



The GSH 60-Second Memo

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Allegedly 'Inflexible' Leave Policy Comes Under Attack

By Emery K. Harlan, Esq.

The Family and Medical Leave Act (FMLA) affords employees who cannot work as a result of a serious health condition up to 12 weeks of leave in a year. So, it would seem that an employer that offers its employees 12 months of leave would not have much to worry about in the way of lawsuits for failure to provide medical leave.

Nevertheless, United Parcel Service Inc. (UPS) is being sued by the Equal Employment Opportunity Commission (EEOC), despite giving its employees one of the most generous leave policies an employee could ask for, and one which far exceeds what the FMLA requires.

So, what is the EEOC's theory of liability in trying to maintain such a suit? It is suing under the Americans with Disabilities Act of 1990 (ADA) instead of the FMLA.

The complaint, filed August 27 in federal court in Chicago, admits that the employee, Trudi Momsen, took 12 months of medical leave, but was still unable to return to her position.

Nevertheless, the complaint alleges that UPS terminated Momsen "because of her disability rather than accommodating her by extending her leave, and, further, discriminated against a

class of individuals with disabilities (including but not limited to Trudi Momsen) by maintaining an inflexible 12-month leave policy which did not provide for reasonable accommodation and which instead provided for termination of employment, all in violation of the ADA."

Later in the complaint, the EEOC alleges that UPS terminated Momsen "rather than accommodating her by extending her leave or by returning her to work in an available position which she could have performed..." (Whether this is mere boilerplate language or whether there existed a position she could have performed is not clear from the complaint). In any event, the EEOC is seeking class certification and compensatory and punitive damages on behalf of employees who need more than 12 months medical leave.

As the case was filed in Chicago and Seventh Circuit case law applies, the suit faces an uphill fight. Several cases in the circuit address cases under the ADA by employees seeking unlimited medical leave, and all rule in favor of the employer.

In the first case, *Waggoner v. Olin Corp.*, 169 F.3d 481 (7th Cir. 1999), the employee spent roughly six months of her twenty-month employment on leave.

In upholding summary judgment in favor of the employer, the court wrote, "Rather than attempting to show that she is a qualified individual, however, Waggoner seems to want to turn the ADA on its head. It is as if she thinks that rather than ensuring that she be allowed to work, the ADA requires Olin to provide her with a job but not require that she regularly perform it. Rather, Olin must hire another employee to do the job for her while she remains a full-time employee. The Act does not go so far." *Waggoner*, at 484.

The second case is *EEOC v. Yellow Freight System*, 253 F.3d 943 (7th Cir. 2000). The employee had AIDS, and missed a lot of work; during one calendar year, he was absent more days than he worked. The employer offered him a 90-day leave of absence, but he refused it. As in *Waggoner*, the Seventh Circuit affirmed summary judgment for the employer.

The court began, "At the outset, let us be clear that our court, and every circuit that has addressed this issue, has held that in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs." *Yellow Freight*, at 948.

The third case is *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003). The employer refused to take the employee back, even though, after a two-month leave, he had purportedly recovered from the mental illness that had rendered him incapable of working. He sued under both the FMLA and the ADA. The Seventh Circuit held that he may have a valid claim

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under the FMLA, because his two month medical leave was less than 12 weeks. However, the court flatly rejected his argument that he could pursue a claim under the ADA, holding that while time off may be an apt accommodation for intermittent conditions like arthritis or lupus, "Inability to work for a multi-month period removes a person from the class protected by the ADA." *Byrne*, at 381.

In light of the precedents against it, it may be that the EEOC filed the litigation as a "test case" seeking ultimately to overrule those precedents. Whatever the motivation, until the issue is resolved, employers would be wise to revise any medical leave policy that contains an "inflexible" cut-off date and always allow for at least the possibility of accommodation.

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