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Briefly

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WHEN IS A LEAVE OF ABSENCE REQUIRED AS A *REASONABLE ACCOMMODATION* UNDER THE ADA?

Kelly A. Campbell

"[Recent] decisions reflect a trend in favor of employers on the long-term leave issue, despite the EEOC's positions to the contrary."

Employers frequently face the situation where an employee seeks a leave of absence due to a medical condition, but the employee has either exhausted or is not eligible for leave under the Family & Medical Leave Act (FMLA). Employers must determine when an additional unpaid leave of absence is required under the ADA (Americans with Disabilities Act) and how much leave is reasonable. The answer to this question can be very confusing, as the courts and the U.S. Equal Employment Opportunity Commission (EEOC) have conflicting positions on this issue.

The EEOC has consistently taken the position that leaves of absence can be a reasonable accommodation. A leave of absence means the employee is not working. However, a reasonable accommodation is generally thought to be a modification of the working environment which enables a qualified individual with a disability to perform the essential functions of that position. Yet, according to the EEOC, leave qualifies as a reasonable accommodation "when it enables an employee to return to work following the period of leave."

The EEOC explains its position in a resource document issued on May 9, 2016, titled "Employer-Provided Leave and the Americans with Disabilities Act." This resource states that employees with disabilities must be provided with equal access to leave under an employer's leave policy. However, the EEOC emphasizes that the ADA requires employers to provide unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. The ADA requires this even if the employer's policies do not offer leave as an employee benefit, the employee is not eligible for leave under the employer's policies, or the employee has exhausted the leave the employer provides as a benefit. However, reasonable accommodation requirements do not require employer to provide paid leave beyond what is provided as part of an employer's paid leave policy. The EEOC further opines that all requests for leave from employment because of a medical condition must be treated as a request for a reasonable accommodation under the ADA, and employers must engage in the interactive process.

The courts have issued conflicting opinions whether additional leaves of absence are required by the ADA, and to what extent. Many courts agree with the EEOC in holding that an additional leave of absence can be a reasonable accommodation under the ADA, and should be provided barring undue hardship. The decisions have generally specified two limits to the bounds of reasonableness for a leave of absence as an accommodation: 1) the employee must provide the employer with an estimated date when she can resume her essential duties because without an expected end date, an employer is unable to determine whether the accommodation is a reasonable one; and 2) a leave request must assure an employer that an employee can perform the essential functions of her position in the "near future."[1]

The issue for employers is determining the meaning of "near future." It is not defined and is subject to an analysis of what is reasonable, effective, and not an undue hardship under the specific circumstances presented in each situation.

The rationale for some of these court decisions is that "[a] leave request must assure an employer that an employee can perform the essential functions of her position in the near future."[2] For example, in the case of *Delgado-Echevarria v. AstraZeneca Pharm.*, No. 15-2232 (1st Cir. May 2, 2017), the court stated that the ADA does not require an employer to grant indefinite leave and hold a job open if an employee has no estimate of when he or she will be able to work again. In this case, the plaintiff had been on leave for five months, and then presented medical document that said her symptoms would not clear up for another 12 months when she "might" be able to return to work. The court found that the plaintiff failed to meet her burden of showing a 12-month leave extension would be reasonable. Specifically, the

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WHEN LESS IS MORE … PROBLEMS WITH "100% HEALED" RETURN-TO-WORK POLICIES

Brent A. Morris

"Return-to-work problems can arise in unexpected ways and at every level of your management or HR team."

The art of Human Resources demands an ability to adapt to ever-changing demands and responsibilities. While we all would like to believe that we can proactively design policies to meet challenges head-on, reactive policies – ones that are created directly in response to a particular problem – are still very much a necessity.

But reactive solutions are occasionally the cause of more headaches in the long run. In an attempt to address a business concern, management will frequently push a policy too aggressively, thereby improving the business but threatening legal exposure. And virtually no policy can create legal issues more swiftly and easily than a "100% Healed" return-to-work requirement.

A 100% Healed return-to-work policy is a blanket requirement, made by the employer, that any employee who becomes ill or is injured must be "100% healed" before being allowed to return to work. Generally, these policies require that the employee be completely healed, with no restrictions on work duties upon return; in addition, the employee may need to provide a physician's authorization. Such policies are usually created in an attempt to solve legitimate business concerns – whether it be a rash of re-aggravation injuries or an abuse by employees of light-duty accommodations.

Return-to-work problems can arise in unexpected ways and at every level of your management or HR team. A frontline supervisor may text his employee that he cannot come back to work until the doctor "gives the green light." A new safety director may see a serious loss of productivity due to workers' compensation injuries and decide to "tighten up" the return-to-work policy. An in-house nurse may suspect that employees are gaming light-duty assignments to get out of the harder work, and she may try to eliminate those jobs completely.

The motivation behind these policies is not necessarily improper or abusive, and the intent frequently comes from a place of genuine concern. The policies are made by employers to address real issues in the workplace. Regardless of intent, however, such hardline policies will lead an employer to new troubles – as the policies themselves are all potentially illegal. In attempting to fix one problem, an employer just creates a bigger one.

What Does the EEOC Say?

In May of 2016, the U.S. Equal Employment Opportunity Commission (EEOC, or "the Agency") published a guideline on *Employer-Provided Leave and the Americans with Disabilities Act* [https://www.eeoc.gov/eeoc/publications/ada-leave.cfm]. While the guideline is meant to provide employers with a big-picture view of responsibilities under the Americans With Disabilities Act (ADA), it specifically addresses 100% Healed policies:

> The EEOC continues to receive charges indicating that some employers may be unaware of Commission positions about leave and the ADA. For example, some employers may not know that they may have to modify policies that limit the amount of leave employees can take when an employee needs additional leave as a reasonable accommodation. Employer policies that require employees on extended leave to be 100 percent healed or able to work without restrictions may deny some employees reasonable accommodations that would enable them to return to work. Employers also sometimes fail to consider reassignment as an option for employees with disabilities who cannot return to their jobs following leave.

Since issuing this guideline, the EEOC has been unquestionably more aggressive with litigating these policies. In a recent presentation at the 2018 Wimberly Lawson Labor Relations & Employment Law Update Conference, Mr. Edmond C. Sims Jr., District Deputy Director of the EEOC's Memphis District Office, indicated that if a claimant (i.e., employee) presents information concerning alleged discrimination due to a 100% Healed policy, the Agency would likely look more closely into the allegations of a Charge. An employer is therefore inviting the EEOC to look into its policies and procedures, if it relies upon language that suggests an employee needs to be fully healthy before returning to work.

And this scrutiny is certainly not limited to the EEOC's Memphis district: The Agency aggressively litigated these policies in 2018. In May of 2018, the EEOC filed a direct suit against a Nevada company for "violat[ing] federal law by maintaining a well-established companywide practice of requiring that employees with disabilities or medical conditions be 100 percent healed before returning to work. This policy does not allow for engagement in an interactive process or providing reasonable accommodations for disabled employees." The employer paid $3.5 million in a consent decree and committed to reviewing their policies with an ADA consultant.

In September of last year, the EEOC sued an Arizona company for "discriminating against employees with disabilities through the application of a 100% return-to-work policy." The Agency alleged that the employer refused to accommodate employees with

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disabilities who exhausted their leave, and failed to consider any accommodations such as alternative placements, additional unpaid leave, or modified work schedules.

Finally, in November, the EEOC sued a Colorado company for a policy of automatically terminating any employee who needed more than 12 weeks of leave. The employer also refused to allow employees to return to work if they had any restrictions. The employer agreed to a consent decree of $4.85 million, mandatory periodic training, and policy revisions.

It is clear that the EEOC has made this issue a priority. But the EEOC is not the only potential source of risk for an employer regarding these policies. State agencies could also investigate under their own statutes and regulations, and an employee could file suit for retaliation under many different laws, especially in the context of a workers' compensation claim.

How Can Employers Handle These Issues?

So how can an employer navigate these issues? As is the case with any ADA issue, a situation in which an employee seeks to return to work after an injury or period of disability requires a case-by-case analysis of potential accommodation and solutions. The interactive process is mandated by law, in order to determine whether an employee's injury can be accommodated.

The solution to any given situation may not be clear cut. HR should look closely at the limitations any employee has and pay careful attention to the type and nature of the work restrictions placed by a physician. But the employer's needs are also relevant. While a job assignment must be within the parameters of an employee's restrictions, the assignment itself need not be unduly burdensome to the employer's operations.

It is important to note that a workers' compensation injury involving lost time is a potential ADA issue. Some employers may erroneously believe that the analysis is somehow different if the employee is an injured worker receiving temporary benefits from a workers' compensation insurer. If a worker is injured such that she has been taken off work or given restrictions by a physician, the analysis should be the same as an ADA case, even if the injury is temporary. An employer should not assume that an employee's injury is menial, or that the effects of the injury are unrelated to the performance of her regular duties. Make sure that any work restrictions placed on the employee by a physician are not violated, by closely analyzing both the job description and the practical movement aspects (lifting/standing/walking) of the job.

It is also important to get to the bottom of what the employee is actually requesting. It could be that a simple accommodation would solve what seems like a complex issue. More frequent unpaid breaks could be the answer to a serious health problem. A stool can resolve lower extremity or lumbar complaints. Less harsh lighting could fix recurring headaches. Be open and creative with finding solutions to these puzzles.

Finally, be aware that these accommodations need not be permanent. The length of any accommodation is an important part of the analysis, and goes to the issue of whether the employer engaged in the interactive process and would have been burdened by the proposed accommodation. A six-week alternative accommodation could be less burdensome and therefore more reasonable than a permanent one. The EEOC has been clear that an employer need not create new positions in response to a request for accommodation, but fixed-length light-duty work, even if it involves menial tasks, can save you from significant headaches. Do not forget, however, to involve the employee and to review updated information prior to ending an alternative assignment.

Regardless of your procedure, the EEOC and state laws make it very clear that a "100% Healed" return-to-work policy is 100% likely to cause your business to be unhealthy.

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plaintiff presented no evidence that the additional leave would "likely enable" her to return to work. Further, an additional 12-month leave, on top of the 5 months already taken, could not meet the "facially reasonable accommodation" test. This court noted that other courts, when confronted with similar issues, have found that even shorter extensions were not reasonable.

There is no bright line rule for how much leave is reasonable under the ADA. However, the EEOC frowns upon employer policies that limit leaves of absence to a specific period, often called automatic termination policies, as demonstrated by recent EEOC settlements and consent decrees with organizations such as Sears, Denny's, UPS and Verizon. While employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit, employers may have to grant leave beyond the maximum amount as a reasonable accommodation to employees who require it because of a disability, unless the employer can show that doing so will cause an undue hardship. The EEOC has taken the position that inflexible leave policies that provide a finite amount of leave violate the ADA because they circumvent the requirement to make an individualized assessment of whether additional leave would constitute an undue hardship. Many courts, however, have upheld the use of maximum leave policies, stating that if applied uniformly to disabled and non-disabled

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employees, are not based upon disability. Employers, however, should still exercise caution in implementing these type policies, and should consider the reasonableness of each individual request for additional leave.

Other courts have recently held that employees who are unable to perform their work duties for an extended period of time are not qualified under the ADA, so no reasonable accommodation or undue hardship analysis is required. These courts have stated that employees seeking excessively long periods of leave need not be accommodated because they are not "otherwise qualified" for their jobs under the ADA, noting that the ADA protects individuals with disabilities who are otherwise qualified, with or without accommodation, to perform the essential functions of their jobs. Courts have noted that if an employee is not capable of working for a lengthy period of time is not capable of performing the job's essential functions.[3]

The 7th Circuit Court of Appeals supports this position in two recent cases. In *Severson v. Heartland Woodcraft*, Inc., 872 F.3d 476 (7th Cir. 2017), cert. denied, No. 17-1001, 2018 WL 489210 (U.S. Apr. 2, 2018), the court held that an employer was not required under the ADA to provide medical leave beyond the requirements of the FMLA, stating that the "[i]nability to work for a multi-month period removes a person from the class protected by the ADA." In this case, the plaintiff had exhausted his FMLA leave, and then requested a leave extension of two to three more months. The employer denied the request and terminated employment at the end of FMLA leave, but notified the plaintiff that he could reapply for employment in the future. The court rejected the EEOC's and the plaintiff's arguments that the long-term medical leave should be considered a reasonable accommodation if the leave is of a fixed duration, is requested in advance, and is likely to enable the employee to perform his or her essential job functions upon return to the workplace. The court noted that this argument would transform the ADA into an "open-ended extension of the FMLA." The court emphasized that an extended leave does not provide the employee with the "means to work; it excuses his not working." In the proceedings before the 7th Circuit, the EEOC filed an *amicus* brief in support of the employee, and among other things noted that other circuits have recognized that "[u]npaid medical leave" — including leave lasting several months or more — "may be a reasonable accommodation under the ADA," subject to the ADA's undue hardship defense.[4]

A few weeks after the *Severson* decision, the 7th Circuit Court of Appeals reached a similar decision in *Golden v. Indianapolis Housing Agency*, 2017 U.S. App. LEXIS 20257 (7th Cir. Oct. 17, 2017). In this case, the employee exhausted her 12 weeks of FMLA leave, was granted an additional 4 weeks of unpaid medical leave, and then requested a further, unspecified leave of absence of up to 6 months. The employer rejected her request, and terminated employment. The court held that the plaintiff was not a qualified individual under the ADA, as her request for 6 months' leave, in addition to the leave provided under the FMLA, removed her from the class of individuals protected by the ADA.

In *Billups v. Emerald Coast Utilities Auth*., 2017 WL 4857430 (11th Cir. Oct. 26, 2017), the 11th Circuit reached a similar conclusion. In this case, the employee was out of work for about 6 months due to a shoulder injury, and then presented a doctor's note that he could possibly return to work 1 month later with restrictions. The employer requested a more definitive return to work note from the employee, which he failed to provide. Employment was then terminated, based on the "substantial hardship" caused by the employee's inability to perform his essential job functions. The court concluded that the plaintiff was not a qualified individual under the ADA, as there was no showing that additional leave would have enabled him to perform his job's essential functions "presently or in the immediate future."

While it is impossible to predict how this conflict will be resolved among the courts, the *Severson, Golden,* and *Billups* decisions reflect a trend in favor of employers on the long-term leave issue, despite the EEOC's positions to the contrary. As a result, employers may have more flexibility in deciding whether to grant an accommodation request for leave beyond the FMLA requirement. However, given the unresolved conflict, when faced with extended leave requests, employers should not deny the request without engaging in the interactive process. Employers should fully consider all information before reaching a decision, as there may be other valid reasons why the request for accommodation may be denied. Employers should also determine the possible application of company policies and procedures. Employers should also consider all possible options including non-leave alternatives which may enable the employee to perform his or her essential job functions. All relevant information should be gathered, documented and thoroughly reviewed before making a decision, which will certainly help the employer to defend its decision if challenged by the employee or the EEOC.

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[1]See *Roberts v. Bd. of County Comm'rs., Kan*., 691 F.3d 1211 (10th Cir. 2012); *Parker v. Columbia Pictures Indus*., 204 F.3d 326 (2nd. Cir. 2000); *Jarrell v. Hospital for Special Care*, 626 F. App'x 308 (2nd Cir. 2015); *Silva v. City of Hidalgo, Tex*., 575 F. App's 419 (5th Cir. 2014); *Larson v. United Nat'l Foods West, Inc*., 518 F. App'x 589 (9th Cir. 2013); *Santandreu v. Miami Dade Cty*., 513 App'x 92 (11th Cir. 2013); *Hudson v. MCI Telecommunications Corp*., 87 F.3d 1167, 1169 (10th Cir. 1996); *Brannon v. Luco Mop Company*, 521 F.3d 843, 849 (8th Cir. 2008).

[2]See *Hwang v. Kansas State Univ*., 753 F.3d 1159 (10th Cir. 2014); *Cash v. Siegel-Robert, Inc*., 548 F. App'x 330 (6th Cir. 2013).

[3]*Hwang*, 753 F.3d at 1161-1162 ("After all, reasonable accommodations…are all about enabling employees to work, not to not work.").

[4]*Nunes v. Wal-Mart Stores, Inc*., 164 F.3d 1243, 1247 (9th Cir. 1999). See, e.g., *Garcia-Ayala v. Lederle Parenterals, Inc*., 212 F.3d 638, 647-48 (1st Cir. 2000) (holding that plaintiff's request for extended medical leave was a reasonable accommodation under ADA and noting other cases that have reached same conclusion); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr*., 155 F.3d 775, 782-83 (6th Cir. 1998) ("medical leave of absence can constitute a reasonable accommodation under appropriate circumstances"); *Rascon v. US West Commc'ns, Inc*., 143 F.3d 1324, 1333-34 (10th Cir. 1998) ("An allowance of time for medical care or treatment may constitute a reasonable accommodation."), overruled on other grounds by *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).