MURTHA CULLINA

NEWS ALERT

LABOR & EMPLOYMENT

Indefinite Leave As Reasonable Accommodation?

By Barry J. Waters | February 27, 2017

A February 5, 2017 decision of a Massachusetts Commission Against Discrimination (MCAD) Hearing Officer tortures common sense by awarding damages against the employer for failure to accommodate a disability by extending FMLA for a period of time that was anything but "definite." MCAD v. Country Bank for Savings, Docket No. 10-SEM-02769 (Judith E. Kaplan, Hearing Officer).

THE EVIDENCE

The Complainant, Amanda LaPete (LaPete) had worked for Country Bank as a loan coordinator for nearly seven years when she notified her supervisor in March 2009 that she was pregnant with a due date of October 4, 2009. On September 8, LaPete's water broke, she was transported to the hospital by ambulance, and she had an emergency C-Section. She remained in the hospital until September 12. She testified at the hearing that once home, she: had difficulty concentrating, was unable to perform her usual household tasks and had insomnia; engaged in a pattern of alternately binge eating and fasting; showered infrequently and sat on her couch crying for long periods of time. Her primary physician diagnosed her with post-partum depression, prescribed Zoloft and referred her to a therapist, whom she began seeing in November 2009. Sometime in October, LaPete notified her employer that she would not be able to return to work on November 30, when her FMLA would be exhausted and she was scheduled to return to work. She saw the therapist on December 1, who diagnosed LaPete with "major post-partum depression and anxiety." As of December 10, the therapist could not determine the duration of LaPete's condition and could not predict an end date to her depression and anxiety. Country Bank received a note from the therapist stating that LaPete would be out indefinitely. On December 11, the Bank's Senior Vice President of Human Resources sent LaPete a letter stating that if she could not return to work by December 21, she would be terminated.

LaPete testified that she called her supervisor (*not* the Vice President of Human Resources) on December 17 or 18 and said she "was improving and should be back to work by mid-January 2010" and that her supervisor allegedly said that "she would look into it." The Hearing Officer credited this testimony against the supervisor's testimony. On December 17, an attorney representing LaPete sent a letter to the Vice President of Human Resources asking for an extension of the LOA but gave

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no return date. The lawyer asked the Bank to hold off until after LaPete saw her therapist in January when the therapist "would advise the Bank whether the therapist could determine a return to work date." On December 22, an attorney representing the Bank sent LaPete's lawyer a letter stating that LaPete had been terminated because she had not returned to work by December 21 and had not provided the Bank with a definite return to work date.

THE RULING: FAILURE TO PROVIDE A REASONABLE ACCOMMODATION

Incredibly, on these facts, the Hearing Officer found that the Bank had failed to engage in the interactive process, that the evidence supported the conclusion that LaPete intended to return to work "by mid-January" and that the Bank should have extended the leave to at least January 14, 2010, when LaPete had a scheduled appointment with her therapist. "At that time it would be determined whether she was able to return to work in mid-January." The Hearing Officer then reached the astonishing conclusion that although "the prognosis for her recovery was still unclear" at the time the Bank terminated LaPete, "she was not seeking an indefinite or unreasonable extension of her leave." Gratuitously, the Hearing Officer added that if by mid-January LaPete "had no definite prognosis for improvement and no date certain to return to work, Respondent's obligation to continue providing further accommodation *would have more likely have ceased*." (Emphasis Added.)

UNDUE BURDEN

Having found that the requested accommodation was reasonable, the Hearing Officer faulted the Bank for failing to present any evidence of hardship or undue burden to its business in granting LaPete "her reasonable request for a brief extension of her medical leave so as to re-evaluate her condition and determine a date certain for her return."

REMEDIES

LaPete's salary at the Bank was $31,715.40. In 2010, she collected $22,100 in unemployment compensation benefits and earned $90 as a substitute teacher. In 2011, she got a job at a salary higher than at the Bank and in 2013 she earned $41,007.50. The Hearing Officer awarded LaPete $12,197.57 in back pay and $50,000 in emotional distress damages. The statutory interest rate in Massachusetts is 12%, measured from the time of the complaint. In this case, LaPete filed her complaint on October 21, 2010, so interest had accrued for over six years at the time of the decision of the Hearing Officer, essentially doubling the award.

DIFFERENT RESULT UNDER RECENT EEOC GUIDANCE ON EMPLOYER-PROVIDED LEAVE?

On May 9, 2016, the EEOC issued a guidance on employer-provided leave and the ADA. In it, the EEOC states that in assessing whether to grant leave as a reasonable accommodation (including extending an FMLA leave otherwise exhausted), an employer may consider whether the leave would cause an undue hardship. The guidance states that "undue hardship" should be evaluated on a case-by-case basis and that in assessing undue hardship, the employer may take into account leave already taken, including the time taken under FMLA and/or leave already granted as a reasonable accommodation.

The guidance acknowledges that a request for leave may not have a definite return date and instead might provide an approximate date (e.g., "sometime during the end of September" or "around October 1") or a range of dates (e.g., "between September 1 and September 30"); in those cases, the EEOC says that the employer should consider the hardship such a request might impose. On the other hand, the EEOC guidance states: "However, indefinite leave – meaning that an employee cannot say whether she will return to work at all – will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation."

The EEOC guidance suggests that an "indefinite" leave is only one in which the employee communicates that she does not know "whether" she will return to work. Most management lawyers would challenge this very narrow articulation of "indefinite." The EEOC guidance suggests that there is a category of leave that is neither definite nor indefinite. Common sense says that a statement that the employee will return "between September 1 and September 30" is infinite. At best, the employer would have to decide whether it could accommodate the September 30 date because it cannot count on the employee returning sooner.

DIFFERENT RESULT IN COURT?

While each case has nuanced facts that affect the result, in general, the courts have ruled that an indefinite leave is not limited to the situation where the employee does not know if she will be able to return to work but also includes a failure to state when the employee is expected to return to work. See Minter v. District of Columbia, 809 F. 3d 66 (D.C. Cir. 2015), *rehearing en banc denied* June 29, 2016 (summary judgment affirmed for employer where employee had been out for three months, doctor stated that she would be out "indefinitely" but employee stated that she "hope[d] to return by the beginning of September, depending on present treatment").

TAKE-AWAYS:

1. It is hard to imagine an employer being more accommodating than Country Bank was in this case. It extended LaPete's leave for three weeks after the exhaustion of her FMLA leave and was willing to entertain additional leave provided it had a definite return to work date.
2. The Bank was clearly getting "played" here. Had it waited nearly four more weeks for LaPete's January 14 therapist appointment, there was not even a vague indication of whether LaPete would have been released to return to work at that time or at any time in the near future. When is enough enough?
3. Make sure to insist that all requests for leave, including extensions of leave, be in writing, and that they be made to one particular manager, preferably a human resources professional.
4. When an expected return date is provided, unforeseen circumstances may arise that might argue in favor of a further extension. Each situation should be evaluated in light of the new circumstances – taking into account, as the EEOC guidance states, the amount of leave already taken.
5. No one can predict with certainty how a judge or hearing officer will apply the law to the particular facts of any case. Determinations in a state agency, in particular, may be difficult to overturn on appeal.
6. Seek legal counsel and review the facts carefully, particularly as they relate to the "interactive process" and discuss whatever hardship the LOA is causing.

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