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MORBIDLY OBESE EMPLOYEE ENTITLED TO LEAVE OF ABSENCE AS REASONABLE ACCOMMODATION

By Barry J. Waters

A case decided by a Massachusetts Commission Against Discrimination Hearing Officer on September 21, 2016 serves as a reminder that, even if an employee is not entitled to paid time-off, granting leave for medical reasons may be a reasonable accommodation under the ADA and state anti-discrimination laws. Under Massachusetts law, individuals (here, the owner of an S Corporation) may be personally liable for failure to accommodate. *M.C.A.D and Carlos Santos v. X-treme Silkscreen and Ronald Caliri*, MCAD Docket No.12-BEM—00055.

The case is somewhat unusual in that X-treme had only six employees at the time of the complaint, January 11, 2012, and therefore was not subject to the FMLA. However, as of July 1, 2015, Massachusetts has a Sick Pay statute which covers *all* employers: employers with more than eleven employees must provide paid sick leave; those with eleven or less can provide unpaid sick leave. Had the law been in effect at the time of Carlos Santos' complaint, X-treme would have been required to provide Santos with unpaid sick leave. According to the Hearing Officer, X-treme owed him leave nonetheless – just not under FMLA or the Sick Pay Act.

X-treme is in the business of designing and producing custom silk screening and embroidery products. Santos worked there as an embroidery machine operator from 2001 until November 28, 2011, when Ronald Caliri terminated Santos for errors he made on a significant order. The termination occurred the next working day after Santos, who was 5'5" tall and weighed 280 pounds, handed Caliri a note from a surgeon with the Weight Center at Massachusetts General Hospital stating that Santos was scheduled for gastric by-pass surgery on December 20, 2011. The note stated that Santos would require six weeks of recuperation following surgery, with an anticipated return to work date of February 1, 2012. Caliri was aware that Santos had diabetes, was overweight and had been diagnosed with an aneurysm.

Mixed Motive

Where two or more reasons contribute to an adverse employment decision, and the employee proves that a proscribed factor played a motivating part in the adverse employment action, the employer must demonstrate that it would have made the

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same decision even without the illegitimate motive. Here, the Hearing Officer concluded that the decision to terminate Santos "may have resulted in part from concerns about his performance", but she concluded that the "primary reason" for his termination was his request for a leave of absence.

Leave of Absence as a Reasonable Accommodation

Citing Massachusetts law, the Hearing Officer stated that once Santos had identified his disability and had requested an accommodation, it was incumbent upon X-treme to engage in an interactive dialogue and determine if the accommodation sought was reasonable. X-treme did not engage in any dialogue before terminating Santos. In fact, Santos testified that Caliri "took the letter, read it, crumpled it up and threw it in the waste basket".

Under both Massachusetts and federal law, a leave of absence may be a reasonable accommodation, even where, as here, the employee is not otherwise entitled to a leave of absence by statute or employer benefit plan. Similarly, an extension of an otherwise exhausted leave of absence may be a reasonable accommodation. Where, as here, a definite time has been established for the employee's return to work, it is more likely that the leave request will be considered a reasonable accommodation. Here, the surgeon's note specifically stated that Santos would be able to return to work six weeks after surgery. In fact, Santos did undergo the surgery and six weeks later he was released to return to normal day-to-day activities.

Undue Hardship

The MCAD, the EEOC, CHRO and courts are likely to consider a leave, or extension of leave, of limited and finite duration a reasonable accommodation unless the employer can demonstrate that granting it would constitute an "undue hardship". The factors in determining undue hardship include: (1) the overall size of the employer's business, including number of employees, size of budget or available assets; (2) type of operation, including the composition and structure of the workforce; and (3) the nature and costs of the accommodation needed.

Here, given that X-treme had only six employees, "undue hardship" was an obvious defense. However, there was testimony that business was slow in December and January and the Hearing Officer apparently concluded that X-treme could have accommodated Santos without hardship, notwithstanding the testimony that X-treme very quickly advertised for and found a replacement for Santos. X-treme's failure to even consider the leave request, and the testimony that Caliri crumbled up the doctor's note and threw it in the basket in front of Santos, undoubtedly influenced the Hearing Officer's judgment on the issue of "undue hardship".

Is Obesity a Disability?

The Centers for Disease Control and Prevention estimates that over one-third of American adults are obese (defined as a body mass index of 30 or more). A BMI of 40 or more constitutes morbid obesity. The X-treme case did not expressly address whether and under what circumstances an obese or morbidly obese person may have a disability.

In a 1997 decision, the Second Circuit affirmed summary judgment in favor of the City of Meriden where a firefighter whose weight fluctuated between 217 and 247 pounds, did not meet maximum acceptable weight requirements. The Court concluded that obesity, except in special cases where the obesity relates to a physiological disorder, is not a "physical impairment."

Since the enactment of the ADAAA in 2008, there have been conflicting opinions on when obesity may be considered a disability. Just yesterday, on October 4, 2016, the United States Supreme Court declined to review an 8th Circuit decision affirming summary judgment for the employer who refused to hire an applicant for a safety sensitive position because, at 5'10" and over 280lbs, his BMI was over 40. While he had once been diagnosed as "pre-diabetic" and had taken appetite-suppressant medication, he denied suffering from any medical impairment or condition. Despite the expansive definition of "disability" in the ADAAA, the 8th Circuit noted that Congress had not altered the definition of "physical impairment" and, therefore, obesity qualifies as a physical impairment only if it results from an underlying physiological disorder or impairment. According to the 8th Circuit, the ADA does not prohibit discrimination based on a perception that a physical characteristic – as opposed to a physical impairment – may eventually lead to a physical impairment sometime in the future. Morriss v. BNSF Railway Co., 817 F.3d 1104 (8th Cir.), cert. denied., S.C. #16-233 (2016).

Take-aways:

1. Don't assume that when an employee exhausts FMLA or state-law leave protections, you can simply ignore further requests for leave.

2. Don't assume that an employee who does not qualify for any leave by statute or under a company benefit plan has no right to a leave of absence. For example, a new employee who has not yet qualified for any statutory protection or employee benefit, may nonetheless be entitled to a leave of absence as a reasonable accommodation.

3. Consult medical literature, and an expert as necessary, to determine whether the employee's condition may meet the definition of disability. Obesity is a good example of a condition that may or may not constitute a disability, depending on related health factors.

4. When an otherwise ineligible employee requests a leave, determine whether that employee may have a disability or handicap (MA law), and err on the side of assuming that the employee falls into that protected category.

5. Request information about the nature of the disability, the need for the leave, the need for a particular timing if surgery has been recommended, and the anticipated return to work date. Nail down any vague details with the employee and/or the treating physician as best as possible.

6. Explore alternatives that would avoid the need for a leave (part-time work, temporary reassignment, work-from-home, additional rest breaks, accommodations for medical appointments). This is part of the "interactive process".

7. Discuss with management what hardship, if any, the leave would pose. Press management for its back-up plan for getting the work done in the employee's absence – whether or not the leave is granted. Oftentimes, the job could not be filled in the timeframe at issue, or the work could be accomplished through reassignment or the hiring of a temporary worker. Recognizing management's legitimate frustration with the alternatives, make sure there is a bona fide hardship before denying the leave.

8. If the leave is granted, and the temporary employee who is filling in is stellar, discourage management from even thinking it can replace the employee on leave with the stellar replacement.

9. If the leave is denied, prepare a carefully-considered communication to the employee as to the reasons the leave would cause an undue hardship and cannot be granted.

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