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Extended leave can be aspect of accommodation

Under Americans With Disabilities Act, it can outlast other laws' leaves.

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AN EXTENDED LEAVE of absence as an accommodation for a disability apart from the statutory family or medical leave laws has been the subject of intense litigation in recent years. With increasing frequency, courts are deciding whether extending a leave of absence beyond the period required by law (for example, the Family and Medical Leave Act) or the employer's policy is reasonable.

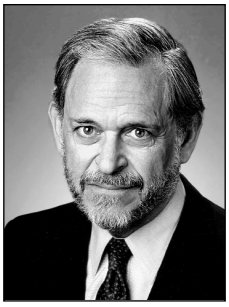
The Americans With Disabilities Act (ADA) prohibits employment discrimination against a qualified individual with a disability that substantially limits one or more major life activities. The law requires employers to make "reasonable accommodations" to otherwise qualified but disabled employees that enable them to perform the essential functions of the job.

The statute sets forth several examples of what are considered reasonable accommodations, including job restructuring, modified work schedules, reassignment to a vacant position or making existing facilities more readily accessible to disabled employees. Employers are not required, however, to extend such accommodations that would cause an undue hardship for the employer. The statute defines such a hardship as any action requiring significant difficulty or expense in light of the nature and cost of the accommodation and the employer's overall financial resources. 42 U.S.C. 12102(2).

Courts have been asked to decide questions such as:

- Is extending a leave beyond that required by law or an employer's leave policy a reasonable accommodation?
- If so, what is a reasonable length of leave?
- Must the employer keep the same or equivalent position open for the employee until he is able to return to work?
- What factors will courts consider in determining whether a position is equivalent to the employee's original job?

Case law and other authorities are unanimous that a leave or an extension of leave beyond the maximum 12-week requirement under the Family and Medical Leave Act (FMLA) or comparable state law allotment can be a form of reasonable accommodation required by the ADA. Whether an extended leave would be required in a particular case, and for how long, depends on whether the leave would create an undue hardship for the employer.



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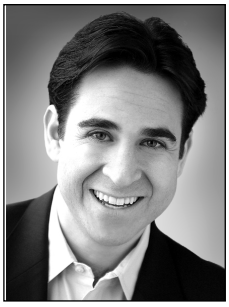

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Cases ruling leave is required

In upholding extended leave as a reasonable accommodation, courts have held that extended medical leave may be a reasonable accommodation if it does not pose an undue hardship and if it will permit the employee eventually to perform the essential functions of her position. *Nunes v. Wal-Mart Stores*, 164 F.3d 1243, 1247 (9th Cir. 1999). If an employer cannot show that an extension of leave would impose an undue hardship, additional leave would be a reasonable accommodation. *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998). For example, medical leave could be a reasonable accommodation for a union employee undergoing experimental cancer treatments. *Wells v. District Lodge 751*, 5 Fed. Appx. 605 (9th Cir. 2001).

Courts uphold longer leave if it does not pose undue hardship.

A reasonable accommodation could include a one-month leave of absence and subsequent leave extensions when a disabled employee offered evidence tending to show that her leave would be temporary and would allow her doctor to design an effective treatment program for her. *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998).

An employer is required to affirmatively assist an employee who becomes disabled while employed. Thus, an employee's failure formally to request an accommodation does not absolve the employer of its obligation reasonably to accommodate its employees' disabilities. *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1990).

Cases that reject leave

Courts are not, however, always willing to grant extended leave as a reasonable accommodation. When a request for additional leave contains only a vague estimate of the date the employee could return to his job (for example, one to three years in the future), this amounts to a request for indefinite leave and is not a reasonable accommodation. *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000).

In addition, an employer is not required to continue to grant extended medical leave if the employee cannot provide an expected duration of the impairment or any expected date of return. *Harris v. Circuit Court*, 21 Fed. Appx. 431 (6th Cir. 2001). An employer is not required to accommodate an employee who suffered from a prolonged illness by allowing him an indefinite leave. *Nowak v. St. Rita High School*, 142 F.3d 999 (7th Cir. 1998).

A policy of termination after one year would not violate the ADA if it does not differentiate between disabled and nondisabled employees. However, it must be applied uniformly to all employees. If this standard is met, no leave extension would be required. *Gantt v. Wilson Sporting Goods*, 143 F.3d 1042 (6th Cir. 1998).

Under some circumstances, an employer may be required to hold a position open for some duration, but when the employee cannot state that he could resume his job or the equivalent, there is no need for indefinite leave. *Watkins v. J&S Oil Co. Inc.*, 164 F.3d 55 (1st Cir. 1998).

Although there is no per se rule that an indefinite or lengthy leave is unreasonable, such a leave may be especially reasonable if the employer has a sizeable work force, with high turnover and fungible employees. *Norris v. Allied Sysco Food Services*, 948 F. Supp. 1418 (N.D. Calif. 1996).

Duty to determine feasibility

As discussed above, the duty under the ADA to make reasonable accommodations does not require an employer to hold an injured employee's position open indefinitely while the employee attempts to recover, nor does it force an employer to investigate every aspect of an employee's condition before terminating him based on his inability to work, but at the very least, an employee who proposes an accommodation while still on short-term leave triggers a responsibility on the employer's part to investigate that request and determine its feasibility. An employer who fails to do so, and instead terminates the employee based on exhaustion of leave, has discriminated against the employee "because of" disability within the meaning of the ADA. *Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir. 2000).

The ADA, however, does not require an employer to wait for an indefinite period for an accommodation it has made to an employee to achieve its intended effect. Instead, reasonable accommodation is a decision that can, either currently or in the immediate future, enable the

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employee to perform the essential functions of the job. *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003), cert. denied, 124 S. Ct. 467 (2003). An accommodation that eliminates the essential function of a job is not reasonable, and an employer is not required to wait indefinitely for an employee to return to work. *Smith v. Blue Cross/Blue Shield of Kansas Inc.*, 102 F.3d 1075 (10th Cir. 1996), cert. denied, 118 S. Ct. 54 (1997).

In *Ragsdale v. Wolverine World Wide Inc.*, 535 U.S. 81 (2002), although proper notice required by a U.S. Department of Labor regulation was at issue, the court found that, if the employer's leave program exceeds the 12 weeks of leave required by the FMLA, the failure to give proper notice may be irrelevant.

In *Ragsdale*, when cancer kept the employee out of work, the employer granted the employee 30 weeks of unpaid sick leave in one year. When the employee's condition persisted and she failed to return to work, the employer terminated her. The employee argued that the leave did not count against her FMLA entitlement because the employer failed to notify her that 12 weeks of the absence would count as her FMLA leave. The court determined that the employee was not entitled to additional FMLA leave.

But employers need not hold positions open indefinitely.

Reassigning or reinstating

Reassignment does not constitute a "reasonable accommodation" under the ADA when a position comparable to the employee's former placement is available, but the employee instead is assigned to a position that would involve a significant diminution in salary, benefits, seniority or other advantages that the employee possessed in a former job. *Norville v. Staten Island University Hospital*, 196 F.3d 89 (2d Cir. 1999).

Although a reasonable accommodation under the ADA could include reassignment to a position if it becomes vacant "within a reasonable amount of time," six months is too long when the employer does not know at the time of the termination that the job would become available. *Boykin v. ATC/Vancom of Colorado*, 247 F.3d 1061 (10th Cir. 2001).

A determination of undue hardship is based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. It should be based on several factors, including the nature and cost of the accommodation needed; the overall financial resources of the facility making the accommodation, the number of persons employed at the facility and the effect on expenses and resources of the facility; the overall financial resources, size, number of employees and type and location of facilities of the employer; the type of operation of the employer, including the structure and functions of the work force, the geographic separateness and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and the impact of the accommodation on the operation of the facility. 42 U.S.C. 12112(b) (5)(A); 29 C.F.R. 1630.2(o).

Whether the employee's position must be kept open or the employee restored to an equivalent position depends on whether it would pose an undue hardship. The ADA and the California Fair Employment and Housing Act regulations are silent as to whether an employee on disability leave must be restored to the same job. According to the Equal Employment Opportunity Commission enforcement guidance, the employee must be returned to the same job unless holding the position open would be an undue hardship.

Even if it would be an undue hardship to the employer to hold the position open, the employer must place the employee on leave in a vacant equivalent position for which he is qualified during the remainder of leave, and then when he returns (absent undue hardship). If no vacant equivalent position is open, then he must be given a lower-level position for which he is qualified. Continued leave is not required if a vacant position at a lower level is not available. There is no obligation to create a new position.

The California Family Rights Act requires reinstatement to the "same or comparable" position. "Comparable" is defined the same as "equivalent" under the FMLA. The position must be "virtually identical to the employee's original position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be also performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term 'equivalent position' in the FMLA and its implementing regulations." 2 CCR § 7297.0(g)

An equivalent position

Whether the employee's position must be kept open or the employee restored to an equivalent position also depends on whether it would pose an undue hardship. With respect to what is an "equivalent job," there is no specific definition in the ADA or California Fair Employment and Housing Act of what would constitute an equivalent job.

Both the FMLA and the California Family Rights Act offer definitions that can provide some guidance. An equivalent position is defined under the FMLA as "one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. 825.215.

Equivalent pay includes any unconditional pay raises and same-pay premiums (such as shift differentials); equivalent benefits include insurance, leave, pensions and the retention of accrued benefits. Equivalent terms and conditions of employment is defined as substantially similar duties, conditions, responsibilities, privileges and status. This includes the same or a nearby work site (with no significant increase in the length of the commute); the same shift or work schedule; and the same opportunity for bonuses, profit-sharing and other payments. It does not include de minimus, intangible or unmeasurable aspects of the job.

Limits to accommodations

There are limits to an employer's obligations. An inability to work for a multimonth period removes a person from the class protected by the ADA. *Byrne v. Avon Products Inc.*, 328 F.3d 379 (7th Cir. 2003), cert denied, 124 S. Ct. 327 (2003). For example, an employer is not obligated to accommodate a request to be left alone and allowed to sit at a desk without any interaction with management until retirement. *Mack v. State Farm Mutual Automobile Insurance Co.*, No. 99-2315, 2000 WL 52888 (7th Cir. Jan. 20, 2000).

When an employee's authority has been diminished and responsibilities reduced, the post-leave position is not equivalent to the position held before the employee left. *Noyer v. Viacom Inc.*, No. 97 Civ. 6989, 1998 WL 226172 (S.D.N.Y. May 5, 1998). However, the employee has the burden to prove that other positions offered were not equivalent. *Watkins v. J&S Oil Co. Inc.*, 164 F.3d 55 (1st Cir. 1998).

Employers must try to give employees 'equivalent' jobs.

California courts have also required that employers give serious consideration to extended leave and alternate positions as an accommodation. The employer is not required to wait indefinitely, or to offer the best accommodation or the one that the employee prefers. An offer of an alternative position is sufficient if it is the only one available. *Hanson v. Lucky Stores Inc.*, 74 Cal. App. 4th 215 (1999).

The determination of whether an extended leave is a reasonable accommodation will be based on several factors and the individual facts of each case. Employers should take each factor into consideration in deciding whether to extend a leave beyond that required by law or company policy. NLJ

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