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6 Lessons From Recent FMLA And ADA Decisions: Part 2

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This is the second in a two-part series discussing recent notable Family and Medical Leave Act and Americans with Disabilities Act cases. The cases decided this year continue to be interesting, confounding and unusual, and present lessons employers can and should learn about how to (or how not to) treat employees with various medical conditions.

The first part of this series discussed the following lessons: (1) recognizing when an employee provides notice; (2) understanding when a medical condition will be considered a serious health condition and/or a disability; and (3) understanding what constitutes an essential job function.

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Part two of this series concludes with the following lessons: (4) determining when lengthy leaves of absence are too long and may be denied; (5) understanding when an employee on leave may be asked to help with work and understanding other examples of FMLA interference; and (6) how to determine if an employee is abusing leave while not running afoul of the law. Employers who stay abreast of developments under the FMLA and ADA will go a long way to ensuring appropriate administrations of leaves and other accommodations, and hopefully minimizing legal risk in this challenging area.

4. Employers May Be Able to Stop the Clock on Lengthy Leaves of Absence

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Where an employee is not eligible for or has exhausted FMLA leave, employers must confront the issue of whether to grant additional leave as a reasonable accommodation under the ADA. The U.S. Equal Employment Opportunity Commission has long emphasized that unpaid leave is a form of reasonable accommodation when necessitated by an employee's disability. Unlike the FMLA, however, the ADA does not specifically identify leave as an accommodation, let alone provide any parameters indicating the amount of leave that may be required. Nevertheless, the EEOC's position is that medical leave of any duration will qualify as a reasonable accommodation provided that it is of finite duration and the employee is likely to be able to perform the job's essential function at the conclusion of the leave. Recently, the courts have begun to challenge this position, creating some hope among employers that they can put an end to protracted medical leaves.

Most notably, last year, in the landmark case of Severson v. Heartland Woodcraft Inc.,[1] the Seventh Circuit held that a multi-month continuous leave of absence was beyond the scope of reasonable accommodation. Raymond Severson worked for Heartland Woodcraft, a retail display fabricator, in a position requiring manual labor. In June 2013, Severson wrenched his back at home, aggravating a pre-existing condition and making it difficult for him to work. At that time, he began FMLA leave, periodically submitting notes from his treating physician. On week 10 of his leave, Severson informed Heartland that his condition had not improved and that he needed surgery, which was scheduled for the last day of his 12-week FMLA period. He requested an extension of leave to recover from the surgery, which would take approximately two to three months. Heartland denied the request for additional leave and terminated Severson's employment, inviting him to reapply when he recovered. Instead of doing so, however, Severson filed suit, alleging an ADA violation for failure to grant reasonable accommodation.

The district court awarded summary judgment in favor of Heartland on Severson's ADA claims, and the Seventh Circuit affirmed. While expressly leaving open the possibility that "a brief period of leave to deal with a medical condition" may be a reasonable accommodation in some circumstances, the court emphasized that a "medical leave spanning multiple months does not permit the employee to perform the essential functions of the job."[2] The court specifically rejected the EEOC's position (that the length of the leave does not matter), stating that this would transform the ADA "into a medical-leave statute — in effect, an open ended extension of the FMLA."[3] Such an interpretation, the court believed, was untenable and negated the word "reasonable" which was intended to modify and narrow the required "accommodations."

Less than a month after Severson, the Seventh Circuit echoed its position that the ADA is not a medical leave statute. Golden v. Indianapolis Housing Agency[4] involved Marytza Golden, a police officer, who was diagnosed with breast cancer, and required surgery and extended leave. After taking 16 weeks of medical leave, Golden was unable to return to work and her doctor had not provided an expected return-to-work date. Golden requested additional unpaid time off pursuant to city policy, which permitted leave for a specified period of time not to exceed six months. Her employer denied her request and terminated her employment. In an analysis comprised of only three sentences, the court affirmed the district court's decision granting summary judgment in favor of the employer. The court emphasized that while it sympathized with Golden, "an employee who requires a multi-month period of medical leave is not a qualified individual."[5]

While these two Seventh Circuit opinions are heartening, it is not yet time to celebrate. The reach of this new precedent is limited to employers in the Seventh Circuit (comprised of Illinois, Wisconsin and Indiana). In addition and unfortunately, on April 2, 2018, the U.S. Supreme Court denied review of Severson,[6] leaving the issue of lengthy leaves unsettled. There are a few generally accepted, guiding principles, however, that can prove helpful.

First, both the EEOC and the courts generally agree that employers are not required to grant indefinite leave as an accommodation under the ADA. Even vague requests for leave without any sound estimate of time needed for recovery have been found to be unreasonable.[7]

Second, even finite requests for relatively brief periods of leave will typically be found unreasonable where the employee's return-to-work date becomes a moving target or there is no evidence that the employee will be able to return to work at the conclusion of the fixed period of leave. The leave-after-leave cases are among the most frustrating for employers.

Such was the case in Ruiz v. Paradigmworks Group Inc.[8] After Corinna Ruiz fell and broke her ankle on Nov. 11, 2015, her doctor faxed a note to her employer, Paradigmworks Group Inc., or PGI, stating that Ruiz was temporarily, totally disabled through Nov. 20. The employer approved leave. On that date, however, Ruiz's physician sent another note, explaining that surgery was scheduled for Nov. 23, and Ruiz would be disabled through Feb. 22, 2016. The employer extended her leave. But, then on Feb. 18, Ruiz's physician again extended her return-to-work date through April 1. Instead of granting the additional period of leave, PGI terminated Ruiz's employment. Concluding that Ruiz's requested extension of leave was not a reasonable accommodation, the district court granted summary judgment in favor of PGI. According to the court, Ruiz offered no evidence that she would have been ready and able to return to work on April 1, "and based on her inability to return to work at the end of the periods stated in the two previous doctor's notes, PGI had no reason to believe that she would be able to return to work on April 1, 2016, based on the third doctor's note."[9]

Despite several recent notable victories, employers must still exercise care when considering an employee's request for leave as an accommodation. In the absence of any clear guidance from the Supreme Court, the state of the law remains uncertain. While employees don't necessarily have to give an exact return date for leave to be considered reasonable, they must still be able to provide a good estimate and explain why the leave will allow them to get back to work. When in doubt, employers should request clarity from the employee's medical provider concerning the specific nature of the medical condition at issue, the effectiveness of any treatment being received for that condition, and the ability of the employee to return to work at the conclusion of the leave. Employers should bear in mind that, in all cases, thoughtful and respectful communication is key.

5. Tread Carefully When Asking Employees on FMLA Leave to Do Anything That Could Be Construed as Work

In addition to obtaining periodic updates regarding leave status and intent to return to work, employers often need to speak to employees about work-related matters during their leaves of absence — especially in situations when the need for leave arose suddenly with little or no notice. The FMLA does not establish clear boundaries for contact between employers and employees while employees are out on FMLA leave. As a general matter, employees on leave should be fully relieved of all duties and should not be asked or allowed to work on any assignments. Any such requests could expose employers to liability for FMLA interference, among other things.

Of course the FMLA does not require that employees be left alone completely. The consensus among courts is that reasonable contact limited to inquiries about the location of files, passing on general institutional knowledge or providing status updates on ongoing work projects will not interfere with an employee's FMLA rights.[10] While asking employees on FMLA leave to field occasional calls and emails that relate to their jobs will generally not interfere with their statutory rights, employers should not request or expect employees to complete assignments or produce work product while out on leave. The determinative factor in this area is the nature of the request and the amount of effort required to respond. The more limited the request, the better an employer's ability to withstand an interference claim.[11]

Sometimes, an employee might actually prefer to complete tasks or otherwise do some amount of work on leave. The FMLA regulations permit voluntary and uncoerced acceptance of work by employees on leave, provided the acceptance is truly voluntary and not a condition of employment.[12] The issue of voluntary work during leave was recently addressed by the Fifth Circuit in D'Onofrio v. Vacation Publications Inc.[13]

In this case, Karen D'Onofrio, a sales representative, requested FMLA leave to care for her husband. At the time of her request, her employer, Vacation Publications, offered her two options: (1) she could take unpaid FMLA leave; or (2) she could log in remotely a few times per week and continue to service her existing accounts so that she could keep the commissions while on leave. She chose the latter option. Shortly after the leave began, however, Vacation learned that D'Onofrio was not responding to emails and voicemails. Ultimately, after receiving several complaints, Vacation brought D'Onofrio's clients in house, and locked her out of her email. D'Onofrio later learned that a Vacation manager mistakenly sent an email to 23 of D'Onofrio's clients, including her husband, stating that she was no longer working there. Although that email had been sent in error, D'Onofrio believed she had been terminated. When Vacation subsequently emailed her to ask if she planned to return to work at the end of her leave, D'Onofrio declined because she believed that she had already been terminated.

D'Onofrio sued, claiming among other things, that Vacation interfered with her FMLA rights by requiring her to perform work while on leave. The court disagreed, affirming summary judgment for Vacation on D'Onofrio's interference claim. According to the court, "giving employees the option to work while on leave does not constitute interference with FMLA rights so long as working while on leave is not a condition of continued employment."[14] Here, there was no evidence of coercion and D'Onofrio herself conceded that she was presented with two options and chose to continue servicing her existing clients.

While the court's decision certainly seems like a "no-brainer," the case nevertheless highlights the need to exercise caution when communicating with employees concerning the voluntary performance of work during a leave. Employers must emphasize that work is truly voluntary, that the decision is the employee's and the employer should document that any decision was made voluntarily and without coercion. Additionally, employers must be mindful that any time spent working by an employee on FMLA leave is likely to be compensable time and should not count against the employee's FMLA entitlement.

6. Overzealous Surveillance Can Land an Employer in the Hot Seat

An employer who acts to discourage or chill an employee's access to leave may be liable for FMLA interference — even if the employee ultimately takes all leave to which he/she is entitled.[15] For example, negative comments concerning the impact of an employee's leave, frequent calls from unrelenting managers seeking status updates, and demands for medical documentation beyond that which is permitted by the FMLA have all been found to be actionable interference.

Using surveillance to monitor employees during leave can likewise be problematic. Such was the case in Walker v. City of Pocatello.[16] The facts in Walker are ripe for a made-for-TV movie. John Walker had worked for the Pocatello Police Department for 21 years. At some undisclosed time in the recent past, Walker investigated several officers, including Scott Marchand, who were suspected of accessing pornography on their work computers. Though it is unclear what became of that investigation, the tables later turned and Marchand was promoted to chief of police, becoming Walker's boss. Walker then received an unfavorable review from Marchand and was later denied a promised promotion. When Walker took FMLA leave the following year, Marchand ordered secret video surveillance of him by setting up cameras in his neighbor's fields. Although Walker was never discharged and ultimately received all of the FMLA leave he requested, he filed suit asserting FMLA interference, among other things.

The district court denied the department's motion for summary judgement, holding that a plaintiff need not demonstrate the denial of benefits to establish an FMLA interference claim where an employer acts to discourage or "chill" an employee's use of leave. This was the quintessential case of "chill." There was no evidence casting doubt on the validity of Walker's medical certification, and the department declined to pursue a less invasive check on the FMLA request by obtaining a second opinion. Instead, the department opted for surveillance. The court held that "invasive surveillance of Walker's private activities would 'chill' his use of FMLA leave."[17]

Notwithstanding the Walker decision, when there is an honest, objective belief that an employee is abusing FMLA leave, courts generally support an employer's right to investigate. Surveillance can be a useful tool, but employers should proceed with caution. Before undertaking surveillance, employers should first consider other alternatives such as requesting a second opinion or recertification. Employers should also ensure that they have an objective reason for believing that the employee is abusing leave. This could be the case where an employer has been given inconsistent reasons for leave, notices a suspicious pattern or change in frequency of absences, or learns that the employee has engaged in conduct seemingly inconsistent with the asserted reason for leave.[18]

Employers should never rush to judgment in these cases. Instead, before taking adverse action, employers should conduct an investigation, seek any required clarification from the applicable health care provider, and ensure that they have reached a well-reasoned conclusion about the suspected fraud or dishonesty. Maintaining proper, contemporaneous documentation of all of the above is also imperative.

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[1] 872 F.3d 476 (7th Cir. 2017)

[2] 872 F.3d at 481

[3] Id. at 482

[4] 698 F. App'x 835 (7th Cir. 2017)

[5] Id. at 837

[6] See Severson v. Heartland Woodcraft Inc., 138 S. Ct. 1441 (2018)

[7] See e.g., Easter v. Ark. Children's Hosp., 2018 WL 4778045, at *3 (E.D. Ark. Oct. 3, 2018) (holding that request for an extension of leave by an employee who was then unable to work so that she could attend a doctor appointment several weeks later for further evaluation of her medical condition amounted to a request for indefinite leave as there was no indication when or if she would be able to return to perform the job's essential functions). See also Kieffer v. CPR Restoration & Cleaning Services LLC, 733 F. App'x 632 (3d Cir. 2018) (Holding that employee's request for "a few weeks or a few months" of leave was

essentially a request for indefinite leave, and therefore, not a reasonable accommodation as a matter of law.)

[8] 2018 WL 1010475 (S.D. Cal. Feb. 22, 2018)

[9] Id. at *3

[10] See e.g., Nowlin v. Nova Nordisk Inc., 2018 WL 1805141 (6th Cir. Feb. 28, 2018) (Affirming summary judgement for employer. While on leave, plaintiff, a sales representative, received two emails from her supervisor asking that she return damaged samples. Court held that while multiple attempts to contact employee on FMLA leave could constitute unlawful interference, two isolated emails did not rise to this level, especially because plaintiff not required to check email and could have ignored requests until her return to work.)

[11] See e.g., Hall v. Board of Education of the City of Chicago, 2018 WL 587151 (N.D. Ill. Jan. 29, 2018) (Denying employer motion for summary judgment. Calling teacher multiple times during FMLA leave to request emergency lesson plans and to direct that she post student grades was actionable interference.)

[12] See 29 C.F.R. §825.220(d) (stating that an employee's voluntary and uncoerced acceptance of a light duty assignment while recovering from a serious health condition does not violate the FMLA).

[13] 888 F.3d 197 (5th Cir. 2018)

[14] Id. at 210

[15] 29 C.F.R. §825.220(b)

[16] 2018 WL 650417 (D. Idaho Jan. 31, 2017)

[17] Id. at 6

[18] See e.g., Sharrow v. S.C. Johnson & Son Inc., 2018 WL 1762674, *8 (E.D. Mich. April 12, 2018) (Granting summary judgment for employer. Employer put employee on last chance agreement and ultimately discharged him after learning via Facebook that he had participated in a golf tournament and went river tubing during FMLA leave taken due to foot pain.)