The Legal Intelligencer

Employment Law

When Employee's FMLA Leave Is Over, the ADA Kicks In

Jeffrey Campolongo, The Legal Intelligencer

May 22, 2015

Having just returned from speaking at the Pennsylvania Bar Institute's 21st annual Employment Law Institute, the No. 1 question on the mind of employers was how to deal with an employee's request for leave under the Americans with Disabilities Act once the employee's Family and Medical Leave Act leave has expired. The answer, like most reasonable accommodation issues, is it depends. Courts throughout the country have consistently held that unpaid leave is a form of reasonable accommodation. Unpaid leave may be an appropriate reasonable accommodation when an individual expects to return to work after getting treatment for a disability, recovering from an illness, or taking some other action in connection with his or her disability.

The U.S. Equal Employment Opportunity Commission has consistently taken the position that leave can be a reasonable accommodation. (See 29 C.F.R. Section 1630.2(o); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (Oct. 17, 2002) at Question 16.) Likewise, the Department of Labor regulations state that a reasonable accommodation may require an employer "to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment of hospitalization." Further, the U.S. Court of Appeals for the Third Circuit has held that a leave of absence can be a reasonable accommodation under the ADA, reasoning that a reasonable accommodation at the present time would enable the employee to perform her essential job functions sometime in the near future, in *Conoshenti v. Public Service Electric & Gas*, 364 F.3d 135, 151 (3d Cir. 2004), citing *Criado v. IBM*, 145 F.3d 437, 444 (1st Cir. 1998).

Accordingly, employees who are unable to return to work after the expiration of their FMLA leave due to their own serious health condition may be entitled to additional leave under the ADA. In addition, employees who are not eligible for FMLA leave may nevertheless be entitled to leave as a reasonable accommodation. The tricky issue, however, is when the request for leave is for an indefinite period of time, particularly where the employee presents no evidence of the expected duration of the impairment and no indication of a favorable prognosis. (See *Fogleman v. Greater Hazleton Health Alliance*, 122 Fed. App'x 581, 585 (3d Cir. Dec. 23, 2004) (unpublished).) How much leave an individual must be given as a reasonable accommodation is a fact-specific inquiry

depending on whether a particular amount of time imposes an undue hardship on the employer and on whether the individual is still considered "qualified."

A recent holding from the U.S. District Court for the Eastern District of Pennsylvania emphasized this very point. In *Aspen v. Wilhelmsen Ships Service* (E.D. Pa. Mar. 9, 2015), the plaintiff worked as a shipping agent for the employer for seven years until he was injured on the job when a ramp fell on his foot. John M. Aspen sustained "crushing injuries to his left foot which resulted in the amputation of all five toes and a portion of the foot itself." After being out of work for approximately eight weeks, Aspen learned that his employment was being terminated out of "business necessity."

According to the opinion, the employer eliminated Aspen's position so that it could "afford to hire a ship's agent who could better service the Baltimore area and, among other things, relieve the strain placed on the understaffed Folcroft facility while the plaintiff was out on medical leave." After his termination, Aspen requested an eight-week extension of his medical leave, which the employer denied. At the time of Aspen's termination, his doctor had not yet released him to return to work. For that reason, the employer argued that the plaintiff could not perform the essential functions of his position because he did not know, at that point, if or when he would be medically cleared to return to work. This eight-week request was essentially a request for indefinite leave, according to the employer.

The court explained that this conclusion was not supported by the actual facts. According to emails and documents received by the employer, there was a suggestion by the plaintiff's treating doctor that Aspen could possibly be released to return to work within two weeks if his wound healed well and quickly. Accordingly, there was a significant possibility that the plaintiff's doctor would return him to work "within a few weeks—albeit with restrictions. Moreover, when the plaintiff did submit a request for an extension of medical leave, it was for a period of eight weeks," the opinion said. Per the opinion, these circumstances "simply do not bespeak indefinite leave."

There were two other important issues discussed by the court in dismissing the employer's motion for summary judgment. The first related to the employer's argument that the plaintiff was not even cleared to return to work until several months after his termination; therefore, this shows the request for leave was indefinite. The court opined that the "crucial question here is not how long it actually took the plaintiff to recover, but what the defendant knew and expected of the plaintiff's condition ex ante—at the time of the decision to terminate him without accommodation." Since an accommodation in the form of a finite extension of medical leave was possible, precisely how the plaintiff's recovery actually played out "is simply irrelevant." What matters is whether the plaintiff was a qualified individual within the meaning of the ADA at the time of his termination.

The second major issue explained by the court related to the timeliness of the plaintiff's request for accommodation, having come 12 days after he was already terminated. To that point, the court re-emphasized the long-standing principle that the employer must have enough information to know of "both the disability and desire for an accommodation ... or circumstances must at least be sufficient to cause a reasonable employer to make appropriate inquiries about the possible need for an accommodation." Here, the court said that the employer was aware of Aspen's disabled condition, if not based on multiple emails about it, then as it was expressed in his desire to remain employed, which was conveyed in his request for extended leave while he finished recovering. This was "sufficient to cause a reasonable employer to make appropriate inquiries about the possible need for an accommodation," the opinion said.

Employers should evaluate whether leave as a reasonable accommodation is possible based on the facts specifically related to the employee's situation. For example, does the employee have a definite return to work date supported by medical documentation? If so, an employer should evaluate whether such leave would be reasonable under the circumstances or whether it imposes an undue hardship on the employer. If the employee does not have a return to work date, then a reasonable accommodation may not be possible. If the return date is unknown, but not necessarily indefinite, then it would make sense for the employer to do what it can to accommodate the employee.

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.* •
