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## Tenth Circuit Says a Leave of Absence of More than Six Months Is Virtually Never a Required Accommodation

By Darren Nadel and Michael Roaldi

"[R]easonable accommodations...are all about enabling employees to work, not to not work."<sup>1</sup> This fundamental insight guides the recent decision by the U.S. Court of Appeals for the Tenth Circuit, holding that a six-month, inflexible leave policy is virtually always "more than sufficient" to comply with the Rehabilitation Act, and by implication, the Americans with Disabilities Act (ADA).<sup>2</sup> The court provided employers with refreshingly clear guidance on how to best structure leave policies to avoid exposure for disability discrimination claims.

### Legal Background

In general, a disabled person can sustain a claim under the ADA or Rehabilitation Act by showing that he or she is capable of performing the essential functions of the position with a reasonable accommodation and the employer refused to provide such an accommodation.<sup>3</sup> Prior to *Hwang*, the Tenth Circuit, like many circuits, had held that an employer need not provide an employee with an indefinite leave of absence as an accommodation under the ADA.<sup>4</sup> The court previously ruled that leave can be a reasonable accommodation where the employee can provide the employer with an estimated return-to-work date and that date is in the "near future."<sup>5</sup>

### Factual Background

During her employment, the plaintiff was a well-regarded professor. When she fell ill prior to beginning the school's fall term, she sought and received a six-month paid leave of absence. At the end of that period, her doctor advised her to seek more time off. The school denied her second request and terminated her employment, attributing the denial to a policy allowing no more than six months' sick leave under any circumstances.

The plaintiff then filed suit contending that this effectively terminated her employment in violation of the Rehabilitation Act. The district court dismissed her complaint, and the plaintiff appealed.

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1 *Hwang v. Kansas State Univ.*, No. 12-3070, 2014 WL 2212071, \*1 (10th Cir. May 29, 2014).

2 *Id.*

3 *Id.*

4 *Robert v. Board of County Commissioners of Brown County*, 691 F.3d 1211, 1218 (10th Cir. 2012).

5 *Id.*

## Analysis of a Six-Month Restriction on Leave

The plaintiff argued that the failure to extend her sick leave, and the University's inflexible six-month leave limitation, amounted to disability discrimination.

The Rehabilitation Act prohibits recipients of federal funding from discriminating on the basis of disability.<sup>6</sup> The court began its analysis by noting that, like the ADA, the analysis of a Rehabilitation Act claim is two tiered. A disabled plaintiff can establish a claim for discrimination by showing that he or she can perform the essential functions of the position with reasonable accommodation and that the employer failed to provide such an accommodation. If these threshold requirements are met, the employer can avoid liability only by showing the accommodation required would impose an undue hardship on its business.

The court then scrutinized the first tier of the plaintiff's accommodation claim and determined that she could not establish that she was able to perform the essential functions of her job with a reasonable accommodation. This aspect of the court's analysis provides important and clear insight into what constitutes a reasonable accommodation in the context of a leave of absence:

By her own admission, she couldn't work at any point or in any manner for a period spanning more than six months. **It 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. After all, reasonable accommodations—typically things like adding ramps or allowing more flexible working hours—are all about enabling employees to work, not to not work.<sup>7</sup> (emphasis added)

The court reasoned that in nearly all cases, an employee who cannot return to work within six months (and potentially sooner) is not capable of performing the essential functions with a reasonable accommodation and, therefore, cannot sustain a claim for discrimination. The court did recognize the possibility that a rare exception could exist; perhaps, for example, if a tax accountant started a leave on April 16.

The court made it clear that the fact that an employee requires a "brief absence" does not compel a conclusion that an employee cannot perform the essential duties of his or her position. The key factors to consider in determining the reasonableness of a leave request are the nature of the duties accompanying the job, the nature and length of the leave sought, and the impact on fellow employees.<sup>8</sup> Still, the court reiterated that there is a clear durational limit to reasonableness, noting that "it's difficult to conceive how an employee's absence for six months—an absence in which she could not work from home, part-time, or in any way in any place—could be consistent with discharging the essential functions of most any job in the national economy today."

## Analysis of "Inflexible" Sick Leave Policies

The Tenth Circuit then undertook an analysis of the "inflexible" nature of the sick leave policy – an important issue given the EEOC's stance that "inflexible" policies violate the obligation to engage in the "interactive" process when discussing reasonable accommodations. The EEOC's *Enforcement Guidance* even ostensibly requires modification of all "no-fault" leave policies without a showing of undue hardship.<sup>9</sup>

The court first noted that the *Enforcement Guidance* only commands deference to the extent that its reasoning is persuasive, and it pointed out that the *Enforcement Guidance* offers only conclusions without any analysis. Next, the court stated that the *Enforcement Guidance* puts the cart before the horse—only after it has been established that a leave of a certain time period is reasonable does the interactive process come into play. There is no need to have a dialogue about a leave of more than six months when a leave of that period of time is unreasonable as a matter of law. Therefore, according to the court, the *Enforcement Guidance's* prohibition on "inflexible" leave policies adds nothing to the analysis of whether a leave of absence of a particular period of time is or is not reasonable.

6 29 U.S.C.A. § 794(a).

7 Notably, the Court cites 42 U.S.C. § 12111(9); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1122-24 (10th Cir. 2004), and *Mathews v. Denver Post*, 263 F.3d 1164, 1168-69 (10th Cir. 2001), to support this holding. All of these authorities are ADA precedent. Thus, the court draws no distinction between the ADA and Rehabilitation Act in this aspect of the analysis.

8 The court cites *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) for these factors.

9 EEOC, NO. 915.002, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html> at Q. 17.

Essentially, the court's logic boils down to this: step one is to determine whether the length of the leave request is reasonable. If it is not, proceed no further. If it is reasonable, then engage in a dialogue about whether other options are available, or whether other options might shorten the needed leave of absence. To support this analysis, the court cited to a later provision in the *Enforcement Guidance*, which states "six months is beyond a reasonable amount of time" to retain an employee in the hopes that a job which she or he can perform will become available.<sup>10</sup>

The court further justified this holding by recognizing that firm policies ensure clarity and consistent treatment and, therefore, they are more desirable. Policies which permit more discretion allow discriminatory motives to be disguised. The court analogized its reasoning to the Supreme Court's rejection of the notion that inflexible seniority policies discriminate against the disabled. "[T]he Supreme Court has noted that they can 'provide[] important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment."<sup>11</sup>

While the court found the policy to be permissible in the context in which it arose, it cautioned that such policies are not "categorically immune from attack." Policies that are unreasonably short, as well as policies that provide for different treatment of disabled employees compared to other employees, will result in an inference of discrimination. The plaintiff was unable to plead facts establishing inconsistent application of the policy, thus her claim failed.<sup>12</sup>

## Considerations for Employers

The Tenth Circuit's holding in *Hwang* may affect both the character and implementation of leave policies. While the ruling only is binding the Tenth Circuit,<sup>13</sup> Employers should consider the following factors in establishing leave policies.

First, *Hwang* opens the door for employers to maintain time-limited leave policies. As the court noted, they should be of sufficient duration, and they should still make room for the possibility of a longer accommodation if such an accommodation is required by law. Employers that adopt firm-duration leave policies should recognize that by doing so they lose the luxury of exercising discretion in instances in which they would like to retain an employee seeking to take leave beyond the policy's limitation. Retaining an employee despite an inflexible policy, no matter how stellar the employee's performance, could establish discriminatory treatment in a subsequent ADA claim in which a disabled individual is not granted a similar exception.

Finally, employers should continue to take the following steps when an employee seeks leave under a policy:

- Review the essential functions of the employee's position;
- Assess whether a temporary leave of absence will allow the employee to perform some (or all) essential functions at home;
- Assess whether a temporary leave of absence will allow the employee to return to work and also to perform the essential functions of the position, with or without a reasonable accommodation;
- Assess whether other accommodations might shorten the duration of the requested leave;
- Assess whether the proposed duration of the leave is reasonable in light of the employee's specific position (i.e., conduct an individualized assessment under the ADA as to the reasonableness of the length of the leave); and
- Document with department management, the impact that the employee's leave of absence will have on the department, if granted, (e.g., who will take over certain essential functions, are temporary employees needed, etc.) in order to have this information should the employee request additional leave.<sup>14</sup>

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<sup>10</sup> *Id.* at Q. 24, Example D.

<sup>11</sup> *Barnett*, 535 U.S. at 404.

<sup>12</sup> The plaintiff also alleged that she was treated differently than non-disabled professors who earn sabbaticals. The court rejected that argument, finding that she was not similarly situated to a tenured professor who completed all the requirements to be eligible for a sabbatical.

<sup>13</sup> The Tenth Circuit covers Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

<sup>14</sup> See Kerry Notestine and Jillian Ballard, [Tenth Circuit Issues Confirming Decision: Employers Are Not Required to Provide Employees with Indefinite Leave from the Performance of Essential Functions](#), Littler ASAP (Sept. 17, 2012).