# PUBLICATION

## Medical Leave as a Reasonable Accommodation under the ADA: How Far Must an Employer Go?

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On May 9, 2016, the EEOC released further guidance on the provision of medical leave as a reasonable accommodation under the ADA. While the guidance reiterates the Commission's previous position that employers must consider unpaid leave as a potential accommodation, it stops short of providing concrete parameters for employers to operate within. When is a request for additional leave unreasonably long? When would it pose an undue hardship? Questions like those were left open by the EEOC to be determined on a case-by-case basis. The guidance did make clear, however, that this issue is high on the EEOC's priority list, and clearly, the Commission believes that medical leave beyond the FMLA, and beyond an employer's leave policies, are mandatory considerations during the good faith interactive process. Whether additional leave must be granted as a reasonable accommodation, of course, depends on the circumstances.

Hoping to provide employers with a little more clarity, I conducted a recent survey of cases – mostly from the Sixth Circuit Court of Appeals and the district courts of Tennessee – to see where various judges have drawn the line between medical leave that is, and is not, a reasonable accommodation. Along the way, three trends emerged – each of which will help employers draw reliable boundaries for themselves on this issue.

**A. "Qualified Individual"?**

To be protected by the ADA (and thus entitled to a reasonable accommodation), an employee must be a "qualified individual with a disability." 42 U.S.C. § 1211(a). A "qualified individual" is an employee "who, with or without reasonable accommodation, can perform the essential functions of the job." 42 U.S.C. § 1211(8). Many employers consider regular attendance to be an essential job function, and thus, there is a natural tension between that requirement and the provision of leave as an accommodation of an employee's disability – especially if the leave goes beyond the FMLA or the employer's (sometimes generous) leave policies.

The Sixth Circuit recently considered this issue in *Boileau v. Capital Bank* (6th Cir. April 25, 2015). There, a bank teller with lupus (and other medical conditions) exhausted her FMLA leave and then sought further time-off as an accommodation of her condition. The district court granted summary judgment to the employer, and the Sixth Circuit affirmed. Interestingly, the Sixth Circuit did not consider whether the additional leave was a reasonable accommodation or whether it would pose an undue hardship. Instead, the court ruled that, because the employee's doctor certified that she would be incapacitated by her condition every two months for eight to 12 weeks at a time, the employee could not perform one of the essential functions of her job – namely, to attend work on a regular basis. The court held she was not a "qualified individual" as a result and dismissed her case.

Chief Judge Merrick Garland of the D.C. Court of Appeals, who is President Obama's current nominee to fill Justice Scalia's vacancy on the Supreme Court, authored a similar opinion in *Minter v. District of Columbia* (D.C. Cir. December 29, 2015). In that case, an employee missed three consecutive months of work due to her arthritis and an intervening workplace injury. At the conclusion of those three months, the employee's doctor stated that her condition, which rendered her "totally disabled," would continue "indefinitely," but the employee "hope[d] to return to work in another three months." Faced with the potential for at least a six-month leave of absence, Judge Garland held the employee was not a "qualified individual with a disability" because she could

not attend work regularly. Again, the dispositive issue was not reasonable accommodation or undue hardship, but rather, statutory coverage. Due to the length and vagueness of the employee's sought-after leave, the court held she was not protected by the ADA at all. *See also Mdamu v. American Traffic Solutions Inc.* (D. Ariz. June 28, 2016) (holding plaintiff's inability to abide by the employer's attendance guidelines meant that "a reasonable jury could not find she is a qualified person with a disability under the ADA.").

It is important to note, however, that there are limits to this line of thinking. In *Cehrs v. Northeast Ohio Alzheimer's Research Center* (6th Cir. Sept. 1, 1998), the Sixth Circuit ruled that there is "no presumption" that "uninterrupted attendance is an essential job function, and … a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances." The key word there is "uninterrupted," as the extent to which "regular" attendance can be an essential job function is left to be explored. In this particular case, the court went on to rule that issues of fact precluded summary judgment on the employee's reasonable accommodation claim, where she sought a five-month leave of absence from her job as a nurse following an extreme psoriasis flare up. Thus, while it is still a circumstantial determination, both the specificity and the duration of the leave will inform (1) whether it eliminates an essential job function, and (2) if not, whether it is a reasonable, or unduly burdensome, request.

**B. Requests for Indefinite Leave**

As Judge Garland's opinion suggests, requests for indefinite leave will often fall short, especially without a specific conclusion date. In *Monette v. Electronic Data Systems* (6th Cir. July 30, 1996), a customer service representative suffered a workplace injury and was unable to work for seven months. He received full pay and benefits during that time, but after his request for long-term disability was denied, the employee attempted to return to work. His employer had by then filled his position, however, and no other customer service representative jobs were open. The employee was placed on an unpaid leave of absence as a result, but after another month passed and there were still no positions for him, he was terminated. In rejecting the employee's reasonable accommodation claim, the Sixth Circuit stated, "While it is true that employers may be required, as a reasonable accommodation, to transfer disabled employees to a vacant position ... employers are under no duty to keep employees on unpaid leave indefinitely until such a position opens up." Thus, the employee's request for indefinite leave until a job for him became available was held to be unreasonable.

The Sixth Circuit issued a similar decision in *Walsh v. United Parcel Service* (6th Cir. Jan. 6, 2000). There, a pilot was given a year of paid disability leave by the company. He was then allowed another six months of unpaid leave and, afterwards, sought an additional 90 days for further diagnosis and treatment. UPS denied that request and terminated his employment. Again rejecting the employee's reasonable accommodation, the court held "when … an employer has already provided a substantial leave, an additional leave period of significant duration with no clear prospects of recovery is an objectively unreasonable accommodation." The court cited *Hudson v. MCI Telecomm. Corp.* (10th Cir. 1996) in support of its ruling. That case held that a plaintiff's failure to present evidence of the expected duration of her impairment rendered her accommodation request for medical leave unreasonable as a matter of law. Employers, therefore, must be given some basis for predicting how long an employee's leave will be, and when the employee will return to work. Indefiniteness can only be tolerated for a brief period of time.

Conversely, requests that provide enough specifics and are not too long are regularly upheld as reasonable. In *Coffman v. Robert J. Young* (M.D. Tenn. May 14, 2012), the employee's accommodation claim survived summary judgment, where she received 12 weeks of FMLA leave following her motorcycle accident and then requested one additional month of unpaid leave before returning to her position. The court held that there was no evidence the additional month of leave would pose an undue hardship on the employer, and with a date certain for the employee's return, her claim proceeded to trial. A similar ruling resulted in *Dunn v. Chattanooga Publishing Company* (E.D. Tenn. Jan. 8, 2014). There, an employee with breast cancer sought between four

and eight weeks of leave to recover from an upcoming surgery, which was going to be scheduled "as soon as possible." The employer denied her request because she did not provide an exact start and end date to her requested leave. Rejecting the employer's rationale as too literal, the court stated that the law requires two things of an accommodation leave request: "the leave must be finite, and it must not be too lengthy." The court went on to rule that, "[c]ontrary to [the employer's] contention, [the employee's] request met both of those requirements in this case." Indeed, a range of four to eight weeks of unpaid leave, set to commence as soon as her surgery could be scheduled, was not unreasonable as a matter of law.

These cases highlight the importance of getting as many specifics as possible about an employee's need for leave during the good faith interactive process. In particular, pinning down how long an employee will be out of work is essential. If the employee (or the employee's health care provider) cannot give the employer a reasonably specific timeframe within which to expect the employee's return, and also cannot cure the failure within a reasonable amount of time, the request for leave should fail as too vague and indefinite. Alternatively, if the employee can provide a reasonably specific return date, then the employer must consider whether the duration of the leave is too long, such that it poses an undue hardship.

**C. The Six-Month Bogey**

The reasonableness of the duration of an employee's leave of absence is a case-by-case determination. That is important to remember because no hard and fast rules apply to every situation in this context. Indeed, the Sixth Circuit expressly declined in *Cehrs* to adopt "a per se rule that an unpaid leave of absence of … a very lengthy period … could never constitute a 'reasonable accommodation' under the ADA." (quoting *Norris v. Allied-Sysco Food Services* (N.D. Cal. 1996)). Thus, examining the burden placed on the employer of accommodating the leave in question is necessary.

That being said, employers should know that the extension of a previous leave of absence by longer than six months is where the rubber often meets the road here. Courts usually hold that such a leave extension is too long to be reasonable. *See, e.g., Walsh* (6th Cir. 2000) (holding request for 90 days of leave, after a paid year-off and another six months of unpaid leave, was unreasonable as a matter of law); *Monette* (6th Cir. 1996) (dismissing employee's reasonable accommodation claim seeking additional unpaid time-off after a seven-month leave of absence); *Minter* (D.C. Cir. 2015) (noting six-month duration of employee's requested leave of absence as a reason to hold she was not a "qualified individual"). That is not always the case, however, and before a particular leave reaches six months, the likelihood that it will be considered a reasonable accommodation goes up significantly. *See, e.g., Austin v. Better Business Bureau of Middle Tennessee* (M.D. Tenn. Mar. 18, 2011) (denying summary judgment where the employee sought a nine-day extension of leave beyond her initial three and one-half months as a reasonable accommodation); *Cleveland v. Federal Express Corp.* (Nov. 28, 2003) (ruling that triable issues of fact existed on plaintiff's claim for "approximately one-half year" of unpaid leave as a reasonable accommodation of her pregnancy-aggravated lupus); *Hodge v. Henry County Medical Center* (E.D. Tenn. Oct. 3, 2003) (denying summary judgment where disputes of fact existed as to the hardship caused by the employer permitting plaintiff to extend his leave of absence beyond the employer's six-month maximum rule). The point: six months seems to be a tipping point. As a result, if an employee's leave request falls within or near that timeframe, pay close attention. If the request is denied, be able to explain why, citing the burdens and costs on your business and your other employees.

To conclude, my recent survey of cases revealed three things useful to employers who are trying to navigate medical leave as a reasonable accommodation under the ADA. First, depending on the job in question, an employee's inability to come to work may well prevent him from being a "qualified individual with a disability." If so, that employee is not entitled to a reasonable accommodation at all. Second, leave requests should be as definite as possible. During the interactive process, employers should learn how long an employee expects to be out and when, with reasonable specificity, the employee will return. If the employee cannot provide that

information after having a sufficient opportunity to do so, the leave may be denied as too indefinite. Third, the reasonableness of the duration of an employee's leave is a case-by-case determination. Different results occur in different circumstances, but six months is often a touchstone – both in terms of the initial duration and any extensions. Pay careful attention at that point, and be able to explain your decision, either way, with tangible business realities.