Jeffrey Campolongo, The Legal Intelligencer

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Jeffrey Campolongo

When is an employer's "inflexible" attendance policy really just a sham to discriminate against disabled workers? That is the million-dollar question. Or, at least it was the question raised in two recent cases under the Americans with Disabilities Act (ADA).

In the first decision, handed down Feb. 11 by U.S. District Judge Sara L. Ellis of the Northern District of Illinois, the court examined whether the U.S. Equal Employment Opportunity Commission (EEOC) could challenge United Parcel Service Inc.'s (UPS) policy of terminating employees who were unable to return to

work after 12 months of leave on the grounds that such a policy constitutes an unlawful qualification standard under the ADA. (See *EEOC v. UPS*, 2014 BL 35887, N.D. Ill., No. 1:09-cv-05291, Feb. 11, 2014.) In doing so, the court rejected UPS's contention that the requirement is an attendance policy permissible under the ADA because regular attendance is an essential job function for its workforce.

The second decision, rendered May 29 by the U.S. Court of Appeals for the Tenth Circuit in *Hwang v. Kansas State University*, No. 12-3070, (10th Cir. May 29, 2014), in the opening sentence of the opinion, asked the following question: "Must an employer allow employees more than six months' sick leave or face liability under the Rehabilitation Act? Unsurprisingly, the answer is almost always no."

On the one hand is a court telling employers that firing a person for not being able to return to work after 12 months is not OK, while another court is saying that an employer need not allow the employee more than six months of leave under the Rehabilitation Act (and by extension, the ADA). Huh? This is one of those head-scratching moments that we so often encounter when litigating disability discrimination claims throughout the federal court system.

Upon second glance, however, there are differing issues at play in both the *UPS* and *Hwang* cases. In order to understand the legal issues, we have to first understand the facts.

THE UPS BACKGROUND

In the *UPS* case, it was contended by the EEOC in its second amended complaint that UPS maintained a leave policy since 2002 providing that employees will be "administratively separated from employment" after 12 months of leave; and that the policy is applied to qualified individuals with disabilities who can perform the essential functions of their jobs with or without a reasonable accommodation, according to the opinion.

The EEOC initially sued UPS in August 2009 on behalf of Trudi Momsen and an unidentified class of similarly situated former UPS employees. According to the court's decision, Momsen, an employee of UPS since 1990, was terminated in March 2007 after returning from a 12-month medical leave of absence, the opinion said. After returning in February 2007, she required a cane to walk and requested reasonable accommodations, such as a hand cart, but UPS did not provide her with any accommodations. Momsen then injured herself and took additional time off to receive therapeutic treatment, the opinion said. Instead of granting Momsen's request for additional medical leave, however, UPS fired her pursuant to its 12-month leave policy. Mavis Luvert, another employee, was also fired after going on disability leave for 12 months.

ANALYSIS OF THE 12-MONTH LEAVE POLICY

The EEOC alleged that in terminating Momsen, Luvert and the others pursuant to its inflexible, 12-month leave policy, UPS imposed a job retention standard made illegal by the ADA. It is clear from the statute that the ADA prohibits an employer from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity."

In an interesting twist of legal strategy, the EEOC contended that UPS's leave policy, which acts as a 100 percent healed requirement, operates as a qualification standard in violation of Section 12112(b)(6), the

opinion said. The opinion quoted the second amended complaint wherein the EEOC alleged, "In order for UPS employees to return to work from their medical leave, they had to meet a standard of fitness which required them to work without an additional accommodation, in violation of the ADA." UPS countered by arguing that this is irrelevant because "the ability to regularly attend work and not miss multiple months is an essential job function and not a qualification standard, employment test or other selection criteria."

The significance to UPS was that if the 12-month leave policy was indeed a "100 percent healed policy," then according to the Seventh Circuit, when applied to a qualified individual with a disability, such a policy is per se impermissible because it "prevents individualized assessment" and thus "necessarily operates to exclude disabled people that are qualified to work," as in *Steffen v. Donahoe*, 680 F.3d 738, 748 (7th Cir. 2012).

The court found that the ADA regulations define qualification standards as "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." An essential job function, on the other hand, is defined as "the fundamental job duties of the employment position the individual with a disability holds or desires," the court said.

UPS was correct in arguing that regular attendance can be an essential job requirement; however, the EEOC's claim was not "premised on attendance but rather on UPS's imposition of a 100 percent healed requirement on those seeking to return to work." According to the decision, because such a requirement falls within the definition of a "qualification standard," and the EEOC alleged that the policy applies to qualified individuals with disabilities, the EEOC was permitted to proceed with its Section 12112(b)(6) claim.

THE HWANG BACKGROUND

Turning to the *Hwang* case, the Tenth Circuit explained that, by all accounts, Grace Hwang, an assistant professor at Kansas State University, was a "good teacher suffering a wretched year." She had signed a written one-year contract to teach classes over the fall, spring and summer academic terms. However, before the fall term began, Hwang received news that she had cancer and needed treatment. Per the opinion, Hwang sought and the university gave her a six-month (paid) leave of absence. As that period drew to a close, Hwang's doctor advised her to seek more time off, the opinion said. She asked the university to extend her leave through the end of the spring semester, promising to return in time for the summer term. But according to Hwang's complaint, the university refused, explaining that it had an inflexible policy allowing no more than six months' sick leave.

ANALYSIS OF THE SIX-MONTH LEAVE RESTRICTION

According to the decision, Hwang contended that the failure to extend her sick leave, and the university's application of its inflexible six-month leave limitation, amounted to a failure to accommodate under the ADA. The appellate court declared that there was no question that the plaintiff was unable to perform the essential functions of her job even with a reasonable accommodation. "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."

The court further questioned what separates an absence that enables an employee to discharge the essential duties of her job from an absence that renders the employee unable to discharge those essential duties. The answer, according to the Tenth Circuit, usually depends on factors like the duties essential to the job in question, the nature and length of the leave sought, and the impact "on fellow employees." It was difficult for the circuit court to conceive that requiring so much latitude from an employer would qualify as a reasonable accommodation.

With respect to the inflexibility of leave policies, the court made it clear not to suggest that such policies are categorically immune to attack. Policies providing unreasonably short sick-leave periods, for example, may not provide accommodation enough for employees who are capable of performing their jobs' essential functions with just a little more forgiven absence. Importantly, though, if it turns out that an employer's supposedly inflexible sick leave policy is really a sham and other employees are routinely granted dispensations that disabled employees are not, an inference of discrimination will naturally arise.

THE TAKEAWAY

As discussed above, the holdings in the *UPS* and *Hwang* cases are not necessarily in as stark a contrast as it might seem. For example, the UPS 12-month policy, as inflexible as it was alleged to be, was not challenged for violating the reasonable accommodation provisions of the act, whereas the six-month leave policy in *Hwang* was directly challenged on reasonable accommodation grounds. It is difficult to predict how the Tenth Circuit would have ruled if it was confronted with a similar challenge to that posed in the *UPS* case. Given the court's reticence to pay significant deference to the EEOC's own regulations, it is conceivable that even a Section 12112(b)(6) challenge would have failed before the Tenth Circuit.

Moving forward, the application of inflexible leave policies will provide fertile ground for litigation. What many of us once believed was a well-settled doctrine prohibiting the employer's use of such rote leave policies, has thrown those of us in the ADA world a curveball. We will keep an eye out for further developments on the *UPS* case from Chicago and this column will monitor and keep readers apprised of any similar holdings in our area, as well.

***Jeffrey Campolongo** is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.* •

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