



In-Depth Discussion | January 24, 2018

## **DEAR LITTLER: IS AN EXTENDED LEAVE OF ABSENCE A REASONABLE ACCOMMODATION REQUIRED BY THE ADA?**

By: Michelle Barrett Falconer and Casey Kurtz

**Dear Littler:** One of our key employees was injured in a serious car accident. She qualified for, and took, a full 12 weeks of leave under the Family and Medical Leave Act (FMLA) to recover. She was supposed to return to work on Monday but now says she'll need to take at least another month off for physical therapy as a "reasonable accommodation." Must we grant her this leave? Since when is NOT working considered a reasonable accommodation?

- Miffed in Milwaukee

### **Dear Miffed in Milwaukee,**

While it may be small consolation, your confusion about how to handle this delicate (but not uncommon) situation is understandable. Courts, the Equal Employment Opportunity Commission (EEOC), and employers continue to debate whether—and how—extended leave should constitute a reasonable accommodation under the Americans with Disabilities Act (ADA).

Your question raises a host of interwoven legal and practical issues. At the outset, and as most employers know, the ADA and related state antidiscrimination laws prohibit discrimination against individuals with disabilities, *i.e.*, applicants or employees with physical or mental impairments that substantially limit<sup>1</sup> one or more major life activities.<sup>2</sup> Congress has explicitly stated that the definition

<sup>1</sup> Some states set a threshold for demonstrating a disability that is different from an impairment that "substantially limits" one or more major life activities. See, e.g., Cal. Gov't Code §§ 12926(j)(1), 12926(m)(1)(B) (mental or physical disability must limit one or more major life activities); N.Y. Exec. Law § 292(21) (disability is an impairment that can be medically diagnosed or that prevents some "normal" bodily function).

<sup>2</sup> See 42 U.S.C. § 12102.

of “disability” under the ADA should be interpreted widely, to expand coverage for workers with disabilities.<sup>3</sup> Although you did not mention the details of your employee’s medical condition, we’ll assume that she has a disability within the meaning of the ADA.<sup>4</sup> Generally, the ADA requires employers to provide reasonable accommodations to qualified applicants and employees with disabilities.<sup>5</sup>

Reasonable accommodations can take many forms, depending on the circumstances and an individual’s needs. Accommodations may include making workplace facilities accessible, changing tests or training materials, providing interpreters or assistive equipment, or modifying work schedules.<sup>6</sup> As described by the EEOC, the underlying “purpose of the ADA’s reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work.”<sup>7</sup> Thus, for example, it may be a reasonable accommodation to provide a stool to a cashier who, due to a medical disability, grows fatigued if required to stand for her shift, but who can perform her job effectively if seated.

### Leave as a Reasonable Accommodation

A leave of absence also may constitute a reasonable accommodation under the ADA, even though—as you point out—a leave means that the employee is not working. As explained by the EEOC, leave qualifies as a reasonable accommodation “when it enables an employee to return to work following the period of leave.” Employees with disabilities may need leave for a variety of reasons, including physical therapy, recuperation from an illness or the manifestation of a disability, obtaining repairs on wheelchairs or other assistive devices, or training a service animal.<sup>8</sup> As with the FMLA, leave may even be intermittent, depending on the circumstances.

According to the EEOC (and most federal courts), the ADA mandates that employers “consider providing unpaid leave to an employee with a disability . . . if the employee requires it.”<sup>9</sup> An employer covered by the ADA must seriously explore leave requests even if: (1) the employer does not provide leave benefits; (2) the employee is not eligible for benefits under any company leave policy; or (3) the employee already exhausted available leaves of absence, including under a company policy or the FMLA. According to the EEOC, leave must be granted unless another reasonable accommodation option would be effective (e.g., would enable the employee to perform his/her essential job functions) or if the leave would cause the employer undue hardship.

### Undue Hardship

Under the ADA, “undue hardship” refers to an action that requires “significant difficulty or expense.” Whether an accommodation is an undue hardship is a very fact-specific question and involves consideration of several criteria, such as: (1) the nature and cost of that accommodation; (2) the overall financial resources of the facility and impact on expenses and resources; (3) the overall resources of the employer; (4) the nature of the employer’s operations, including the composition, structure and

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<sup>3</sup> 42 U.S.C. § 12102(4).

<sup>4</sup> Even if her medical condition seems temporary, it can still qualify as a “disability.” See, e.g., 29 U.S.C. 1630.2(j)(1)(ix) (“The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of” the ADA). We also assume that the employer is covered by the ADA. 29 U.S.C. 1630.2(e)(1) (defining employer as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year”).

<sup>5</sup> For purposes of this discussion, we will not delve into discussion of any pertinent state law.

<sup>6</sup> EEOC, Enforcement Guidance, [Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#), No. 915.002, General Principles (Oct. 17, 2002) [hereinafter 2002 EEOC Guidance].

<sup>7</sup> EEOC, Publication, [Employer-Provided Leave and the Americans with Disabilities Act](#) (May 9, 2016) (emphasis omitted) [hereinafter 2016 EEOC Guidance].

<sup>8</sup> 2002 EEOC Guidance, Types of Reasonable Accommodations Related to Job Performance, Leave.

<sup>9</sup> 2016 EEOC Guidance, Granting Leave as a Reasonable Accommodation.

functions of the workplace; and (5) the impact of the accommodation on operations, including any impact on the ability of other employees to perform their work.<sup>10</sup>

When assessing whether a leave of absence might rise to the level of an undue hardship, employers should closely analyze factors including the length of leave required and, if the leave would be intermittent, the frequency and predictability of each separate absence episode. Employers should contemplate whether any flexibility might alleviate potential hardship, such as whether the employee could receive treatment on a particular day of the week preferable for the employer. Employers also should consider the material impact of the leave on operations, coworkers' productivity, and customer service; in turn, this assessment likely will depend on the size of the employer and its ability to maintain productivity despite an employee's absence.<sup>11</sup>

### **But What About Extended or Indefinite Leave?**

With that background in mind, let's home in on your dilemma: how may employers handle requests for leave that are lengthy, or even open-ended?

While an extended medical leave may be a reasonable accommodation, an employer generally does not have to provide a leave of indefinite duration. The EEOC has stated that "indefinite leave—meaning that an employee cannot say whether or when she will be able to return to work at all—will constitute an undue burden." Similarly, numerous federal appellate courts have held that an employee is not entitled to leave as a reasonable accommodation if the duration is unknown.<sup>12</sup>

Courts also have rejected requests for leave that have a specific end date but are deemed excessive. The rationale for some of these holdings is that "[a] leave request must assure an employer that an employee can perform the essential functions of her position in the near future." For example, some courts have concluded that a six-month leave of absence is simply too long to be a reasonable accommodation.<sup>13</sup>

<sup>10</sup> 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(2).

<sup>11</sup> 2016 EEOC Guidance, Undue Hardship. The employer may also consider the cumulative impact of the leave sought with leave already taken. *Id.*

<sup>12</sup> See *Robert v. Board of Cty. Comm'rs of Brown Cty., Kan.*, 691 F.3d 1211 (10th Cir. 2012)(holding that, because defendant "did not have a reasonable estimate of when [plaintiff employee] would be able to resume all essential functions of her employment[,] ... the only potential accommodation that would allow [her] to perform the essential functions of her position was an indefinite reprieve from those functions—an accommodation that is unreasonable as a matter of law"); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 338 (2d Cir.2000)("The duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee's position open indefinitely while the employee attempts to recover..."); *Jarrell v. Hospital for Special Care*, 626 F. App'x 308 (2d Cir. 2015)(non-precedential)(need for "at least 14 weeks" of leave essentially indeterminate and, therefore, unreasonable); *Silva v. City of Hidalgo, Tex.*, 575 F. App'x 419 (5th Cir. 2014)(non-precedential)(holding that it would be unreasonable for employer to have to wait "at least one or two months" beyond FMLA exhaustion for employee to return to work); *Larson v. United Nat'l Foods West, Inc.*, 518 F. App'x 589 (9th Cir. 2013) (non-precedential)(indefinite - and at least 6-month-long - leave to permit driver to fulfill alcoholism treatment obligations so that he might eventually be physically qualified under the DOT regulations is not a reasonable accommodation); *Santandreu v. Miami Dade Cty.*, 513 F. App'x 92 (11th Cir. 2013)(non-precedential)(because employee granted 15 months of leave that had been extended 4 times "was unable to show that he would be able to perform the essential functions of the job anytime in the reasonably immediate future, his request for additional leave was not a request for a reasonable accommodation").

<sup>13</sup> See *Robert*, 691 F.3d at 1218; *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 (8th Cir. 2003). Relatedly, the EEOC asserts that employers cannot hide behind "no-fault" or "inflexible" leave policies, whereby employees are terminated if they fail to return at the conclusion of the leave offered by the employer to all employees. 2016 EEOC Guidance, Maximum Leave Policies; 2002 EEOC Guidance, Types of Reasonable Accommodations Related to Job Performance, Leave, at Question 17. The EEOC and private plaintiffs have brokered settlements of such claims, although not all courts have fully endorsed that principle. To the contrary, some courts have held that such neutral policies do not violate the ADA where the leave offered is sufficient as a practical matter to comply with the ADA (i.e., a policy allowing leave for six months or a year, whatever the reason). 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).

A few courts have described these limitations in another way—including the Seventh Circuit Court of Appeals, which covers your hometown of Milwaukee.<sup>14</sup> These courts have indicated that individuals seeking excessively long or undetermined leaves need not be accommodated because they are not “otherwise qualified” for their jobs under the ADA. Remember that the ADA protects individuals with disabilities who are otherwise qualified, with or without accommodation, to perform the essential functions of their jobs. But as some courts have noted, “[i]t perhaps goes without saying that an employee who isn’t capable of working for so long isn’t an employee capable of performing a job’s essential functions—and that requiring an employer to keep a job open for so long doesn’t qualify as a reasonable accommodation.”<sup>15</sup> By that logic, employees requiring lengthy or indefinite leave are not entitled to accommodation because the individual is no longer protected by the ADA.

The Seventh Circuit stressed this point in two recent cases, beginning with *Severson v. Heartland Woodcraft, Inc.* Indeed, the court bluntly stated in *Severson* that “a long-term leave of absence cannot be a reasonable accommodation.” There, the plaintiff had taken his full 12 weeks of FMLA leave due to a back injury that aggravated a preexisting condition. While on leave, he informed his employer that he would require surgery and requested an extension of his medical leave for two or three more months. The employer responded that, while the plaintiff would be welcome to reapply in the future, his employment would expire along with his FMLA leave if he failed to return to work. On the final day of his FMLA leave, the plaintiff underwent surgery and later sued alleging failure to accommodate, citing in support the fact that his doctor had cleared him to return to work three months after his surgery. The parties agreed that the plaintiff had a disability but disputed whether the desired multi-month leave of absence constituted a reasonable accommodation.

The plaintiff, supported by the EEOC as *amicus curiae*, argued that long-term medical leave should be considered a reasonable accommodation if it 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 Seventh Circuit rejected this approach, however, reasoning that it would transform the ADA into an “open-ended extension of the FMLA.” In reaching this holding, the court emphasized that an extended leave does not provide an individual with disabilities with the “means to work; it excuses his not working.” The court relied on prior precedent, explaining that the inability of a person to work for months at a time removes that individual from ADA coverage.

Just a few weeks after *Severson*, the Seventh Circuit reiterated this interpretation in *Golden v. Indianapolis Housing Agency*.<sup>16</sup> The plaintiff, a 15-year employee, requested and exhausted FMLA leave following a breast cancer diagnosis and surgery. Her employer granted her an additional four weeks of unpaid medical leave, but required that she return to work on a specified date thereafter. The night before her scheduled return, she e-mailed human resources personnel to request a further, unspecified leave of absence, alluding to the employer’s general unpaid leave policy, which permitted leave of up to

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<sup>14</sup> *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017); *Hwang*, 753 F.3d at 1161-62; *Peyton v. Fred’s Stores of Ark., Inc.*, 561 F.3d 900 (8th Cir. 2009).

<sup>15</sup> *Hwang*, 753 F.3d at 1161-62 (“After all, reasonable accommodations . . . are all about enabling employees to work, not to not work.”).

<sup>16</sup> 2017 U.S. App. LEXIS 20257 (7th Cir. Oct. 17, 2017).

six months when no other type of leave applied. The employer rejected that request (perhaps due to its untimeliness—the court noted that the policy required two weeks’ notice before requesting leave and that plaintiff’s request was “last-minute”). The employee sued, alleging that her employer unlawfully terminated her and failed to accommodate her disability by refusing to extend her leave for an additional six months. The Seventh Circuit readily concluded that the requirement that the plaintiff be a “‘qualified individual’ is fatal to [plaintiff’s] case.” The court affirmed judgment for the employer, finding that the request for six months’ leave, in addition to the leave provided under the FMLA, removed the plaintiff from the class of individuals protected by the ADA.

Even more recently, the Eleventh Circuit Court of Appeals entered the extended-leave-as-accommodation fray with an opinion relying on some older cases in that circuit for the proposition that an employee is not entitled to leave under the ADA unless it would permit the employee to return “in the present or in the immediate future.”<sup>17</sup> The employee, a utility worker for a government body in Florida, sustained a shoulder injury at work in December 2013. About halfway through his 12-week FMLA leave entitlement, his doctors determined that surgery would be required; however, the surgery was delayed until April 2014 for reasons over which the employee had no control. The surgeon predicted that recovery from the surgery would take six months.

In late May 2014, a few weeks before exhausting three months of post-FMLA leave provided per the employer’s policies, the employee’s surgeon predicted that he was “likely” to be able to return to work with no restrictions in six weeks. In a meeting on June 19 with employer and union representatives, he provided a note from his surgeon predicting a possible return to work by July 15, 2014, but he further qualified that by stating that he still would have some work-related limitations on the manner in which he would be able to lift at that point. After he failed to meet a demand that he produce (by the next day) a more definitive return-to-work note,<sup>18</sup> the employer terminated him, citing the “substantial hardship” caused by his inability to perform essential job functions.

In his lawsuit, the employee argued that his employer should have accommodated him “by offering a limited period of unpaid leave while he recovered from surgery.” Noting that the employee indisputably could not work at the time of his termination and that there was only “a possibility, but no certainty, that [he] could return to work by mid-July 2014,” the court concluded that he was not a “qualified individual with a disability.” He had failed to show that additional leave would have enabled him to perform his job’s essential functions “presently or in the immediate future.” Therefore, the court affirmed the dismissal of his ADA failure-to-accommodate claim. It is not clear whether the court would have held differently if the employee had been able to produce a note with a more definitive prediction about his ability to return to work within a month of the date he was terminated.

Consistent with these authorities, your employee’s somewhat open-ended request for additional leave—that is, for “at least another month off for physical therapy”—may not be covered by the ADA. She has not, for example, provided an estimated date upon which she can return to work. As a result, your company may be permitted to deny her request. ***It is important to keep in mind***, however, that there are risks associated with summary rejection of her request, not the least of which is that the EEOC’s regional office in Chicago often investigates and litigates aggressively, in particular with regard to ADA cases alleging failure to accommodate. Given the risks, your company should consider gathering more information to make the most appropriate decision, both legally and practically.

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<sup>17</sup> *Billups v. Emerald Coast Utilities Auth.*, Docket No. 3:15-cv-00491, 2017 WL 4857430 (11th Cir. Oct. 26, 2017)(unpublished) (citing *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003) and *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997).

<sup>18</sup> Ultimately, the employee was not released to return to work without restrictions until October 23, 2014.

## Make an Informed Decision!

Before denying this employee's request for further leave under the ADA, your company should entertain the request and consider the possible application of its own policies and practices. Your question does not indicate whether your company has a leave policy in place that might be relevant to the reasonable accommodation analysis. For example, if your company offers up to six months of discretionary leave per year, the requesting employee cannot be denied that leave for discriminatory reasons. Seventh Circuit authority ultimately may support denial of this request, but your company should make the most informed decision possible.

To that end, your company should consider engaging in the interactive process with this employee. This process can serve two purposes. First, additional information about the circumstances may reveal that accommodation is not required. Further details might confirm that the employee is no longer an "otherwise qualified" individual, consistent with new or otherwise governing case law. Or, an investigation of the impact on the business of additional leave may reveal a legitimate undue hardship to your organization, providing a separate basis on which to deny the request. Specifically, you mentioned that she is a key employee; evaluation of her request and the pertinent factors identified earlier may show that her prolonged absence would not be reasonable. (If so, your company may need to consider whether a vacant position for which the employee is qualified exists and could be held open for her.<sup>19</sup>) In any event, your company's position will be more defensible if you take time to assess the full picture, explore the availability of non-leave accommodations and conduct an undue hardship analysis (if warranted).

Second, the interactive process might reveal an accommodation (other than extended leave) that would be effective and would not pose an undue hardship. It is possible that your employee has not considered what options might exist at your workplace and so did not think to ask for (and/or have her medical provider weigh in on) a non-leave accommodation that might be reasonable. We know that she needs time for physical therapy; perhaps your company could accommodate her physical therapy appointments, once you learn more about their length, expected frequency, whether she needs recovery time, etc. Because she is a key employee, it might be worth investigating whether she could return to work with a modified or part-time schedule, at least temporarily. Would it be feasible for her to work from home, part or all of the time? Could the employee, or her health care providers, give you more specific detail about when she could return? The answers to these questions might present a mutually-acceptable solution that allows you to accommodate the employee and that enables her to get back to working.<sup>20</sup>

In sum, *Miffed in Milwaukee*, you are not alone in questioning whether and when not working could constitute a reasonable accommodation. There certainly may be valid reasons your company does not have to grant this employee's additional leave request. That being said, you and your organization should be sure that you have all relevant information before proceeding, lest you unintentionally violate the ADA.

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19 See 2002 EEOC Guidance, Types of Reasonable Accommodations Related to Job Performance, Leave, at Question 18 (stating that "[i]f an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position").

20 See, e.g., 2002 EEOC Guidance, Types of Reasonable Accommodations Related to Job Performance, Leave, at Question 20 (explaining that an employer may provide a reasonable accommodation that requires the employee to remain on the job, so long as it does not interfere with his or her ability to address medical needs).