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Employers Get 'Holy Grail' Ruling on Leave as Job Accommodation

By Patrick Dorrian

Snapshot

- Wisconsin employer didn't violate law when it fired disabled worker who wanted 2-3 months' more leave
- Federal disability-rights law is anti-bias, not leave-entitlement statute, Seventh Circuit says in blow to EEOC
- Decision sets parameters on what one attorney calls 'huge issue' for workplace, may influence other courts

An injured or ill employee isn't ready to return to work after using all of her federally protected medical leave. Is the worker entitled to take more leave as an accommodation for her disability? If so, how much more?

Employers may be required to allow workers to take a couple of extra days or weeks off, but long-term medical leave spanning months isn't required under federal disability rights law, according to a federal appeals court in Chicago.

The Family and Medical Leave Act is the federal law that controls the rights of eligible workers to take job-protected medical leave, the court said. The Americans with Disabilities Act, which covers when a disabled worker may get a job accommodation for a medical condition, "is an anti-discrimination statute, not a medical leave entitlement" (*Severson v. Heartland Woodcraft, Inc.*, 2017 BL 332032, 7th Cir., No. 15-3754, 9/20/17).

The ruling by the U.S. Court of Appeals for the Seventh Circuit is "a big deal" and "a holy grail for employers," a management attorney told Bloomberg BNA. How much, if any, leave a sick or injured employee may be entitled to is an issue employers struggle with regularly, Franczek Radelet P.C.'s Jeff Nowak said.

"Courts have danced around the issue of leave as a reasonable accommodation for a long time" and previously had failed to provide "clear parameters" for granting or denying extended leave requests, he said. This ruling may influence other courts, Nowak said.

But the Seventh Circuit's holding seemingly flies in the face of the Equal Employment Opportunity Commission's crackdown on employer "maximum leave" and similar policies. The agency has long maintained the view that such policies violate the Americans with Disabilities Act, because under them, employers fail to at least consider a type of potential accommodation that may help keep a disabled employee in the workforce until she's able to return to work or resume full duties.

The EEOC has sued countless employers over the years for maintaining what it believes are unlawfully inflexible employee leave policies. And not without success. United Parcel Service Inc., for example, in August agreed to pay $1.7 million to settle a nationwide lawsuit by the agency challenging the delivery company's policy of terminating workers who can't return from medical leave after 12 months.

Blow to EEOC's Position?

The EEOC, which appeared as an amicus in the case, told Bloomberg BNA that it's "disappointed" by the ruling. The Seventh Circuit seemed concerned about the length of leave sought by Heartland Woodcraft Inc. employee Raymond Severson, said Jennifer S. Goldstein, an appellate attorney with the EEOC.

Severson wanted two to three more months of leave to recover from back surgery, which he had on the day his 12 weeks of federally protected leave under the FMLA expired. "We thought that was reasonable" under the circumstances and should have shifted the burden to the employer to show that granting the leave would have imposed an undue hardship on its business, Goldstein said. But the court never got into the undue-hardship part of the analysis, she said.

The EEOC's position that multi-month leaves of absences may be required under the ADA is off-base and would effectively rewrite the law to task employers with providing disabled workers with "effective" accommodations, not just reasonable ones, the Seventh Circuit said in the Sept. 20 ruling. According to the EEOC, leave or extended leave as a job accommodation should be considered when a worker's doctor is able to estimate a specific endpoint for the leave, the employee asks for the leave ahead of time, and the leave will likely enable the employee to fully perform her job afterward.

The decision "signals to the EEOC that length of post-FMLA leave matters under the ADA," Nowak said. It also gives employers, or at least those in the states that make up the Seventh Circuit—Illinois, Indiana, and Wisconsin, "a clear road map" for how to handle requests for leave or extended leave under the ADA, he said. The Chicago-based Nowak is co-chair of Franczek Radelet's labor and employment practice group.

"It's been frustrating to employers that the EEOC has taken such a liberal view" on what a reasonable length of leave may be under the ADA's accommodations provisions, Nowak said. But he doesn't see the agency changing its stance on the issue, at least not immediately.

The EEOC will at some point become Republican-controlled once President Donald J. Trump's nominees for two seats on the five-member commission are approved, Nowak said. He said he hopes that a reconstituted EEOC will pick up on the Seventh Circuit's "eminently reasonable" ruling "and set clearer guidelines on leave as an ADA accommodation" for all employers.

Reaffirms Circuit Precedent

Severson had worked for Wisconsin-based Heartland Woodcraft for seven years when he was sidelined by a flare-up of a pre-existing back condition. He was fired when his 12 weeks of FMLA-protected leave expired and he was unable to return to work.

He and his doctor had decided late in his FMLA-leave period that other treatments weren't working and that Severson would need disc decompression surgery on his back. Severson told Heartland about his need for surgery and the expectation that he would need at least two additional months after the expiration of his FMLA leave to recover.

Heartland denied his request for additional leave beyond the 12 weeks Severson was entitled to under the FMLA. It told him his employment would end when his FMLA leave ended but that he could reapply with the company when he was healthy.

Severson was cleared to partially return to his job duties, which included heavy lifting, roughly seven weeks after surgery, and he was cleared for full duty about two-and-a-half weeks after that. However, he never reapplied to Heartland and instead sued for alleged failure to accommodate under the ADA.

His proposed accommodation of two to three months' leave wasn't reasonable under the ADA, the Seventh Circuit said, affirming a lower court. It cited an earlier ruling in which it held that an employee who needs long-term leave is unable to work and thus isn't entitled to accommodation under the ADA. At base, a reasonable accommodation under the ADA is one that allows the employee to perform the essential functions of her job, the Seventh Circuit said.

"Simply put, an extended leave does not give a disabled individual the means to work; it excuses his not working," the court wrote.

Lessons Learned and What's Next

Nowak said there are three key takeaways from the court's ruling for employers in the Seventh Circuit. First, companies should communicate with an employee who takes FMLA leave for a disability-related reason while the employee is still on leave and well in advance of the date the leave is set to end, he said.

Second, employers should fully communicate with such employees about their ability to return to work at the end of their FMLA-leave period, Nowak said. Third, if such an employee requests more leave and the request is for a period of months or an indefinite period, companies now have "clear guidance" from the Seventh Circuit that such a request is "simply unacceptable as a matter of law."

As for the ruling's potential impact beyond the Seventh Circuit, both Nowak and David A. McClurg—who represented Heartland in the case—see reasons why other federal circuit courts may follow the Chicago-based appeals court's lead.

"I think other courts" will adopt the Seventh Circuit's express holding that leave of eight weeks or more isn't a reasonable accommodation under the ADA, McClurg told Bloomberg BNA Sept. 25. He said other circuits have already suggested as much by stating that the most logical interpretation of "reasonable accommodation" is a job change or adjustment that "presently or in the immediate future" enables the employee to do her job. "Two months is not the immediate future," he said. McClurg is a member of Petrie & Pettit S.C. in Milwaukee.

Nowak cited the Seventh Circuit's general influence on ADA case law. The court "is one of the leading circuits" when it comes to interpreting the federal disability-rights statute, he said. Because its opinion in the case is well-reasoned and thoughtful, "I think other courts will cite it often," Nowak said.

But that doesn't mean employee advocates won't continue to litigate cases under the ADA involving requests for leave of less than two months, McClurg added. It's unclear how courts might rule in situations involving leave requests of four to seven weeks, he said. "That's sort of a gray area right now."

"This is a huge issue for employers" and "one of the biggest issues I deal with in counseling clients," Nowak said. The Seventh Circuit's decision "goes a long way" in setting parameters to guide companies in handling requests for leave as a disability-related accommodation.

Jesse Dill, who represented Severson, declined to comment on the ruling Sept. 22 when contacted by Bloomberg BNA. He is with Walcheske & Luzi LLC in Brookfield, Wis.

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