Court Hands Victory To Employer In "Leave After Leave" Battle

Insights
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Of all the accommodations considered reasonable under the Americans with Disabilities Act (ADA), perhaps the most frustrating is when an employee requests additional time off after their 12 weeks of Family and Medical Leave Act (FMLA) leave ends. This is particularly true since the ADA, unlike the FMLA, provides no statutory or regulatory parameters indicating the amount of additional leave you must provide. However, a federal appeals court has just handed employers a milestone victory in one such legal battle that might ease the frustration levels for some.

Employer Frustrations With Additional ADA Leave
For decades, employers have been vexed by the thorny issue of whether to grant additional leave – and how much to allow – as a reasonable accommodation under the ADA after an employee's FMLA leave has expired. Further, the Equal Employment Opportunity Commission (EEOC) has aggressively sought to protect employees seeking such an accommodation, and courts have often sided with the federal watchdog agency.

For example, the EEOC filed a class action lawsuit in an Illinois district court against United Parcel Service (UPS) in August 2009, alleging that the employer violated the ADA with its allegedly inflexible policy of terminating employees rather than further extending their leave when they were unable to return to work after *one year*. Finally, just this year UPS settled the lawsuit for $2 million.

Light At The End Of The Tunnel?
UPS may be grinding its teeth over that settlement in light of a recent decision that grants employers significant rights in similar situations. In the September 20, 2017 decision of *Severson vs. Hartline Woodcraft, Inc.*, the 7th Circuit Court of Appeals rejected the EEOC's position that offering a finite multi-month ADA leave to begin at the expiration of FMLA leave is a reasonable accommodation as a matter of law.

The plaintiff, Raymond Severson, had performed physically demanding work for the fabricator of retail display fixtures in Wisconsin for seven years. In June 2013, he took FMLA leave because of a back condition. When he was unable to return to work at the end of his FMLA-protected leave, he requested two additional months of leave to have surgery. The employer denied his request and terminated his employment, but stated he could reapply when he was physically able to return.

About two months later, Severson's doctor cleared him for full duty. Rather than reapplying for work, he filed a lawsuit. The lower federal court rejected his claim, prompting Severson to file an

appeal. In its recent decision, the 7th Circuit Court of Appeals rejected Severson's argument that the additional leave was a reasonable accommodation, stating that the FMLA – not the ADA – governed long-term medical leave. The appeals court concluded that "a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job. To the contrary, the inability to work for a multi-month period removes the person from the class protected by the ADA."

This is a significant victory for employers. But it's not necessarily time for you to pop the champagne. It is important to note that the 7th Circuit did not reject all leave as a reasonable accommodation; it expressly acknowledged that intermittent, episodic leave, lasting less than a month, could be reasonable. Moreover, this decision is only of immediate practical benefit for employers in Indiana, Illinois, and Wisconsin – those under the jurisdiction of this appeals court.

While this decision imposes a nice bright-line rule for employers (i.e., a multi-month leave is not a reasonable accommodation, regardless of whether it will enable the employee to return to work) in the 7th Circuit's jurisdiction, it's of no help to employers making leave decisions for their disabled employees outside of those three states, where circuits have few bright-line rules.

When Is Enough Enough?

Virtually every other appellate court around the country has held that a leave of absence may be a reasonable accommodation even if it runs directly after an FMLA leave, provided it is finite and will enable the employee to return to work. Most courts agreed that there is no "bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation," as the 6th Circuit ruled in a 2003 decision.

The 1st Circuit recently summarized the opinions shared by most other courts with regard to determining the amount of leave that is reasonable. In 2017's *Echevarria v Astrazeneca Pharmaceuticals* decision, the court said that you must do so on a case-by-case basis. In that instance, the court concluded that an employee's request for 12 additional months of leave was not facially reasonable after having already received five months off, but noted that such a request would not be unreasonable in every case.

And therein lies the difficulty of analyzing a request for leave as an accommodation: when is enough enough?

Some Practical Guidelines For Employers

Although there may not always be a black-and-white answer to that question, employers do have a few guidelines that can help them navigate these tricky situations.

Indefinite Leave Is Never Reasonable

First of all, indefinite leave is never a reasonable accommodation. Both the EEOC and the courts agree that you will be in an advantageous position if you can obtain a statement from the employee's

agree that you will be in an advantageous position if you can obtain a statement from the employee's medical provider through an interactive process that "indefinite" leave is needed.

Be Wary Of "De Facto" Indefinite Leave

Next, "de facto" indefinite leave requests – those repeated requests for additional time where you receive a note extending the employee's leave another month, and then another, and then another – are generally not reasonable. The 3rd, 4th, 6th, 7th, 8th, and 9th Circuit Courts of Appeal have all held that an employer is not required to grant repeated requests for extensions of leave because, in essence, the employee is actually requesting indefinite leave.

The EEOC's own Fact Sheet on Applying Performance and Conduct Standards to Employees with Disabilities states that, where an employee seeks a second six-week extension after an initial 12 weeks of leave, an employer is entitled to inquire why the physician's estimated return-to-work date was incorrect and why additional leave would enable the employee to return to work. Still, you must exercise deliberate judgment in determining when the leave has become de facto indefinite.

Seek Information About The Purpose Of The Leave

Further, time off that does not enable an employee to return to work is generally considered not reasonable. Therefore, you should ask for information from the employee's physician about what objective medical basis exists to support the belief that the leave will enable the employee to return to work. Just last year, in fact, the 11th Circuit upheld an employer's refusal to extend an employee's medical leave for one week even though that week would have allowed the employee to become eligible for FMLA leave (*Luke v. Florida A&M University*).

That sounds good until you read further and realize the court did so because the plaintiff had already been on leave for nine months and there was no evidence that she "would have been able to perform her job duties even after an additional twelve weeks of FMLA leave." That seems to suggest the additional leave might have been reasonable had there been evidence the employee could have returned at the end of the FMLA leave. The court said that for leave to be reasonable, it had to enable the employee to return "in the present or the immediate future," whenever that is.

Last Resort: Undue Hardship

If the leave request is finite and there is evidence it will enable the employee to return to work, you still may deny it if the leave would impose an undue hardship on your business. Most employers immediately think of financial considerations when they hear the phrase "undue hardship," which is a high hurdle to overcome. But courts have applied the undue hardship defense in other situations, such as when coworkers are forced to work harder or longer because they are performing the disabled employee's work while they are on leave, or when coworkers are not getting their own work done because they are filling in for the absence, or when there is significant disruption to company operations.

Further, a particular leave may not initially cause undue hardship, but it may develop as time goes on and problems arise. In fact, although an undue hardship analysis may not be used to deny FMLA leave for an employee's own serious health condition, you may start to experience such hardship before the FMLA leave ends. If that occurs and the employee requests additional leave under the ADA, your analysis can include not just a review of the issues associated with the additional leave, but whether undue hardship already exists.

Conclusion

Although the *Severson* case currently aids only those employers in Illinois, Indiana, and Wisconsin, there is a chance that courts in other parts of the country will look to the logic contained in this most recent decision and decide to apply it in future cases. Until that day occurs, however, you should handle "leave after leave" requests cautiously.

You should require the employee to provide a note from the treating physician stating an estimated return to work date, and providing the objective medical basis for the belief that the leave will enable the employee to return on that date. It's possible that the information provided by the physician will allow you to apply some of the standards described above in a way that is beneficial to your operation.

For more information, contact the author at MCreighton@fisherphillips.com or 404.240.4285.

Related People

Myra K. Creighton
Partner
404.240.4285
Email

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