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Unpaid Leave as a “Reasonable Accommodation”

By Jeffrey R. Townsend

Most human resource personnel understand that employers cannot discriminate against individuals with disabilities, and that the Americans with Disabilities Act (ADA) requires “reasonable accommodations” that enable a “qualified individual with a disability” to perform the essential functions of his job, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the employer. What constitutes a “reasonable accommodation” will depend on the needs of the qualified individual and the circumstances of the employer’s business.

One question that has arisen periodically over the past few years, and which I recently addressed with a client, is whether an unpaid leave of absence may constitute a reasonable accommodation under ADA. The ADA defines a “qualified individual with a disability” as “an individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.”

Intuitively, an individual who has a disability, which precludes him from being present at the work place, cannot possibly “perform” the essential functions of a job that requires attendance at the work place; hence, such an individual would not be qualified. However, the courts that have addressed the issue and have consistently held that unpaid leave of absence may be a reasonable accommodation for an individual with a disability. The answer to the question – “Is an unpaid leave of absence a reasonable accommodation?” – is . . . it depends.

Whether unpaid leave is a reasonable accommodation depends primarily on the duration of the employee’s proposed leave. The courts have generally held that the ADA does not require employers to grant “extended,” “indefinite” or “open-ended” periods of leave to employees. If an employee can establish that the leave is necessary to resolve the disability to the extent it will enable him to return to work and perform the essential functions of his job, within a limited period of time, then the requested leave would likely be a reasonable accommodation.

In my opinion, the matter was properly addressed, and the issue clearly explained by Judge Easterbrook of the Seventh Circuit in *Bryne v. Avon Products*. In that matter the employee/plaintiff, Mr. Byrne, suffered from depression and sleep disturbance, which resulted in his sleeping on the job. On November 17, 1998, after failing to meet with his supervisors to discuss his behavior, Mr. Byrne was fired. After two months of treatment, Mr. Byrne got his condition under control and requested his job back. When Avon refused to take him back, Mr. Byrne filed a lawsuit alleging violation of the ADA. He contended that Avon should have accommodated him by granting a two-month leave of absence, in other words, by allowing him not to work.

In delivering the opinion of the court, Judge Easterbrook stated that “accommodations” under the ADA are ones that will allow a person to perform the essential functions of the job and that “[n]ot working is not a means to

perform the job's essential functions. An inability to do the job's essential tasks means that the one is not 'qualified'; it does not mean that the employer must excuse the inability."

Judge Easterbrook did note that time off may be a reasonable accommodation for "intermittent" conditions where someone may need a few days off, and that part-time work may be appropriate for someone recovering from a medical condition. However, Judge Easterbrook concluded, "[i]nability to work for a multi-month period [in this case 2 months] removes a person from the class protected by the ADA." Thus, an employee who cannot be at work to perform the essential functions of the job is not a "qualified individual" under the ADA. Other courts that have also concluded that extended, lengthy, or indefinite leaves of absence are not required under the ADA.

On the other hand, some courts have ruled that leave requests of 2-4 weeks for a physician to treat a condition that will allow an employee to return to work, either full-time or part-time, are reasonable accommodations required by the ADA. For example, in *Criado v. IBM*, Elizabeth Criado was diagnosed with Attention Deficit Disorder. Her condition affected her work performance and her physician requested that she be given a one-month leave of absence to ameliorate her condition to the point where she could return to work as a productive employee. IBM, however, allowed her only a two-week leave of absence, and would not extend the leave despite her physician's request. At the end of her approved two-week leave, Ms. Criado did not return to work, and the following day she was terminated.

Following a jury trial Ms. Criado was awarded back pay, as well as \$250,000 in punitive damages. On appeal, the Court determined that Ms. Criado presented sufficient evidence that her leave would be temporary, and to allow her physician to design an effective treatment plan. The court concluded that under the circumstances such was a reasonable accommodation that IBM should have granted Ms. Criado the full one-month leave of absence.

In summary, the employee has the burden of identifying the necessary reasonable accommodation. A request for a leave of absence will be a reasonable accommodation, required under the ADA, if (1) it is supported by a physician's opinion that the leave is necessary to treat an employee's condition, and (2) the leave of absence will be for a limited, finite, period.

Employers Responsibility When Presented with a Request

As discussed above, it is the employee's burden to show that the requested leave is a reasonable accommodation. Accordingly, it would be a mistake to terminate an employee with a known disability without addressing the possibility of a leave of absence. As the employer's human resource personnel, your obligation to provide an accommodation to a qualified individual arises when you know, or should know, of the need for the accommodation.

Once an employee requests a leave of absence due to a disability, or you have reason to suspect such an accommodation may be warranted, you have an obligation to engage in a good faith "interactive process" with the employee to determine whether there is a reasonable accommodation that will enable the employee to perform the essential functions of the job. In this context, "good faith" means a sincere effort to work with the employee to find an accommodation that will allow him to perform the functions of his job. "Under the ADA, once the employer's responsibility to provide reasonable accommodation is triggered, the employer must engage with the employee in an 'interactive process' to determine the appropriate accommodation under the circumstances." *Haschmann v. Time Warner Entertainment Co.*

In situations where a leave of absence may be a reasonable accommodation, you should request that the employee provide a report from his personal physician specifying the accommodation that is needed, the expected duration of the leave of absence, and a prognosis for the employee's ability to perform his job functions upon return. The physician does not have to provide a specific date of return, but an estimated length of duration of the leave would likely suffice (i.e., Ms. Jones should remain off work for treatment for 3-5 weeks). The "interactive process" may require multiple conversations with the employee and/or his personal physician to determine the scope of leave. Additionally, if the duration is an estimate, as opposed to a date certain, the employer may require that the employee provide updates on his condition and anticipated date of return.

Failure to engage the employee in the "interactive process" could result in substantial penalties against an employer if it is determined that a leave of absence would have been a reasonable accommodation (i.e., it would have been for a short duration and would have enabled the employee to return to work.) The "interactive process" is a fundamental requirement of the ADA. "An employee's request for reasonable accommodation requires a great deal of communication between the employee and employer; both parties bear responsibility for determining what accommodation is necessary." Failure to engage in a good faith dialogue could be construed as intentional discrimination, and subject the employer to punitive damages.

At the end of the "interactive process" it may still be appropriate to terminate the employee if the leave is for an extended period of time (more than two months), or the physician is unable to give an estimated duration of the necessary leave, or if the physician is unable to give a prognosis of the employee's ability to perform the functions of his job upon expiration of the leave.

In the matter I recently handled, the ultimate decision was made by the human resource director to terminate the employee because his physician stated that the employee would not be able to return to work and perform the essential functions of his job for the foreseeable future. However, the decision to terminate was made only after a lengthy interactive process between the employer and the employee and his physician.

What this means for human resources personnel is that it is not enough to simply terminate an employee who says that he needs to miss 4-6 weeks of work. First, you need to find out why he needs to miss that much time, and whether it is for a "disability" under the ADA. If it is for disability, the employee needs to provide an opinion from a medical professional regarding the expected duration of leave, and a prognosis of the employee's ability to work upon return.

There may be situations where the employee is unable, or unwilling, to provide a medical opinion regarding the anticipated duration of leave. Because of the "mutual" obligation for determining a reasonable accommodation, you should not terminate the employee for failure to provide you with the report. Rather, the better course of direction would be to request the employee submit to a medical evaluation to determine the necessity and scope of a leave of absence. Under the ADA, an employer may inquire into an employee's medical condition if the inquiry is job-related and consistent with business necessity. The interactive process may require "a great deal of communication", but, in the long run, it will be cost productive in either retaining an employee, or in defending a discrimination and wrongful termination lawsuit.

Undue Hardship on the Employer

While extended, indefinite, leaves of absence will generally not be required for reasonable accommodation, a shorter, finite request for leave is not necessarily reasonable. You are required to make reasonable accommodations, unless you can demonstrate that the accommodation would impose an undue hardship on the operations of your business. Whether an accommodation is an "undue hardship" is to be determined on a case-by-case basis, and will depend in large part upon the employee's position, and on the financial ability of the business to keep the position unfilled. If the position is critical to the operation of the business, it may be an

“undue hardship” to leave the position unfilled for even one week. In that situation, you would have to consider reassignment of the employee to another vacant position, if one exists. If you transfer the employee to a lower level position upon return, you can pay the employee a salary commensurate with the new position; you do not have to pay him at his prior rate.

On the other hand, if you have kept similar positions open for others without disabilities while they took similar leaves, it would be difficult to argue that keeping the position open is an undue hardship on the business. Similarly, if the position is not critical, or if the position remains unfilled during the length the employees requested leave, a jury or court would likely find that granting a leave of absence would not have been an undue hardship on the business.

Conclusion

The ADA does not require that you grant an employee an extended leave of absence to deal with a disability. However, under certain circumstances, a leave of absence may be a required reasonable accommodation if it is for a limited time and will enable the employee to return and perform the essential functions of his job. Employees may be entitled to leave based on provisions other than the ADA, including the Family and Medical Leave Act (FMLA), or the employer’s own disability and leave policies.