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Tenth Circuit Issues Confirming Decision: Employers Are Not Required to Provide Employees with Indefinite Leave from the Performance of Essential Functions

By Kerry Notestine and Jillian Ballard

The Tenth Circuit Court of Appeals, recently issued an important decision in *Robert v. Board of County Commissioner of Brown County*, 2012 U.S. App. LEXIS 18365 (10th Cir. Aug. 29, 2012), holding that an employee on leave must provide an employer with a reasonable estimate of when he or she will be able to return to duty, performing all essential functions, in order for a leave of absence to be a reasonable accommodation under the Americans with Disabilities Act (ADA). The decision supports the notion that employers have no obligation to provide leave of an indefinite duration if there is not a realistic prospect that the employee will return to performing all the essential functions of his or her position in a reasonable time. While this decision is helpful for employers when considering extending leaves of absence as a reasonable accommodation under the ADA, employers should be mindful that an "individualized assessment" of potential accommodations is required under the ADA when confronted with leaves of absence as a potential accommodation and treat the interactive process regarding the leave request accordingly.

Factual Background

Catherine Robert was employed with the county as an Adult Intensive Supervision Officer. In this position, part of her essential functions required that she visit offenders at their homes or in jail, attend hearings, and supervise drug testing. In 2004, Robert was diagnosed with sacroiliac joint dysfunction¹ for which she had surgery in April 2004.

In the weeks preceding her surgery, and again during her recovery, Robert worked from home, auditing files for closed cases. During this time period, Robert could not visit offenders at their homes or in jail, and she was unable to supervise drug screenings. Accordingly, other employees handled these tasks for her, which created tension within the small department. Robert returned to working from the office in July or August of 2004 and resumed all of the essential functions of her position.

In November 2005, Robert fell down the stairs at work. Thereafter, symptoms of her joint dysfunction returned, which resulted in her scheduling another surgery for April 2006. Like in

¹ Sacroiliac joint dysfunction generally refers to pain in the tailbone or pelvis region that is caused by either too much or too little motion. It results in inflammation of the joint area and can be debilitating.

2004, Robert continued to perform work before her surgery, but she was unable to perform site visits or supervise drug screenings. And like in 2004 her co-workers assumed those responsibilities.

Robert's surgery was conducted as planned and her family and medical leave expired on July 5, 2006. As of this date she had also exhausted all of her sick and vacation leave, and it was evident that she would need additional time away from work for her recovery. Accordingly, her treating physician prepared a "Work Status Report" indicating that Robert could work on a computer from home.² Moreover, Robert had submitted a leave request to the county prior to her surgery, which did not include an anticipated return-to-work date.

On July 31, 2006, the county decided to terminate Robert's employment because her FMLA, sick and vacation leave were exhausted, and it was unclear from Robert's leave request how long it would take for Robert to be able to perform *all* of the essential functions of her job.

The Court's Analysis

In affirming the district court's granting of summary judgment for the county as to all of Robert's claims, the Tenth Circuit Court of Appeals addressed the disability discrimination claim analyzing the following: (a) whether Robert was able to perform essential functions of her position under the ADA; and (b) whether Robert's indefinite leave of absence request as a means for her to perform the essential functions of her position was a "reasonable accommodation."

The ADA protects a "qualified individual" with a disability who can perform the essential functions of the job with or without reasonable accommodation. To determine whether an employee is a "qualified individual," courts generally consider two criteria: (1) whether an employee's impairment prevented him or her from performing the essential functions of his or her job; and (2) whether the employee might have nevertheless been able to perform those functions if the employer provided a reasonable accommodation.

Robert Was Unable to Perform the Essential Functions of Her Job

Here, the court addressed the first criterion of the analysis and found that Robert could not perform the essential functions of her position, even presuming that the county would permit her to work from home as a potential accommodation while she recovered from her surgery. Specifically, Robert could neither visit offenders at home or in jail, nor could she supervise drug screenings – all of which were essential functions of her position.

Robert's Indefinite Leave Request Was Not Reasonable

In addressing the second criterion – of whether a reasonable accommodation could permit Robert to perform the essential functions of her position – the court noted that Robert's complete inability to perform site visits or supervise drug screenings at the time of her termination rendered the only potential accommodation to be a *temporary* reprieve from these functions all together.

In analyzing Robert's leave request, the court noted that there are two limits on the bounds of reasonableness for leave as an accommodation. First, the employee must provide the employer with an estimated date when essential job duties can be resumed because without such an end date an employer cannot assess whether a temporary exemption from these duties is reasonable. Second, there is a durational limit, namely that "a leave request must assure an employer than an employee can perform the essential functions of her position 'in the near future.'"³

Here, the court held that Robert's leave request failed the first limit of reasonableness. As the court noted, there was no evidence in the record that the county had any estimation of the date that Robert would resume the fieldwork functions essential to her position. Moreover, Robert testified that she needed near full mobility to ensure her safety when she visited offenders in their homes, workplaces, or jail, as the visits could be dangerous. Therefore, the court held that the only potential accommodation that would allow Robert to eventually perform the essential functions of her job was an indefinite reprieve from those functions – an accommodation the court held was not reasonable as a matter of law. Because the court held that Robert could not meet the first limitation on reasonableness, it did not address the durational limitation.

² The court's opinion highlights that the factual record was unclear as to whether the physician provided Robert or the workers' compensation case worker with a copy of the report. The county, however, never received a copy of the report. *Robert*, at *4-7.

³ The court noted that while the Tenth Circuit had not specified how near the future must be, the Eighth Circuit ruled in a similar case that a six-month leave request was too long to be a reasonable accommodation. *Id.* at *12.

Considerations for Employers

The topic of leaves of absence as a reasonable accommodation under the ADA is certainly not novel. Indeed, Littler has provided guidance,⁴ and the EEOC held a public meeting, on the topic in June 2011.⁵

What is novel about the Tenth Circuit's recent decision is that the court has confirmed that an employer is not required to provide extended leave – from all essential functions – even when an employee can perform some essential functions for an indefinite period of time. This holding highlights that in some circumstances while working from home might prove to be a suitable accommodation with respect to some essential functions of an employee's position, if an employee cannot perform *all* of her essential functions when working from home the employer can require a date-certain by which the employee will be able to return to work so as to handle *all* essential functions. In obtaining a date-certain (or lack thereof) an employer can then assess whether the leave accommodation request is reasonable.

Robert serves as a reminder for employers that, when engaging in the interactive process as it relates to leaves of absence as a reasonable accommodation, employers should be mindful to communicate with the employee regarding the requested leave. Appropriately trained personnel, who are engaged in the interactive process communications should:

- Review the essential functions of the employee's position;
- Assess whether a temporary leave of absence will permit the employee to perform some (or all) essential functions at home;
- Assess whether a temporary leave of absence will permit the employee to return to work to perform all essential functions of the position;
- Assess whether the proposed duration of the leave is reasonable in light of the employee's specific position (*i.e.*, perform an individualized assessment under the ADA as to the reasonableness of the length of the leave); and
- Document, with management in the employee's department, how the department is impacted by the employee's leave of absence if it is granted (*i.e.*, who takes over certain essential functions, are temporary employees needed, etc.) in order to have this information readily available and understood should the employee request additional leave.

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⁴ Kerry Notestine and Kelley Edwards, *Recent EEOC Lawsuits Highlight Importance of Adopting Comprehensive Procedures for Managing Employee Leaves*, Littler Insight (Feb. 22, 2011), <http://www.littler.com/publication-press/publication/recent-eoc-lawsuits-highlight-importance-adopting-comprehensive-proce>.

⁵ See Barry Hartstein, Greg Coulter, Sue Douglas, Shanthi Gaur, Jacquelyn Meirick, Marcy McGovern, Brandon Mita, Terrence Murphy, Peter Petesch, and Illyse Schuman, *Annual Report on EEOC Developments – Fiscal Year 2011*, Littler Report (Jan. 20, 2012), <http://www.littler.com/publication-press/publication/annual-report-eoc-developments-fiscal-year-2011>.