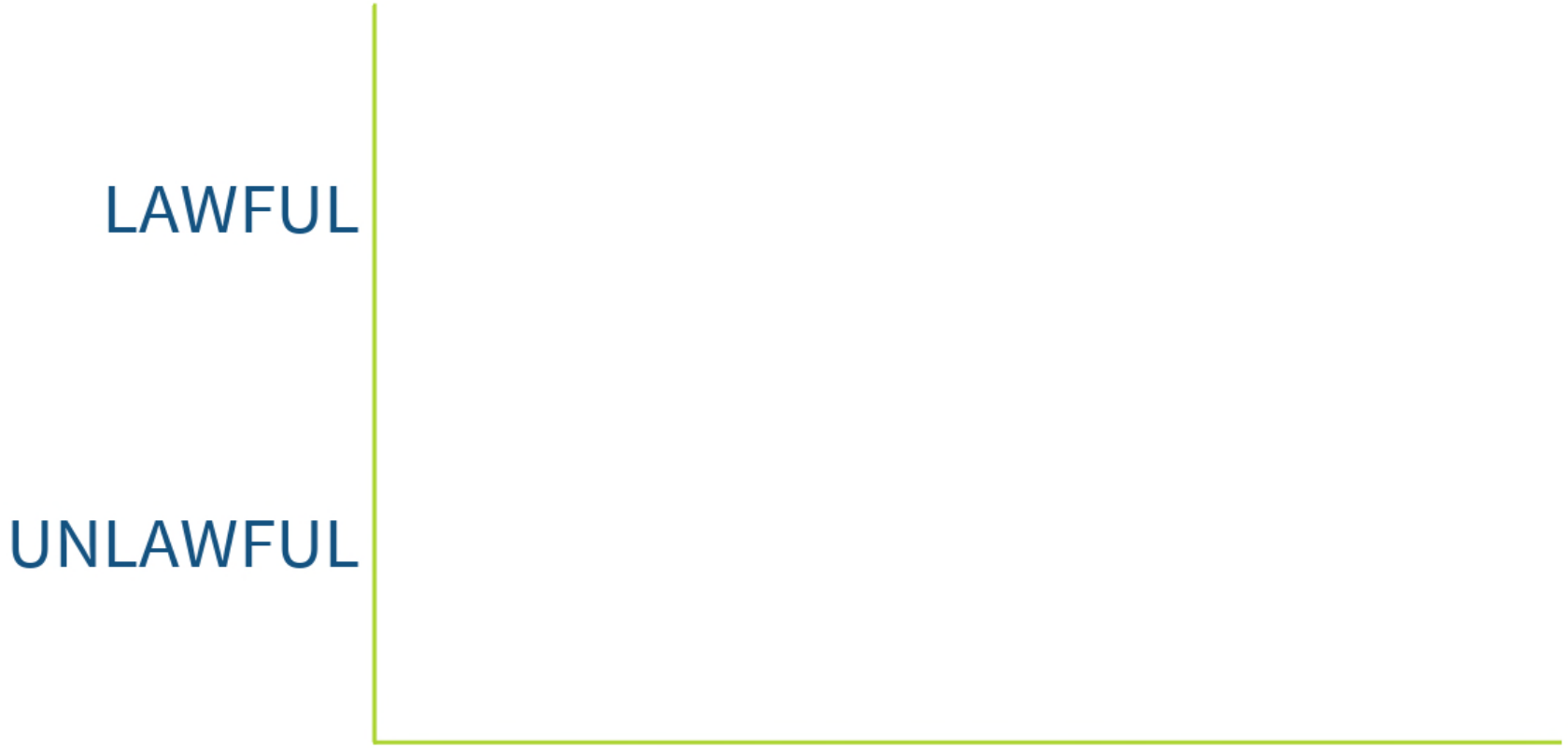
- In an issue of first impression in the Seventh Circuit, the Court of Appeals upheld summary judgment in favor of the Employer dismissing Employee's claim that obesity qualified as a disability under the ADA.
- The Court of Appeals sided with several other Circuit and District courts, finding that "obesity is an ADA impairment **only if it is the result of an underlying physiological disorder or condition**."
- Employee failed to present any evidence proving an underlying physiological disorder or condition caused his extreme obesity. Accordingly, the Seventh Circuit granted Employer's motion for summary judgment and dismissed the case.
- Although the Seventh Circuit joins three other federal appeals courts in holding that obesity alone does not constitute a physical impairment under the ADA, the issue remains unsettled in other jurisdictions and under state and local laws.

Richardson v. Chi. Transit Authority (June 2019)

OBESITY AS AN IMPAIRMENT

- The Employee, who was morbidly obese, worked as a facility maintenance technician, repairing and maintaining manufacturing equipment.
- His supervisor noted the Employee had difficulty walking and using the stairs and was concerned about the Employee's ability to perform his job duties.
- The supervisor checked the computerized work logs, which indicated that the Employee had completed 12 assignments—even though the Employee was on vacation.
- When confronted, the Employee admitted he hadn't yet performed the work but intended to do so when he returned from vacation.
- The Employee was terminated for falsifying records, and filed suit, alleging he was terminated because of his alleged disability, obesity, in violation of the ADA.

Was the Employee's termination lawful or unlawful?



LAWFUL

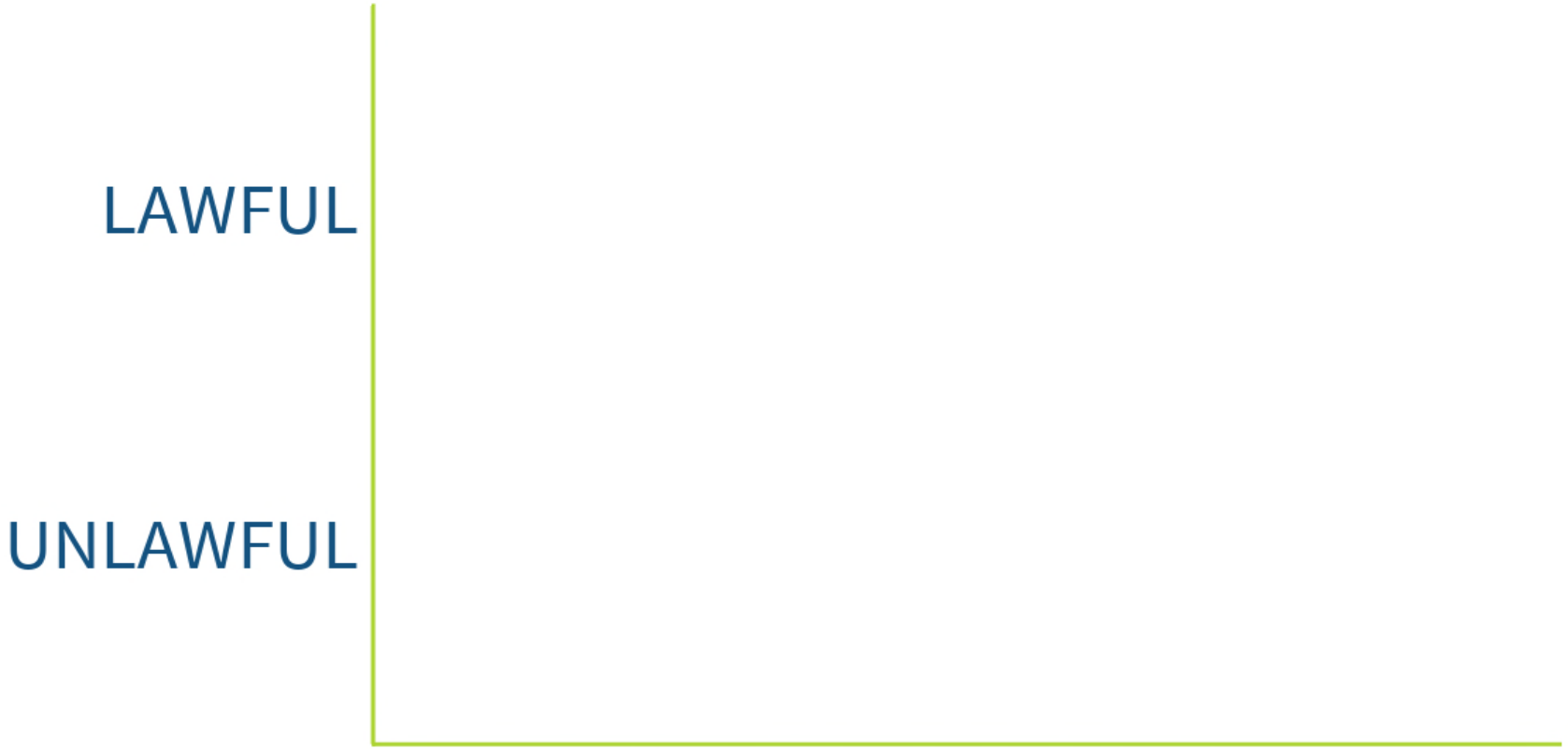
- The District Court granted summary judgment to the Employer, finding that obesity is not a disability under the ADA unless it is caused by an underlying physiological condition. The Employee appealed.
- The EEOC submitted an amicus brief asserting that its position is that morbid obesity itself is an impairment under the ADA and the expanded definition of "disability" under the ADAAA, and that Employee suffered from a host of medical issues which are often associated with obesity including insulin resistance, leg edema, high blood pressure, joint pain, etc.
- The 9th Circuit Court of Appeals did not address the issue of whether obesity is an impairment under the ADA but affirmed summary judgment for the Employer because there was no basis for concluding the Employee wasn't terminated for any reason other than falsification of records.

Valtierra v. Medtronic Inc. (August 2019)

5. TELEWORK AS A REASONABLE ACCOMMODATION

- The Employee was a communications specialist for a national airline with multiple sclerosis. She lived in Chicago but traveled to Dallas HQ about once a week. The rest of the time she worked remotely.
- After a corporate merger, the job responsibilities of everyone in the Employee's department were changed from primarily written work to in-person events and team-centered crisis management functions. The Employer rescinded the remote work arrangements of all employees.
- The Employer attempted to work with the Employee to identify accommodations that would allow her to work in Dallas, or to find her another position in Chicago, but the Employee was either uninterested or unqualified for the Chicago jobs and refused to relocate to Dallas. Ultimately, the Employee was terminated.
- She filed suit alleging failure to accommodate and retaliation in violation of the ADA, and a related state law claim.

Was the Employee's termination lawful or unlawful?



Start the presentation to see live content. Still no live content? Install the app or get help at **PollEv.com/app**

LAWFUL

- The 7th Circuit Court of Appeals found that after the essential functions of the Employee's job changed post-merger, she was no longer a "qualified individual" under the ADA, as she could no longer perform the job, even with a reasonable accommodation.
- The Court was not persuaded by the Employee's argument that she was able to perform her job prior to the merger, and for a short while after the merger. The Court stated, "Just as an employer is not required to create a new position or strip a current job of its essential functions [under the ADA], an employer is not required to maintain an existing position or structure that, for legitimate reasons, it no longer believes is appropriate."

Bilinsky v. American Airlines (June 2019)

6. REASSIGNMENT AS AN ACCOMMODATION

- The Employee, a supervisor at a bank call center, was responsible for fielding escalated calls from customers.
- The Employee developed anxiety, ultimately taking medical leave to address his increasing symptoms.
- The Employee's physician opined that Employee's job aggravated his anxiety and recommended Employee be reassigned to a position that did not include that task. The physician also recommended that Employee stay out of work until such an accommodation was put in place.
- The Employer denied the request and indicated it was willing to discuss "other, more reasonable accommodations" once Employee returned to work in his current position.
- The Employee quit and filed a charge of discrimination with the EEOC. The EEOC has filed suit against the bank, seeking back pay, compensatory and punitive damages, and injunctive relief.

EEOC v. Citizen's Bank (July 2, 2019)

REASSIGNMENT ACCOMMODATION

- The ADA explicitly recognizes reassignment to a vacant position as a type of reasonable accommodation
- As an accommodation "of last resort," the employer has no obligation to consider reassignment to another position **until it is determined that the employee cannot be accommodated in their own position**
- Reassignment accommodation is limited to jobs that are currently vacant or the employer knows will become vacant in the near future
- The law is unsettled as to whether reassignment means allowing the disabled employee to compete for a vacant position, or whether the employer must prefer a minimally qualified disabled candidate over other, more qualified, candidates.

7. FITNESS-FOR-DUTY STANDARD UNDER ADA

Employer may require FFD examination for return from medical leave if employer has a reasonable belief that:

- The employee's present ability to perform essential job functions will be impaired, or
- The employee will pose a direct threat due to a medical condition

WHAT IS A REASONABLE BELIEF BASED ON OBJECTIVE EVIDENCE?

According to the EEOC, an employer might:

Observe performance problems and reasonably attribute them to a medical condition	**Receive reliable information from a credible third party that an employee has a medical condition**	**Observe symptoms indicating that an employee may have a medical condition that will impair his or her ability to perform essential job functions or pose a direct threat**

WHAT IS A "DIRECT THREAT"?

"Direct threat" means a "significant risk of substantial harm that cannot be eliminated or reduced through reasonable accommodation"

Must be based on the best available objective medical evidence that relies upon the most current medical knowledge

- Medical information must be "job-related and consistent with business necessity"

Factors to consider in making direct threat determinations:

- Severity of harm
- Likelihood of harm
- Imminence of harm

8. OBVIOUS ADA ISSUE AT INTERVIEW/HIRE

- An applicant comes in for an interview, using a cane. What should you do? What can you do?

Can the interviewer inquire about the individual's ability for prolonged walking/standing/stepping?

Yes. It would be odd not to raise the subject since it's obvious the individual has a disability.

Yes, but ONLY if those types of functions are a regular part of the job.

No. Never ask questions about an applicant's disability under any circumstances.

OBVIOUS ADA ISSUE AT INTERVIEW/HIRE

- Under the EEOC's ADA guidelines, while generally an employer may not ask an applicant whether she has a disability or will need a reasonable accommodation to perform a job, under circumstances where "[a]n employer might know that an applicant has a disability because it is obvious or she has voluntarily revealed the existence of one . . . and it is reasonable to question whether the disability might pose difficulties for the individual in performing a specific job task, **then the employer may ask whether she would need reasonable accommodation to perform that task."**
- In this situation, if the job in question is sedentary and would not reasonably implicate the need for a mobility accommodation, the interviewer should not make any reference to the cane, the applicant's condition requiring the use of the cane, or any other comments suggested the interviewer regards the applicant as having a disability.

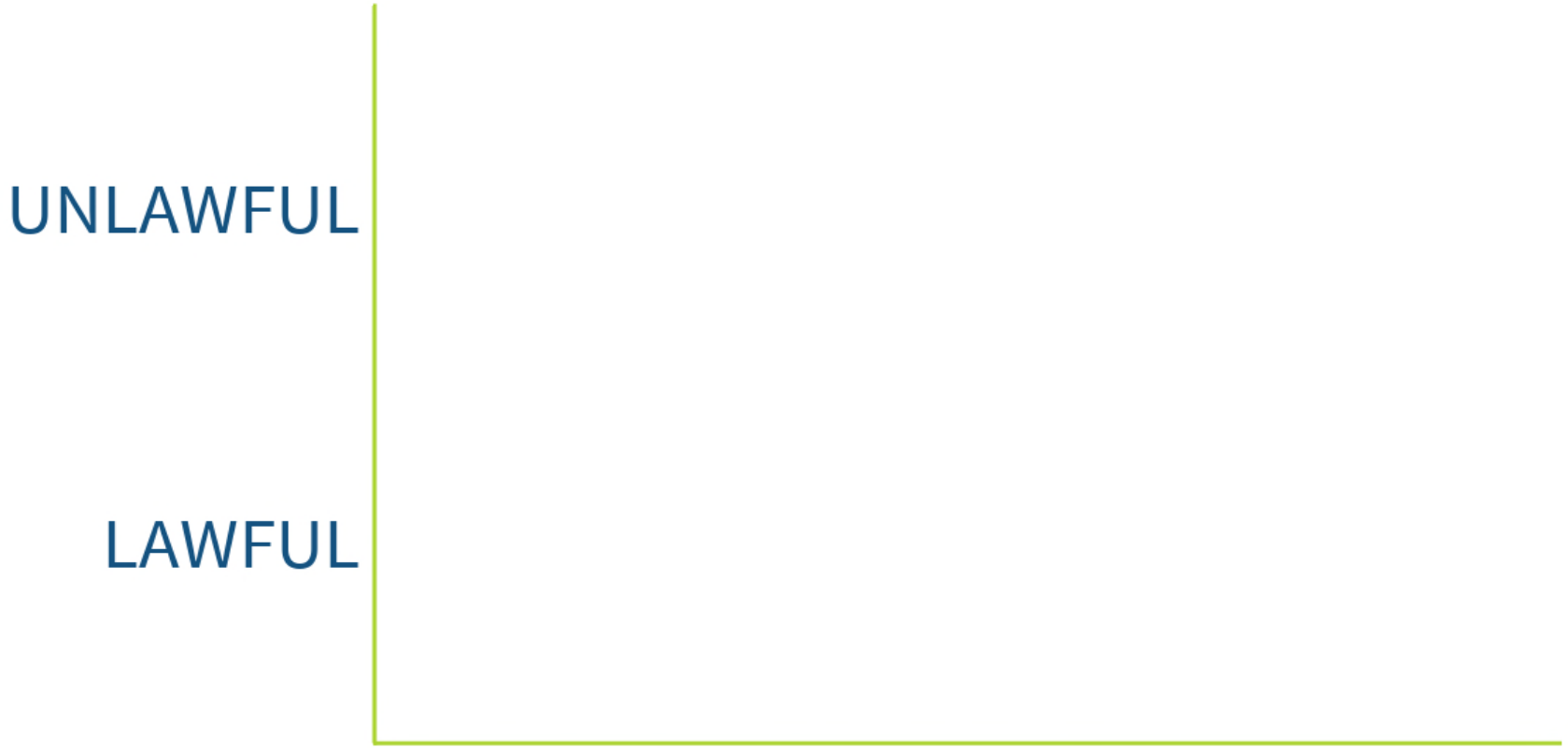
9. PERMISSIBLE INTERVIEW QUESTIONS

- Ability to perform specific job functions
  - State that the performance may be with or without reasonable accommodation
- Non-medical qualifications and skills, e.g. work history, licensing, education, etc.
- Describe/demonstrate how they would perform job tasks
  - Should be asked of all applicants to avoid a claim that any particular applicant was treated differently than others and thus unfairly
- Whether they need reasonable accommodation for hiring process
- Documentation of a disability if applicant requests reasonable accommodation for hiring process
- Whether can meet employer's attendance requirements
- Questions about impairments that are not likely to elicit information about a protected disability, e.g., "how did your break your leg?"
- About current illegal use of drugs

10. TIMING OF TERMINATION

- A dental practice manager was diagnosed with an untreatable neurological condition which caused vision problems and required time off for blinding headaches and medical appointments.
- Sometime after the Employee advised her supervisor, the Chief Operating Officer, about her medical condition, the COO issued the Employee a verbal disciplinary warning—the Employee's first discipline in 11 years of employment—allegedly for poor judgment and decision-making. Over time, the COO would give contradictory reasons for the discipline.
- A few weeks later, the Employee was directed by HR to terminate a problem employee. That employee—for the first time—accused the Employee of being racist and disrespectful to staff. HR investigated but found only a few potentially insensitive remarks. No other employees had ever complained about the Employee.
- Nonetheless, the Employee was terminated for "poor judgment," although other employees who had engaged in far more egregious conduct were not terminated, and the termination didn't follow the progressive discipline policy.
- The Employee brought suit alleging discrimination in violation of the ADA, among other claims.

Was the Employee's termination lawful or unlawful?



Start the presentation to see live content. Still no live content? Install the app or get help at **PollEv.com/app**

WE'LL HAVE TO WAIT AND SEE

- The court denied the Employer's motion for summary judgment—allowing the lawsuit to continue—finding that there is a genuine dispute of material facts as to whether the Employer's proffered reason for termination was merely pretext for unlawful disability discrimination due to the Employee disclosing her medical condition.

Hardcastle v. Center for Family Health (March 2019)

U.S.E.R.R.A.

RECENT CASE LAW

USERRA- EQUAL TREATMENT

- The Employee, a Major General in the Air Force Reserves, worked as an airline pilot for a national airline. His military duties caused him to take leave for over 100 days per year.
- While the airline did not pay those on military leave, it did pay workers on other types of leave. The airline also did not credit employees time spent on military leave toward the calculation of benefits under its profit-sharing plan.
- The Employee brought a class action against the airline alleging that it discriminated against workers on short-term military leave by denying them equal treatment as those absent for jury duty, sick leave, or union leave.

USERRA (CONTINUED)

- The Court denied the Employer's motion to dismiss claims holding that the Employer violated USERRA by treating those on other types of leave differently from those on military leave, finding that the Employer is compelled to treat military leave equivalently to other types of leave and to credit military leave time towards the computation of profit-sharing awards.
- While in general USERRA does not compel employers to pay employees for time spent on military leave, it does demand equal treatment with other employees on the terms, conditions, and privileges of employment.

Scanlan v. Am. Airlines Grp., Inc. (June 2019)

MAINE LEGISLATION

NEW LEAVE LAWS

V.A. LEAVE LAW (EFF. 09/19/2019)

- Employers must provide veterans with time away from work to attend scheduled appointments at Department of Veterans Affairs medical facilities
  - Employees allowed to use paid leave, if available
  - Employees allowed to take unpaid leave, if no paid leave available
- Employees required to give their employer notice of the appointment "as soon as reasonably possible"

ALL-PURPOSE PAID LEAVE LAW (EFF. 01/01/2021)

- **Qualifying Employers**: with least 10 employees who work more than 120 hours in a calendar year (other than seasonal workers)
- **Amount of Leave**: One hour of paid leave for every 40 hours an employee works up to maximum of 40 hours paid leave annually
- **Accrual**: Employees begin accruing earned pay leave at the start of employment and are eligible to use the accrued paid leave after 120 days of employment.
- **Notice**: Employees are required to provide "reasonable notice" of the intent to take leave, absent an emergency or other sudden necessity.
    - The law does not define "reasonable notice" but states that "use of leave must be scheduled to prevent undue hardship on the employer"
- **Pay/Benefits During Leave**: Employees must be paid the same base rate of pay earned prior to taking leave and receive the same benefits as provided for other types of paid leave pursuant to the employer's "established" policies. The taking of paid leave may not result in the loss of any accrued employee benefits.
- **Exception**: The law does not apply to an employee subject to a collective bargaining agreement during the period between January 1, 2021, and the expiration of the agreement.

PROTECTIONS FOR PREGNANT WORKERS (09/19/2019)

- Creates broad protections for workers, covering any limitation of an employee's ability to perform their job due to pregnancy, child birth, or related medical conditions including lactation
- Employers are required to provide reasonable accommodations for pregnancy-related conditions, which may include: more frequent or longer breaks, temporary modifications in work schedules, seating or equipment, temporary relief from lifting requirements, temporary transfer to less strenuous or hazardous work, and provisions for lactation
- Employers may only avoid providing these accommodations if they are able to demonstrate that the accommodation proposed would impose an undue hardship on the operation of their business

THANK YOU!

jackson|lewis®

ABOUT DEBRA WEISS FORD

- Licensed in New Hampshire, Massachusetts and Maine
- AV (Preeminent) Martindale-Hubbell Peer Review Rating, the highest rating in legal knowledge, communication skills, and ethical standards
- "Top Rated Lawyer" by American Lawyer Media and Martindale-Hubbell
- Best Lawyers in America (Labor & Employment Law), Management Lawyer of the Year
- Business New Hampshire Magazine, Best Labor and Employment attorney in New Hampshire
- Listed in Top New Hampshire Lawyers in Labor and Employment, New Hampshire Magazine
- Elected as a Fellow to the College of Labor and Employment Lawyers
- Listed in New England Super Lawyers (Top 100 attorneys in New England)
- Listed in New England Super Lawyers (Top 50 Women in New England, Employment & Labor)
- Listed in The Legal 500 (United States) for Workplace & Employment Counseling
- Listed in Chambers USA as one of the top Lawyers in Labor and Employment

ABOUT JACKSON LEWIS P.C.

- Represents management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation
- More than 900 attorneys in 61 locations nationwide
- Current caseload of over 6,000 litigations approximately 800 class actions
- Founding member of L&E Global
- A leader in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves

PRACTICE AREAS

Affirmative Action Compliance and OFCCP Defense

Class Actions and Complex Litigation

Collegiate and Professional Sports

Corporate Diversity Counseling

Corporate Governance and Internal Investigations

Disability, Leave and Health Management

Employee Benefits

General Employment Litigation

- e-Discovery

Government Relations

Immigration

International Employment Issues

Labor and Preventive Practices

Non-Competes and Protection Against Unfair Competition

Privacy, Data and Cybersecurity

Wage and Hour

White Collar and Government Enforcements

Workplace Safety and Health

Workplace Training

INDUSTRIES REPRESENTED

- Automotive
- Chemicals
- Construction
- Energy & Utilities
- Financial Services
- Fitness
- Government Contractors
- Healthcare
- Higher Education
- Hotels
- Insurance
- Manufacturing
- Media
- Pharmaceuticals
- Professional Services
- Staffing & Independent Workforce
- Real Estate
- Restaurants
- Retail and Consumer Goods
- Technology
- Transportation