

EEOC Targets No Fault Attendance Policies

Even Generous Policies Found by the Commission to Violate ADA if Deemed “Inflexible” in Denying Leave Beyond the Scope of the Policy

The Equal Employment Opportunity Commission (EEOC) has aggressively stepped up enforcement measures, taking a particular interest in what it considers “inflexible” no-fault attendance policies. Many employers have no-fault policies, which provide that employees receive a certain amount of leave (e.g., six or twelve months) and if they surpass that amount they are administratively terminated regardless of the reason for the absence. The problem with such policies, from the EEOC’s point of view, is that disabled employees whose leave exceeds the policy’s cut-off date are administratively terminated. The Commission believes employers must consider individual employees on a case-by-case basis in order to determine whether disabled employees on leave could return to work if granted a reasonable accommodation, which may include additional leave. The difficult issue here is that the EEOC is targeting employers with leave policies that are much more generous than leave under the Family and Medical Leave Act (FMLA) and in almost all cases the companies provide up to one year of leave.

Leave As A Reasonable Accommodation The Americans With Disabilities Act (ADA) requires employers to provide reasonable accommodations to qualified individuals with a disability unless doing so creates an undue hardship.¹ The EEOC and courts have generally agreed that unpaid leave of a specific duration may be a form of reasonable accommodation where the leave would accommodate an employee’s disability and enable the employee to perform the essential functions of the job upon his or her return.² How much leave an individual must be given as a reasonable accommodation is fact specific hinging upon whether a particular amount of time creates an undue hardship for the employers and whether the employee is still qualified to perform the essential functions of the job.

Modifying A No-Fault Leave Policy As An Accommodation No-fault attendance policies are widely used by many employers and such a policy, by itself, is not a ADA violation.³ However, the EEOC’s position is that employers must modify “no-fault” attendance policies if extending an otherwise uniform applied policy would permit an individual with a disability to return to work and perform the essential functions of the job. The EEOC Enforcement Guidance provides the following:

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.⁴

Many courts have agreed with the EEOC and determined that modifying no-fault attendance policies is a reasonable accommodation.⁵ The EEOC recommends that employers take a proactive approach in communicating with employees out on medical or disability leave to determine when and even whether the employee can return to work and take affirmative steps to help such employees.

Indefinite Leave Not Required The problem that immediately arises is whether employers must continue to grant one leave request after another as an accommodation, even where an employee continues to request more and more leave after his or her prior scheduled leave expires or exceeds the limits of the employer's no-fault attendance policy. The courts and the EEOC, however, agree that employers do not have to hold a job open or permit leave for an indefinite period.⁶ Indeed, an employer is not required to provide leave for an undefined amount of time because the "employer cannot determine whether the employee will be able to perform the essential functions of the job in the near future and therefore whether the leave request is a 'reasonable' accommodation."⁷ Moreover, if an employee cannot provide a fixed date of return (or an approximate date of return) it may very well constitute an undue hardship because due to the disruption "the employer can neither plan for the employee's return nor permanently fill the position."⁸ Similarly, the EEOC has opined:

Although employers may have to grant extended medical leave as a reasonable accommodation, they have *no obligation to provide leave of indefinite duration*. Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations.⁹

Individualized Approach Needed Courts tend to analyze repeated requests for extensions of leave as request for indefinite leave. For example, one court determined that the employee's third request for additional leave did not amount to a request for "reasonable accommodation that would permit her to perform the essential functions of regular work attendance."¹⁰ Similarly, the EEOC has noted that when an employee asks for an additional six-week extension after an initial 12 week leave period, the employer may inquire of the doctor: "why earlier predictions on return turned out to be wrong, a clear description of the employee's current condition, and the basis of the doctor's conclusion that only another six weeks are required."¹¹ If the doctor states the "employee's current condition does not permit a clear answer as to when he will be able to return to work", this would "support a conclusion that the employee's request has become one for indefinite leave."¹² Moreover, a returning employee must be able to perform the essential functions of the job with or without a reasonable accommodation. In the end, the safe approach is to consider the individual circumstances of each situation to determine whether an employee's request has morphed into a request for indefinite leave, which is simply not a reasonable accommodation under the ADA.

¹ In order to be qualified under the ADA, an individual must be able to perform the essential functions (i.e., fundamental *not* marginal duties) of the job with or without a reasonable accommodation. The statutory exception to the duty to provide a reasonable accommodation is that no change or accommodation is required if it would cause an "undue hardship" to the employer. Undue hardship means significant difficulty or expense and an employer's analysis should focus on resources and circumstances of the particular employee in relationship to the cost or difficulty of providing a specific accommodation. It also refers to accommodations that are unduly extensive, substantial, or

disruptive, or that would fundamentally alter the nature or operation of the business. 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No 915.002 (10/17/02). Moreover, if an accommodation would be unduly disruptive to other employees' ability to work it may be an undue burden. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No 915.002 (10/17/02) at Question 44. For example, if changing one employee's schedule prevents other employees from doing their jobs such a requested modification would be an undue hardship. *Id.*

² See e.g., *Fogleman v. Greater Hazelton Health Alliance*, 2004 U.S. App. LEXIS 26861 (3d Cir. 2004); *Humphreys v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No 915.002 (10/17/02) at Questions 16-17.

³ *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998).

⁴ EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No 915.002 (10/17/02) at Question 17.

⁵ See e.g., *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000); *Shannon v. City of Philadelphia*, 1999 U.S. Dist. 18089 (E.D. Pa. 1999). But some courts have found that an accommodation request of leave that would exceed a year would constitute an undue burden. *Walsh v. UPS*, 201 F.3d 718 (6th Cir. 2000); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998). Similarly, some cases courts have determined that requests for a year's worth of leave constituted was simply "unreasonable." See e.g., *Powers v. Polygram Holding, Inc.*, 40 F. Supp. 2d 195 (S.D.N.Y. 1999).

⁶ *Peyton v. Fred's Stores of Arkansas*, 2009 U.S. App. LEXIS 8121 (8th Cir. 2009) (holding that "indefinite" leave is not a reasonable accommodation); *Fiumara v. Harvard College*, 2009 U.S. App. LEXIS 9558 (1st Cir. 2009) ("indefinite leave is not a reasonable accommodation under the ADA"); *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003); EEOC Fact Sheet: "Applying Performance and Conduct Standards to Employees with Disabilities (2008) at Question 21.

⁷ *Lara v. State Farm Fire & Casulty Co.*, 2005 U.S. App. LEXIS 1341 (10th Cir. 2005).

⁸ EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No 915.002 (10/17/02) at Question 44.

⁹ EEOC Fact Sheet: "Applying Performance and Conduct Standards to Employees with Disabilities (2008) at Question 21 (emphasis added). In earlier guidance the EEOC stated that "while undue hardship cannot be based solely on the existence of a no-fault leave policy, the employer may be able to show undue hardship based on an individualized assessment showing the disruption to the employer's operations if additional leave is granted beyond the period allowed by the policy. In determining whether undue hardship exists, the employer should consider how much additional leave is needed (e.g., two weeks, six months, one year?). EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No 915.002 (10/17/02) at Question 17 n.50.

¹⁰ *Brannon v. Luco Mop. Co.*, 521 F.3d 843 (8th Cir. 2008).

¹¹ EEOC Fact Sheet: "Applying Performance and Conduct Standards to Employees with Disabilities (2008) at Example 39.

¹² *Id.*