Employment Law Daily Wrap Up, TOP STORY—7th Cir.: Worker not entitled to multi-month leave after FMLA exhaustion; extended absence not reasonable accommodation, (Sep. 21, 2017)

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By Marjorie Johnson, J.D.

An employee’s request for a multi-month medical leave of absence following his exhaustion of FMLA leave was beyond the scope of a reasonable accommodation under the ADA, the Seventh Circuit ruled in affirming dismissal of his ADA claim on summary judgment. Though the EEOC filed a brief as amicus curiae urging for reversal, the appeals court rejected its assertion that long-term leave should be considered a reasonable accommodation when certain circumstances are met, since adopting such a position would transform the ADA into a medical-leave statute, which was "an untenable interpretation of the term 'reasonable accommodation'" (Severson v. Heartland Woodcraft, Inc., September 20, 2017, Sykes, D.).

Surgery scheduled, no FMLA leave left. For several years, the employee worked in a physically demanding job for a fabricator of retail display fixtures. He suffered from a pre-existing back condition and was granted his request for 12 weeks of FMLA leave for treatment of his multiple herniated and bulging discs. His doctor ultimately recommended surgery, which was scheduled for the day that his FMLA leave expired, and would require him to remain off work for two to three more months.

He notified his employer of the scheduled surgery and asked for additional medical leave. However, since he had exhausted his FMLA entitlement, the company denied his request and terminated him. It also invited him to reapply once he was medically cleared to work.

Sued instead of reapplying. The employee was medically cleared to return to work about three months following his surgery. He chose not to reapply, but instead brought this lawsuit accusing the company of violating the ADA by failing to reasonably accommodate his disability. He argued that it should have provided him a three-month leave of absence after his FMLA leave expired, transferred him to a vacant job, or placed him in a temporary light-duty position. The district court granted the employer’s motion for summary judgment and he now appeals, with the EEOC filing a brief as amicus curiae in his support.

Was request reasonable? It was undisputed that the employee had a disability and that, at the time he was fired, couldn’t perform the essential function of frequently lifting over 50 pounds. Thus, the only issue was whether he was denied a reasonable accommodation, with the primary focus being whether a long-term leave of absence is reasonable.

"Qualified" means able to work. The Seventh Circuit sought guidance from the ADA’s statutory language, noting that that its definition of "reasonable accommodation" is flexible, as it advises what the term "may include," and not what it must include. In contrast, the requirement found in the definition of "qualified individual" is concrete—there it provides that a "reasonable accommodation" is one that allows the disabled employee to "perform the essential functions of the employment position." Thus, the term "reasonable accommodation" is expressly limited to those measures that will enable the employee to work.

Multi-month vs. intermittent leave. Putting these "interlocking" definitions together, a long-term leave of absence cannot be a reasonable accommodation. Refusing to disturb its decision in Byrne v. Avon Prods., Inc., the Seventh Circuit reiterated that "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." While Byrne left open the possibility that a brief period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances—such as for intermittent conditions that prevent an employee from doing their jobs for only brief periods of time—those types of circumstances would be analogous to a part-time or modified work schedule.

ADA not a "medical-leave entitlement." In contrast, a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job. Instead, such long-term medical leave is the domain
of the FMLA, which recognizes that employees will sometimes be unable to perform their job duties due to a serious health condition. As stated in Byrne, "the ADA applies only to those who can do the job."

**EEOC position rejected.** In so ruling, the Seventh Circuit squarely rejected the EEOC’s urging that a long-term medical leave of absence should qualify as a reasonable accommodation when the leave is (1) of a definite, time-limited duration; (2) requested in advance; and (3) likely to enable the employee to perform the essential job functions when he returns. Such a reading of the ADA equates "reasonable" accommodation with "effective" accommodation," which the Supreme Court rejected in *Barnett* since an effective accommodation could prove unreasonable. Moreover, under the EEOC’s interpretation, the length of the leave would not matter, thus transforming the ADA a medical-leave statute that would be, in effect, an "open-ended extension" of the FMLA. "The ADA is an antidiscrimination statute, not a medical-leave entitlement."

**No other openings or light duty.** The court also rejected the employee’s assertion that he should have been transferred to a vacant job since there was no evidence that any such positions were available at the time he was fired. He also failed to show that placing him in a light-duty job would have been a reasonable accommodation since the employer did not have a policy of providing light-duty positions for employees who suffered work-related injuries. Rather, it retained the option to give occupationally injured employees temporary duties at its discretion if such work was available, and such assignments were infrequent and usually didn't last more than two days.

The case is No. 15-3754.

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