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NEWS ALERT

LABOR & EMPLOYMENT

Indefinite Leave Not A Reasonable Accommodation Under Connecticut Law

By Barry J. Waters | September 11, 2017

On September 5, 2017, the Connecticut Appellate Court affirmed the Superior Court's entry of summary judgment in favor of the employer in a case involving the thorny issue of whether an extended leave of absence is a reasonable accommodation. *Thomson v. Department of Social Services*, 176 Conn. App. 122, AC 38851. Both the Superior Court and the Appellate Court rejected the employee's claim that her employer had failed to accommodate her disability in terminating her employment while on extended leave after she had exhausted FMLA leave. This decision is an important victory for employers. It makes a strong statement that employers need not grant open-ended leaves of absence under state law. On the facts presented, the court concluded that the employee was not entitled to proceed to trial. Summary judgment decisions in the employer's favor in state court are rare. Rarer still is the affirmation of the Appellate Court on an issue that vexes human resources departments around the state.

The court's analysis reaffirmed the fundamental principal that "attendance is essential to satisfying even the most basic of job functions." It also reaffirmed the principle that a leave of absence beyond the applicable FMLA period *may* be required if the employee's request for extension has some definition to it and is reasonable under the circumstances. If the employee comes forward with a reasonable request, the employer must engage in the "interactive process" to evaluate the request and/or explore alternative accommodations. If the employer denies the request, and that decision is challenged, typically the employer must show that the requested extension would impose an "undue hardship" on its business. Significantly, in this case, the court concluded that the failure to provide a relatively definitive timetable for returning to work rendered the accommodation request unreasonable. If the requested accommodation is unreasonable, the employer need not go further and is relieved of its burden of demonstrating an "undue hardship." Here, the employee's doctor stated that: (1) she would not be able to return to work "until reevaluated"; (2) her inability to return to work was "ongoing"; and (3) she should experience "significant improvement" in one to two months. The employee never provided any further clarification of her status. On these facts, the court held that the employer was justified in terminating her employment for failure to return to work after exhausting all paid and unpaid leave.

This decision establishes the outer limits of an employer's obligation to accommodate an employee's extended leave, decided under state law but generally consistent with federal law. But it does not relieve employers of the obligation of giving due consideration to requests for extended leave. Circumstances vary widely based on the particular (and sometimes peculiar) facts. In most cases, the Company's Human Resources professional needs to prod the affected manager into articulating the particular hardship the Company will suffer if the extension is granted, and then challenge the support for the claim of hardship.

THE EEOC GUIDANCE

On May 9, 2016, the EEOC issued its 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 "indefinite". 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.

FEDERAL COURTS

While each case has nuanced facts that affect the result, in general, the federal 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, *e.g.*, *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. Make sure to insist that all requests for leave, including extensions of leave, be in writing, and that they be made to one designated manager, preferably a human resources professional.
2. 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.
3. 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.
4. 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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