

LEAVE AS A REASONABLE ACCOMMODATION UNDER THE ADA

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The bulk of the information presented below is redacted and amended from: LEAVE AS A REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT by Ramit Mizrahi (2012).

I. INTRODUCTION

A recent study commissioned by the Society for Human Resource Management provided some interesting results:

On average the direct cost of the employee's use of permitted leave was over 15% of payroll.

The estimated loss of productivity for an unplanned absence was 36%.

The average impact of productivity loss due to planned and unplanned absences as a percentage of payroll was 6.2%.

And 72% of supervisors surveyed, indicated that increased use of sick leave around holidays and weekends was noted. *Total Financial Impact of Employee Absences in the U.S.*, Society for Human Resource Management, (August 2014)

Other recent studies have indicated that some governmental employees were using as much as 85% of their allotted sick leave annually and that the use of sick leave by employees is increasing. <http://www.hrmorning.com/study-shows-federal-employee-sick-leave-abuse/>>

The FMLA has increased employers concerns about the potential for abuse of leave policies. However, even if an employee's leave is no longer covered by the FMLA (or was not covered in the first place), other protections may apply, including those created by the Americans with Disabilities Act of 1990 (ADA)

II. LEAVE CAN BE A REASONABLE ACCOMMODATION UNDER THE ADA

It is well-settled that leave can be a reasonable accommodation under the ADA. In its Interpretive Guidance on Title I of the ADA ("Interpretive Guidance"), the EEOC identifies as possible reasonable accommodations "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment." 29 C.F.R. Pt. 1630 App. § 1630.2(o).

Leave has also been explicitly identified as a reasonable accommodation under the ADA in most circuits including the 10th: *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002).

III.ADA LEAVE MAY COVER SITUATIONS THE FMLA DOES NOT

In order for an employee to be entitled to leave under the FMLA, he must be deemed an eligible employee, and must: (1) have been employed by a covered employer for at least 12 months; (2) have had at least 1,250 hours of service during the 12-month period immediately before the leave started; and (3) be employed at a public agency, public school board, or elementary or secondary school. 29 C.F.R. §§ 825.104; 825.110; 825.600.

Under ADA, a qualified employee with a disability may be entitled to leave as a reasonable accommodation even if:

- The employer has less than 50—but at least 15—employees;
- The employee has not worked at the company for twelve months;
- The employee has not worked at the company for the requisite 1250 hours; or
- The employee has already exhausted twelve weeks of FMLA leave.

In some cases, the only basis for a denial of leave as a reasonable accommodation is through a showing that it would be an undue hardship to the employer. 42 U.S.C. § 12112(b)(5)(A). Thus, under certain circumstances **a qualifying individual with a disability may** be entitled to additional leave time beyond the twelve weeks permitted under the FMLA so long as that additional leave time would not constitute an undue hardship on the employer. *See* 29 C.F.R. § 825.702(b) “The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.” S. Rep. No. 103-3, at 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees.”

IV. THE ADA OPERATES INDEPENDENTLY OF THE FMLA

A. A Request for Leave Is a Triggering Event with Respect to the ADA.

When an employee requests time off for a reason related or possibly related to a disability, the employer should determine the employee’s rights under all of the relevant statutes.

See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (“Reasonable Accommodation Guidance”) (Oct. 17, 2002),

<http://www.eeoc.gov/policy/docs/accommodation.html>, at Q&A 21. The request should be deemed one for a reasonable accommodation under the ADA as well as a request for FMLA leave. The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (“FMLA, ADA, and Title VII”) (1995),

<http://www.eeoc.gov/policy/docs/fmlaada.html>, at Q&A 16. Thus, the employer should “initiate an informal, interactive process with the individual with a disability. . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3). A person with a “serious health condition” eligible for FMLA is not necessarily a “qualified individual with a disability” entitled to ADA protections; each statute has its own requirements for coverage.

B. The Greater Protection Applies to Cover the Employee.

Given that the ADA and FMLA operate independently of each other, “[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to

employees.” 29 C.F.R. § 825.702(a). For example, although the FMLA permits the employer to place an employee returning from a covered leave in an “equivalent” position, 29 C.F.R. § 825.215, the ADA requires that the person returning from leave be returned to her original position. Reasonable Accommodation Guidance, at Q&A 21, Example B. Therefore, an employee covered by both statutes would need to be returned to her original position following a return from a medical leave, absent the employer demonstrating undue hardship. The following examples, found at 29 C.F.R. § 825.702(c), illustrate the interplay between the statutes and are therefore quoted at length:

(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee’s present position and an accommodation is not possible in the employee’s present position, or an accommodation in the employee’s present position would cause an undue hardship. . . .

(2) A qualified individual with a disability who is also an “eligible employee” entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee’s FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

An employee who is granted leave as a reasonable accommodation under the ADA is “entitled to return to the same position unless the employer demonstrates that holding open the position would impose an undue hardship.” Reasonable Accommodation Guidance, at Q&A 18.

It is the EEOC’s position that if holding the position open would be an undue hardship, or the employee is no longer qualified to hold the position, the employer must reassign the employee to a vacant equivalent position for which he or she is qualified. *Id.* at Q&A 21. If such a position is unavailable, then the employer must reassign the employee to a vacant position at a lower level if one is available. FMLA, ADA, and Title VII, at Q&A 14.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time

position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees. 29 C.F.R. § 825.702. (Further examples can be found in sections (b) through (e).)

V. A QUALIFIED REASONABLE ACCOMMODATION MUST BE GRANTED UNLESS IT WOULD CAUSE THE EMPLOYER AN UNDUE HARDSHIP

A. The ADA Requires A Fact-Specific, Individualized Inquiry to Determine Whether a Requested Accommodation Must Be Provided.

An employer must provide a reasonable accommodation to a qualified employee under the ADA unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of its business." 42 U.S.C. § 12112(b)(5)(A); *see also* 29 C.F.R. § 1630.9(a). A requested accommodation would impose an "undue hardship" where it requires "significant difficulty or expense." 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(1).

The ADA requires an interactive, fact-specific process to be used in determining whether an accommodation is reasonable or would impose an undue hardship. The following factors are to be considered:

- (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
- (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
- (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
- (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business. 29 C.F.R. § 1630.2(p)(2).

Instead, "[i]n certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position." Reasonable Accommodation Guidance, at Q&A 44.

In addition to the payroll costs incurred in having an employee on leave (for example, the additional costs of hiring a temporary employee), the following may be incurred:

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error;
- Lower quality and less accountability for quality;
- Lost sales;
- Less responsive customer service and increased customer dissatisfaction;
- Deferred projects;
- Increased burdens on management staff required to find replacement workers, or readjust workflow or readjust priorities in light of absent employees; and
- Increased stress on overburdened co-workers.

Thus, a leave is more likely to be deemed an undue hardship the more complex the nature of the employee's work, the more difficult it would be to replace the employee, or the more difficult it would be to redistribute that employee's work.

According to the EEOC, an employer cannot base an assertion of undue hardship on the negative effect an accommodation would have on the morale of other employees, but may claim undue hardship when the accommodation sought would be "unduly disruptive" to other employees' ability to do their jobs. Reasonable Accommodation Guidance. Where an employee has already received a 12-week FMLA leave and seeks additional time, "[t]o evaluate whether additional leave would impose an undue hardship, the employer may consider the impact on its operations caused by the employee's initial 12-week absence, along with the undue hardship factors specified in the ADA." FMLA, ADA, and Title VII, at Q&A 12.

B. The Employee Need Only Show That a Requested Accommodation Is Generally Reasonable; It Is the Employer's Obligation to Demonstrate Specifically That a Request Would Create an Undue Hardship.

An employee requesting a reasonable accommodation, such as a leave, need only show that the requested accommodation is "reasonable on its face, *i.e.*, ordinarily or in the run of cases." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002). Once that is accomplished, the employer must either grant the request, or "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."^s *Id.* at 402. As explained by the EEOC's Interpretive Guidance:

Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. Likewise, an accommodation that poses an undue hardship for one employer in a particular job setting, such as a temporary construction worksite, may not pose an undue hardship for another employer, or even for the same employer at a permanent worksite. 29 C.F.R. Pt. 1630 App. § 1630.15(d). This can make it difficult to look to case law for guidance.

VI. AN INFLEXIBLE MAXIMUM LEAVE POLICY CAN VIOLATE THE ADA

Because the employer has an obligation to assess each requested accommodation on a case-by-case basis, it may not apply a maximum leave policy (under which employees are automatically terminated after they have been on leave for a certain period of time) to an employee with a disability who needs additional leave, unless there is another effective accommodation or granting the additional leave would cause an undue hardship. Reasonable Accommodation Guidance, at Q&A 17. “Modifying workplace policies, including leave policies, is a form of reasonable accommodation.” *Id.*; see also *Barnett*, 535 U.S. at 397-98 (stating that an employer may be required to modify a disability-neutral policy so as to create a reasonable accommodation for an employee).

If an employer has vacancies for comparable positions, it may have a more difficult time demonstrating that permitting the employee a leave would be an undue hardship.

Even if the employer is generous in the amount of leave time it permits as compared to FMLA requirements (for example, permitting employees on short-term disability to be out on leave for a year), a maximum leave policy does not satisfy an employer’s obligation to provide a reasonable accommodation to an employee who needs additional leave. In fact, the EEOC has vigorously challenged such policies. For example, Sears had a maximum one-year leave policy in which any employee who did not return to work at the end of the year was automatically terminated. The EEOC filed suit against Sears in 2004. In 2009, after extensive litigation, the EEOC entered into a \$6.3 million consent decree with Sears, which among other things required Sears to:

- Designate a core group of individuals who would review accommodations requests and would have to approve terminations caused by exhaustion of leave;
- Change the way it communicates with employees on medical leave, including informing them by certified mail of their rights to request accommodations, and identifying accommodations options;
- Communicate directly with employees’ doctors about possible accommodations; and
- Seek updates from its workers compensation carrier when medical releases are obtained.

See Written Testimony of John Hendrickson (Regional Attorney, EEOC) (“Hendrickson Testimony”) (June 8, 2011), <http://www1.eeoc.gov/eeoc/meetings/6-8-11/hendrickson.cfm>.

The EEOC also sued Supervalu over a similar one-year maximum disability leave policy, and entered into a \$3.2 million dollar consent decree with the company. The consent decree required that Supervalu hire a consultant to develop a list of accommodations for employees with common restrictions and that it hire a job descriptions consultant to review the company’s job descriptions to ensure that they accurately described what was actually done within each position. *Id.*

Thus, to comply with the ADA, an employer with a maximum leave policy should amend its policy to allow an employee who needs additional leave time beyond the maximum amount stated in the policy to take that time so long as it would not create an undue hardship. In addition, throughout the leave process, employers should communicate with employees, physicians, and other to determine whether other accommodations are needed that would enable employees to return to work.

VII. A “NO FAULT” ATTENDANCE POLICY CAN VIOLATE THE ADA

Also subject to challenge are “no fault” attendance policies in which employees are subject to discipline for reaching a certain number of absences, regardless of the cause of the absences. Such policies adversely affect people with disabilities, and can evidence a failure to accommodate if they do not make exceptions for individuals whose “chargeable absences” were caused by their disabilities. The EEOC’s largest settlement to date has been with Verizon, which recently paid \$20 million to settle a nationwide class disability discrimination lawsuit that challenged its no-fault attendance policy. See EEOC Press Release: Verizon to Pay \$20 Million to Settle Nationwide EEOC Disability Suit, available at <http://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm>.

VIII. LEAVES OF VARYING DURATIONS HAVE BEEN DEEMED REASONABLE

As noted above, the ADA does not identify any amount of leave time that would automatically be deemed an undue hardship. As the court explained in *Garcia-Ayala v. Lederle Parenterals, Inc.*, “[t]hese are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes.” 212 F.3d 638, 50 (1st Cir. 2000). Below are examples of cases in which appellate courts addressed situations where leaves of varying durations were sought as reasonable accommodations.

The following cases found that the requested leaves could be reasonable accommodations:

- In *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000), the employee was a clerical worker who took a medical leave of absence for cancer treatment. The court held that that plaintiff’s request for an additional two-month leave after 15 months of leave did not constitute an undue hardship. The court pointed to the fact that the company had been using temporary employees to cover in her absence and there was no evidence that they cost the company more or were unsatisfactory in their performance.
- In *Nunes v. Wal-Mart Stores*, 164 F.3d 1243 (9th Cir. 1999), the court reversed summary judgment in a case where the employee, who suffered from fainting episodes, had taken a two-month leave, returned to work for six months, then went out on another leave. She had been on this second leave for approximately eight months and sought an additional one to two months of leave through the holiday season as a reasonable accommodation. The court noted that the defendant’s own policy of allowing eligible employees up to one year of unpaid leave and its regular practice as a large retailer of hiring temporary workers factored into the analysis regarding whether the accommodation sought would impose an undue hardship.
- In *Dark v. Curry Cnty.*, 451 F.3d 1078 (9th Cir. 2006), the court found that there was an issue of material fact regarding whether employee’s use of 89 days of accumulated sick leave to allow him to adjust his medication was a reasonable accommodation.
- In *Criado v. IBM*, 145 F.3d 437 (1st Cir. 1998), the employee, whose leave was approved for approximately five weeks, was terminated after employer claimed it had not received paperwork from employee’s physician requesting additional time. In affirming a jury verdict in the employee’s favor, the court pointed out that the employer provides all employees with 52 weeks of paid disability leave, precluding it from asserting that the requested leave would have created an undue hardship.
- In *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002), the employee took a medical leave for approximately six weeks. She was terminated upon her return. In

evaluating her ADA claim, the court determined that where the amount of leave sought by the employee fell within the FMLA leave time the employee was entitled to receive, and therefore it could not conclude that the length was unreasonable or would cause an undue hardship on the employer.

The following cases rejected the requested leaves:

- In *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 671 (3d Cir. 1999), the court held that it would have been an undue hardship for the employer to extend the employee's unpaid leave beyond the approximately nine weeks already given where the employee was a program director in charge of managing a program and overseeing staff.
- In *Byrne v. Avon Prods. Inc.*, 328 F.3d 379 (7th Cir. 2003), the court rejected a 2+ month leave as a reasonable accommodation. The court stated that extended leaves of absence are not reasonable accommodations because reasonable accommodations are intended to allow an employee to perform his essential job functions and "[n]ot working is not a means to perform the job's essential functions."
- In *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000), the court held that where the employee had already received 18 months of leave and was seeking additional time for medical evaluations, said request was unreasonable because the employee could not show that the delay in getting the information was due to his disability. The employee's request was deemed to be a request for indefinite leave.

IX. UNCERTAINTY IS COMMON WHEN IT COMES TO MEDICAL LEAVES

In seeking leave as a reasonable accommodation, the employee need not show that the leave is certain or even likely to be successful to prove that it is a reasonable accommodation, only that it would plausibly enable the employee to return and perform his job. *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001). Oftentimes, an employee (or her physician) cannot give a precise date when she will be able to return to work. Generally speaking, an employer has no obligation to provide an indefinite leave. *See, e.g., Myers v. Hose*, 50 F.3d 278, 280 (4th Cir. 1995) (holding that employer has no obligation to provide an employee with an indefinite leave); *Peyton v. Fred's Stores of Ark., Inc.*, 561 F.3d 900 (8th Cir.), cert. denied, 130 S. Ct. 243 (2009) (affirming summary judgment where employee requested an indefinite medical leave and could not say when, if ever, she could return to work); *Monette v. Electronic Data Sys.*, 90 F.3d 1173 (6th Cir. 1996) (holding that it would have been an undue hardship to place an employee on an indefinite leave until another position opened up where the employee had already been on eight months of leave and had not advised his employer of his desire or intentions to return to work); The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities ("ADA: Performance and Conduct"), <http://www.eeoc.gov/facts/performance-conduct.html>, at Q&A 21. However, an indefinite leave must be distinguished from one where an employee gives an approximate return date or where the situation changes and the original return date has been revised. *See* ADA: Performance and Conduct, at Q&A 21.

A leave request is not "indefinite" simply because the nature of the employee's condition is such that only an approximate return date is provided. *See Garcia-Ayala v. Lederle Parenterals, Inc.* (1st Cir. 2000) 212 F.3d 638, 648; *see also* East Testimony, Section 9 (citing cases holding that a probable return date is adequate for the purposes of the accommodation being a reasonable one). In *Garcia-Ayala*, the employer argued that because the plaintiff's "doctor could not give absolute

assurances that she would be fit to return to work [on the stated return date], the request was per se for an indefinite leave and so was unreasonable.” *Id.* The appellate court rejected this argument:

But see Cehrs v. Ne. Ohio Alzheimer’s Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998) (quoting with approval the following language from *Norris v. Allied-Sysco Food Services, Inc.*, 948 F.Supp. 1418, 1439 (N.D. Cal. 1996), where the district court made the following observation: “Upon reflection, we are not sure that there should be a per se rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a ‘reasonable accommodation’ under the ADA.”). An employer may be hard-pressed to explain why it would be an undue hardship to allow an employee an indefinite leave if the person is working in a position where she has numerous peers and where there is extremely high turnover and/or the role has little specialization.

Similarly, the court viewed García’s requested accommodation—additional leave time with a specific date for return—as a request that her job be held open indefinitely. Lederle had argued that since García’s doctor could not give absolute assurances that she would be fit to return to work on July 30th, the request was per se for an indefinite leave and so was unreasonable. García specified, however, when she would return, and her doctor released her for return several weeks thereafter. There is no evidence that either July 30th or the August 22nd date of medical release, would have imposed any specific hardship on Lederle. Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation.

Id. The EEOC has made the same point: “In certain situations, an employee may be able to provide only an approximate date of return. Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return.” Reasonable Accommodation Guidance, at Q&A 44. The EEOC gives the example of an employee who, while originally scheduled for an eight-week leave for surgery, develops complications that then require an anticipated additional ten to fourteen weeks of leave. That additional time would be deemed a reasonable accommodation unless it would cause an undue hardship. *Id.*

Other cases have also found that approximate return to work dates do not make the leave request indefinite. For example, in *Haschmann v. Time Warner Entm’t Co.*, 151 F.3d 591 (7th Cir. 1998), the court rejected employer’s contention that it would be an undue hardship to give an employee an additional two to four weeks of medical leave on the grounds that the approximate return to work date would create uncertainty. The court pointed out that the employer had not made any inquiry about what accommodations might be needed, and did not make any efforts to independently assess the employee’s prognosis and the reasonableness of the request for leave. The court also highlighted evidence that the job had been vacant for many months before the employee had been hired, that the company took almost six months to fill her position after her discharge, and that subordinates handled the job in the interim. Similarly, in *Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006), the court held that where an employee already on a medical leave asked for “more time” to schedule an appointment with a specialist and said it would take “maybe a couple of weeks,” the request was not one for an indefinite leave.

In the event that the employee's return date changes, "the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request for leave has become one for leave of indefinite duration." ADA: Performance and Conduct, at Q&A 21.

X. "INTERMITTENT" LEAVES AND MODIFIED SCHEDULES CAN BE REASONABLE ACCOMMODATIONS

Sometimes, employees with disabilities seek "intermittent" medical leaves or modified schedules as a reasonable accommodation for their disabilities. These situations are among the toughest for employers to assess, particularly when the leave sought is unplanned. Again, the analysis is a fact-specific one, and there are no bright-line rules that can be followed. Certainly, some positions are much better suited to flexible hours and schedule than others are.

- In *EEOC v. Yellow Freight Sys. Inc.*, 253 F.3d 943 (7th Cir. 2001) (en banc), the court determined that where the employee was a dockworker—a position that required him to be present at the worksite—and where he had significant absenteeism that was erratic and unpredictable, attendance was an essential function of his job. The court noted that the employee had rejected the 90-day leave of absence offered to him, and had instead sought unlimited absences on an as-needed basis.
- In *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003), the employee suffered from cluster headaches. He was routinely granted discretionary leaves over the course of several years (usually of one to three month durations) and missed substantial amounts of work throughout that time. He was later terminated one month into a discretionary leave with no termination date. The court held that indefinite leaves are not reasonable accommodations. The court looked to the employee's history of repeated requests for leaves as evidence that there was no indication that he would be able to return to work within a reasonable time period. The court also held that the fact that he received prior accommodations did not make the accommodation sought reasonable.
- In *Corder v. Lucent Tech., Inc.*, 162 F.3d 924 (7th Cir. 1998), an employee who had repeated, extended, and unpredictable absences due to depression and anxiety over the course of several years was ultimately terminated by her employer. The employer had previously given her numerous extended leaves, adjusted her schedule, and make other work accommodations. The employee requested further leave as needed; the court found this to be an indefinite leave that the employer did not need to provide.
- In *Buckles v. First Data Res., Inc.*, 176 F.3d 1098 (8th Cir. 1999), the court reversed a denial of judgment as a matter of law following a jury verdict in the employee's favor where the employee, who had acute recurrent rhinosinusitis, had sought a workplace free of irritants and unlimited leave so that he could leave work whenever he thought he would be exposed to potential irritants. The court rejected these requests as causing an undue hardship.

XII. RECOMMENDATIONS

- An employer must assess a request for a medical leave under all of the applicable statutes, determining which statutes cover the employee and the benefits to which she is entitled.
- The employer must provide the employee with the greater protections of each applicable statute.

- As soon as there is a triggering event (*e.g.*, a request for leave), the employer must engage in the interactive process with the employee, taking steps to determine whether any accommodations exist that would enable the employee to perform the essential functions of his job.
- The determination of whether a requested leave must be granted as a reasonable accommodation or whether it can be denied because it would cause an undue hardship is one which requires a fact-intensive inquiry.
- The employer must think twice about having leave policies that terminate employees once they have exhausted a maximum, pre-determined amount of leave. **But see *Hwang v. Kansas State University*, herein below** The fact that the leave time allowed by the policy exceeds the FMLA requirements does not provide a defense where the employer cannot establish that additional leave sought by an employee would create an undue hardship.
- The employer must re-examine “no fault” attendance policies that penalize employees with disabilities for absences related to their disabilities.

United States Court of Appeals, Tenth Circuit.
Grace HWANG, Plaintiff–Appellant, v. KANSAS STATE UNIVERSITY,
Defendant–Appellee.

No. 13–3070.

Decided: May 29, 2014

Before LUCERO, HARTZ, and GORSUCH, Circuit Judges. Luanne C. Leeds of Leeds Law, LLC, Topeka, KS, for Plaintiff–Appellant. Peter J. Paukstelis, Office of General Counsel, Kansas State University, Manhattan, KS, for Defendant–Appellee.

Must an employer allow employees more than six months' sick leave or face liability under the Rehabilitation Act? Unsurprisingly, the answer is almost always no.

By all accounts, Grace Hwang was a good teacher suffering a wretched year. An assistant professor at Kansas State University, she signed a written one-year contract to teach classes over three academic terms (fall, spring, and summer). But before the fall term began, Ms. Hwang received news that she had cancer and needed treatment. She sought and the University gave her a six-month (paid) leave of absence. As that period drew to a close and the spring term approached Ms. Hwang's doctor advised her to seek more time off. She asked the University to extend her leave through the end of spring semester, promising to return in time for the summer term. But according to Ms. Hwang's complaint, the University refused, explaining that it had an inflexible policy allowing no more than six months' sick leave. The University did arrange for long-term disability benefits, but Ms. Hwang alleges it effectively terminated her employment. In response, she filed this lawsuit contending that by denying her more than six months' sick leave the University violated the Rehabilitation Act. Failing to see how this much followed, the district court dismissed her complaint and it is this ruling Ms. Hwang now asks us to reverse.

The Rehabilitation Act prohibits recipients of federal funding, like Kansas State, from discriminating on the basis of disability. 29 U.S.C. § 794(a). One way a disabled plaintiff can establish a claim for discrimination in the workplace is by showing that she is qualified for her job; that she can perform the job's essential functions with a reasonable accommodation for her disability; and that her employer failed to provide a reasonable accommodation despite her request for one. Once a plaintiff can show all these things, an employer generally may avoid liability only if it can prove the accommodation in question imposes an undue hardship on its business. See *Sanchez v. Vilsack*, 695 F.3d 1174, 1177 & n. 2 (10th Cir.2012); see also 29 U.S.C. § 794(d); *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002).

When it comes to satisfying her elemental obligations, Ms. Hwang's complaint fails early on. There's no question she's a capable teacher, no question she's disabled within the meaning of the Act. But there's also no question she wasn't able to perform the essential functions of her job even with a reasonable accommodation. By her own admission, she couldn't work at any point or in any manner for a period spanning more than six months. It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions—and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation. After all, reasonable accommodations—typically things like adding ramps or allowing more flexible working hours—are all about enabling employees to work, not to not work. See 42 U.S.C. § 12111(9); *Mason v.*

Avaya Commc'ns, Inc., 357 F.3d 1114, 1122–24 (10th Cir.2004); Brockman v. Wyo. Dep't of Family Servs., 342 F.3d 1159, 1168 (10th Cir.2003); Mathews v. Denver Post, 263 F.3d 1164, 1168–69 (10th Cir.2001) (“The idea of accommodation is to enable an employee to perform the essential functions of his job; an employer is not required to accommodate a disabled worker by . eliminating an essential function of the job.”).

Of course, an employee who needs a brief absence from work for medical care can often still discharge the essential functions of her job. Likewise, allowing such a brief absence may sometimes amount to a (legally required) reasonable accommodation so the employee can proceed to discharge her essential job duties. After all, few jobs require an employee to be on watch 24 hours a day, 7 days a week without the occasional sick day. And no one suggests anything like such unrelenting presence at her post was necessary for Ms. Hwang to fulfill the essential job functions of a teacher at Kansas State. See, e.g., Robert v. Bd. of Cnty. Comm'rs, 691 F.3d 1211, 1218 (10th Cir.2012); Boykin v. ATC/VanCom of Colo., L.P., 247 F.3d 1061, 1064–65 (10th Cir.2001); Hudson v. MCI Telecomms. Corp., 87 F.3d 1167, 1169 (10th Cir.1996).

What separates an absence that enables an employee to discharge the essential duties of her job—and may even amount to a legally compelled reasonable accommodation—from an absence that renders the employee unable to discharge those essential duties and isn't a reasonable accommodation? The answer usually depends on factors like the duties essential to the job in question, the nature and length of the leave sought, and the impact “on fellow employees.” *US Airways*, 535 U.S. at 400. Taking extensive time off work may be more problematic, say, for a medical professional who must be accessible in an emergency than for a tax preparer who's just survived April 15.

Still, it's difficult to conceive how an employee's absence for six months—an absence in which she could not work from home, part-time, or in any way in any place—could be consistent with discharging the essential functions of most any job in the national economy today. Even if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a reasonable accommodation. Ms. Hwang's is a terrible problem, one in no way of her own making, but it's a problem other forms of social security aim to address. The Rehabilitation Act seeks to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disabled persons to work—not to turn employers into safety net providers for those who cannot work. See, e.g., *Boykin*, 247 F.3d at 1065 (six months' leave is beyond a “reasonable amount of time”); *Robert*, 691 F.3d at 1218 (“[T]he Eighth Circuit ruled in an analogous case that a six-month leave request was too long to be a reasonable accommodation.”); see also *U.S. Airways*, 535 U.S. at 399–401.

Ms. Hwang insists we have to hold otherwise because all “inflexible” sick leave policies, even ones granting as long as six months' leave, necessarily violate the Rehabilitation Act. In support of her argument, she directs us to this sentence from an EEOC guidance manual:

If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its “no-fault” leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform

the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship.

EEOC, No. 915.002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), available at 2002 WL 31994335, at *15.

Ms. Hwang's argument here quickly confronts its problems. In the first place, the EEOC manual commands our deference only to the extent its reasoning actually proves persuasive. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n. 6, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002); *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1047 n. 16 (10th Cir.2011). And the sentence Ms. Hwang cites doesn't seek to persuade us of much. It indicates that an employer “must” modify a leave policy if the employee “needs” a modification to ensure a “reasonable accommodation”—that is, unless two listed conditions are met. But none of this answers the antecedent question we face in this case: When is a modification to an inflexible leave policy legally necessary to provide a reasonable accommodation?

On top of that, flipping through the EEOC manual reveals that when it turns more directly to the question presented in our case it speaks in a way distinctly unhelpful to Ms. Hwang. A few pages later the agency expressly states that an employer does not have to retain an employee unable to perform her essential job functions for six months just because another job she can perform will open up then. An employer doesn't have to do so much, the EEOC says, “because six months is beyond a reasonable amount of time.” EEOC, *supra*, at *21 (quotation marks omitted). Here then the EEOC seems to agree with our conclusion that holding onto a non-performing employee for six months just isn't something the Rehabilitation Act ordinarily compels.

Ms. Hwang appears to read the EEOC sentence she cites in a very different way. In her view, it suggests an employer must always modify a leave policy unless one of two enumerated conditions is met—unless an alternative accommodation would be effective or the requested leave modification would constitute undue hardship. But the language of the sentence clearly indicates that these two enumerated conditions come into play only after it's clear the leave policy modification is a reasonable accommodation necessary to ensure the employee can perform his essential job functions. Indeed, the enumerated conditions discuss an affirmative defense and remedial measures—issues that arise only after the plaintiff establishes liability. The second condition acknowledges that an employer may pursue an undue hardship affirmative defense even when the plaintiff has met her burden of proof. See 42 U.S.C. § 12112(b)(5)(A). The first condition makes the point that an employer isn't compelled to modify its leave policy when other effective and reasonable accommodations exist because normally the right to choose among effective remedial accommodations rests with the employer. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1177–78 (10th Cir.1999) (*en banc*); 29 C.F.R. Pt. 1630 app. § 1630.9.¹

Neither is there anything inherently discriminatory in the fact the University's six-month leave policy is “inflexible,” as Ms. Hwang would have us hold. To the contrary, in at least one way an inflexible leave policy can serve to protect rather than threaten the rights of the disabled—by ensuring disabled employees' leave requests aren't secretly singled out for discriminatory treatment, as can happen in a leave system with fewer rules, more discretion, and less transparency. In rejecting the notion that inflexible seniority policies necessarily discriminate against the disabled, the Supreme Court has noted

that they can “provide[] important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment,” introduce “an element of due process,” and limit potential “unfairness in personnel decisions.” *US Airways*, 535 U.S. at 404 (internal quotation marks omitted). All the Court said there about inflexible seniority policies might be just as easily said here about inflexible leave policies.

This isn't to suggest inflexible leave policies are categorically immune to attack. Policies providing unreasonably short sick leave periods, for example, may not provide accommodation enough for employees who are capable of performing their jobs' essential functions with just a little more forgiven absence. Likewise, if it turns out that an employer's supposedly inflexible sick leave policy is really a sham and other employees are routinely granted dispensations that disabled employees are not, an inference of discrimination will naturally arise. See *U.S. Airways*, 535 U.S. at 405; *Rascon v. U.S. West Commc'ns, Inc.*, 143 F.3d 1324, 1334–35 (10th Cir.1998), overruled on other grounds by *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). But the leave policy here granted all employees a full six months' sick leave—more than sufficient to comply with the Act in nearly any case—and Ms. Hwang makes no allegations suggesting unequal enforcement of the policy's terms.

The closest Ms. Hwang comes to that is this. Some University employees, she says, are eligible to receive not only six months' sick leave but sabbaticals lasting up to a year—and she says she wasn't allowed one of those. But to raise the specter of discrimination through disparate treatment a plaintiff must allege facts suggesting non-disabled—but otherwise similarly situated—employees receive more favorable treatment. And this Ms. Hwang has not done. She has pleaded no facts about the non-disabled University employees who receive sabbaticals, let alone facts suggesting they are like her in any relevant way. We have no facts suggesting, for example, that sabbatical-eligible employees include untenured faculty on year-to-year contracts like Ms. Hwang. Or that sabbaticals are given out to those with roughly the same seniority as Ms. Hwang. For all we know from Ms. Hwang's complaint, year-long sabbaticals at Kansas State are reserved for long-serving tenured faculty, not annual contract teachers like herself. To be sure, Ms. Hwang's complaint says she's “similarly situated” to employees who get sabbaticals. But that's just a legal conclusion—and a legal conclusion is never enough. While plaintiffs don't have to incant any particular litany of facts to support a claim of differential treatment, they do have to allege some set of facts that taken together plausibly suggest differential treatment of similarly situated employees. See *Khalik v. United Air Lines*, 671 F.3d 1188, 1193–94 (10th Cir.2012); *McGowan v. City of Eufala*, 472 F.3d 736, 745 (10th Cir.2006).

Beyond Ms. Hwang's various discrimination claims lies one for unlawful retaliation. We've long explained that the Rehabilitation Act prohibits not just discrimination on the basis of disability but retaliation against those who report disability discrimination. *Jarvis v. Potter*, 500 F.3d 1113, 1125 (10th Cir.2007). But the retaliation theories Ms. Hwang presents fail as a matter of law and for reasons that can be illustrated a good deal more briefly.

Take these two examples. First, Ms. Hwang alleges that the University failed to explain her post-employment health benefits under COBRA before or immediately after her termination. By statute, though, an employer has thirty days to supply a COBRA notice. 29 U.S.C. § 1166(a)(2); see also Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. No. 99–272, 100 Stat. 82. And whether or not the University fulfilled its COBRA obligation immediately, Ms. Hwang doesn't contend it failed to

act within the statutory period.²Second, Ms. Hwang says that after losing her teaching job she unsuccessfully applied for two other positions at Kansas State—special assistant to the president for community relations and interim associate provost for international programs—and invites us to conclude a retaliatory intent was in play. But here (again) we're given no facts suggesting the University acted with unlawful animus, no facts suggesting it declined to hire Ms. Hwang because she had engaged in legally protected opposition to discrimination. Ms. Hwang doesn't offer any facts suggesting how she was qualified for these jobs, let alone as qualified as other applicants. She doesn't offer any facts suggesting that the University officials who decided not to hire her knew about her disability. Or about her past opposition to discrimination. Without some facts plausibly suggesting that it was because of her discrimination complaint (or disability) that Ms. Hwang wasn't hired for these jobs, her retaliation claim, like her disability claim, cannot escape a motion to dismiss. See *Khalik*, 671 F.3d at 1194.

Affirmed.

FOOTNOTES

1. To the extent the first condition might be read to suggest an employer must provide an “effective” leave policy modification even if such a policy wouldn't be a “reasonable” accommodation in the mine run of cases, that would contradict the Supreme Court's holding in *US Airways*, 535 U.S. at 399–402 (rejecting the notion “that the statutory words ‘reasonable accommodation’ mean only ‘effective accommodation’”).
2. Early on in this appeal the University filed a motion asking us to sanction Ms. Hwang's attorney for knowing misrepresentations about its provision of COBRA benefits. Happily, at oral argument the University agreed to withdraw the motion so we have no occasion to rule on it.

GORSUCH, Circuit Judge.