ADA Does Not Provide Medical Leave Entitlement to Worker Seeking Post-FMLA Leave, Seventh Circuit Holds

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In a significant ruling for employers, the U.S. Court of Appeals for the Seventh Circuit has held that a request for a two-to-three-month leave of absence is not a reasonable accommodation pursuant to the Americans with Disabilities Act. *Severson v. Heartland Woodcraft*, No. 15-3754 (7th Cir. Sept. 20, 2017).

Companies that have faced an Equal Employment Opportunity Commission ADA investigation into their leave practices will know that this decision contradicts the EEOC's enforcement activity.

The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

Facts and Issues

Raymond Severson held a position with Heartland Woodcraft that involved physical labor. Lifting more than 50 pounds, for example, was an essential function of the job.

Back issues kept him out of work for an extended period. After he exhausted his 12 weeks of leave under the Family and Medical Leave Act, he requested at least two more months of leave to recover from surgery. After learning that Severson would need a continued, multi-month, non-FMLA leave of absence, the employer terminated his employment. Severson fully recovered in about three months.

Severson sued pursuant to the ADA, alleging his employer should have accommodated him by providing two-to-three months of additional leave beyond his FMLA entitlement, among other things.

The district court granted Heartland's motion for summary judgment. According to the district court, only "qualified" individuals are entitled to reasonable accommodations and whether an employee is "qualified" is examined at the time of the adverse employment action at issue. The district court found that at the time Heartland terminated Severson, he was unable to perform some of the essential functions of the position and would remain unable to perform those duties for as long as three months. Accordingly, the district court found that Severson's request for leave of absence would not have been a reasonable accommodation.

The EEOC filed an *amicus* brief arguing that the extended leave was reasonable here because it was for a definite period of time, was requested in advance, and would have enabled the employee to return to work. The EEOC argued that the inquiry as to whether an accommodation is reasonable should not focus on the employee's ability to perform the essential functions of the job at the point of termination, but rather, at the end of the requested leave. Further, the EEOC warned that the district court's focus on Severson's abilities at the time of the termination "would effectively rule out leave as a possible accommodation under the ADA."

Seventh Circuit Ruling

The Seventh Circuit rejected the EEOC's argument. It held that Heartland was not obligated to provide ADA leave to Severson. Some of the Court's observations chip away at the EEOC's long-held enforcement stance that the ADA requires leave, even extended leave in some instances, as an accommodation.

First, the Court characterized the ADA as an "anti-discrimination" statute, not a "leave entitlement" statute. Second, even though the ADA's statutory text is "flexible" in that the examples of reasonable accommodations are illustrative and non-exhaustive, the statute is "concrete" in that it states a reasonable accommodation is one that enables an employee to "perform the essential functions" of

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the job. Third, a leave of absence generally excuses the inability to work, rather than facilitating work. Fourth, the EEOC confused "reasonable accommodation" with "effective accommodation." Finding support in the U.S. Supreme Court's *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 400 (2002), the Court noted that "effectiveness is a necessary but not sufficient condition for a reasonable accommodation." Fifth, the Court criticized the EEOC's position that the length of leave does not matter. It said, "If, as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave statute—in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term 'reasonable accommodation.'"

Leave May Still Be Required

Significantly, the Court did not hold that the ADA never requires leave as an accommodation. For example, it noted that a multi-month leave of absence is different from a leave of absence that is "intermittent," "a couple of days," or "even a couple of weeks." The Court reasoned that the latter examples are "analogous to a part-time or modified work schedule, two of the examples listed in the [ADA's statutory text.]" Accordingly, despite the observation that the ADA is not a leave entitlement statute, the Court left open the possibility that some forms of leave may be reasonable.

It is also worth noting that the Seventh Circuit was addressing Severson's reasonable accommodation challenge, not a claim for disparate treatment under the ADA (*e.g.,* where a company provided extended personal or other company leave to a non-disabled employee, but refused to provide the same amount of leave to a disabled employee).

Looking Forward

At least one other Court of Appeals, the Tenth Circuit, has squarely analyzed the EEOC's position on whether extended leave is a reasonable accommodation. *Hwang v. Kansas State University,* 753 F.3d 1159 (10th Cir. 2014) (lawsuit brought under Rehabilitation Act). In *Hwang,* Supreme Court Justice Neil Gorsuch, then a Tenth Circuit Judge, wrote for the Court that the EEOC's reasonable accommodation guidance did not support extending the plaintiff's leave of absence beyond the maximum six months provided by the defendant's leave policies. Like the Seventh Circuit, the Tenth Circuit ruled that the plaintiff was not able to show that she could perform the essential functions of her job. The Tenth Circuit also found that the plaintiff could not satisfy *Barnett*'s test of showing that her requested accommodation was reasonable.

The EEOC's most extensive pronouncement regarding leave as an accommodation is contained in its 2016 "Resource Document" entitled "Employer Provided Leave and the Americans with Disabilities Act." This document itself equivocates on whether leave is a reasonable accommodation. The Resource Document offers several examples of situations where employers would be expected to provide a leave of absence, unless the employer can show the leave of absence created an undue hardship. However, in a footnote, the EEOC states the examples "assume that the leave requested is 'reasonable' under *Barnett."* Essentially, the EEOC itself has left the door open to the *Barnett* analysis used by the Tenth and Seventh Circuits to find plaintiffs not entitled to leave as a reasonable accommodation.

It is uncertain at this time whether Severson will file a petition for review with the U.S. Supreme Court. For now, employers should continue to evaluate leave requests on a case-by-case basis and be mindful of laws that would apply in a given leave situation and the jurisdiction at issue. Additionally, as part of the interactive process when leave is involved, employers should consider options besides leave that could enable an employee to continue working, such as a transfer to a vacant alternative position or, in very limited circumstances, light duty (both issues touched on briefly in the *Severson* opinion). The *Severson* and *Hwang* rulings may deter the EEOC from pursuing ADA extended leave litigation in the Seventh and Tenth Circuits. However, the EEOC is not constrained by *Severson* and *Hwang* in the territories of the 10 other United States courts of appeal. Even within the Seventh Circuit, it would not be surprising for the EEOC to continue its ADA investigations directed at extended leave.

Please contact a Jackson Lewis attorney with any questions about this or other workplace developments.

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