## New Decisions Evaluating the Reasonableness of Accommodations under the ADA

By Ashleigh M. Leitch

Employment lawyers know that the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., places an affirmative duty on employers to provide reasonable accommodations to employees with known disabilities, unless such an accommodation would be an undue hardship to the employer. But how should practitioners and their clients analyze whether an accommodation is reasonable? In recent months, courts across the country have provided ongoing guidance on this issue.

**Is Additional Time Off a Reasonable Accommodation?**

Because of the physical nature of the employee's work, the employee suffered back pain for which he took a 12-week leave of absence under the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. On the last day of his leave of absence, the employee had back surgery and required an additional two or three months away from work to recover from surgery. The employee requested that his employer continue his medical leave of absence. The employer declined this request because the employee had already depleted his FMLA entitlement. Subsequently, the employer terminated the employee's employment. The employee sued the employer for violating the ADA by failing to provide a reasonable accommodation of three months' leave of absence. This case presented the court with the question of whether a three-month medical leave was a reasonable accommodation.

In a groundbreaking opinion, the Seventh Circuit answered "no" – a "multi-month" leave of absence is not a reasonable accommodation.[1] The Court differentiated between the purpose of the FMLA as a "medical-leave entitlement" statute and the ADA, an anti-discrimination statute. According to the Seventh Circuit, recognizing a multi-month leave as a reasonable accommodation impermissibly conflates the statutes' purposes. As defined by the ADA, a reasonable accommodation allows an employee to perform the essential functions of the job, or, in other words, to work. Because an employee on a multi-month leave is not working, such a leave is not a reasonable accommodation.

It remains to be seen what impact this case will have outside of the Seventh Circuit's jurisdiction of Illinois, Indiana, and Wisconsin. Consistent with prior guidance, the Equal Employment Opportunity Commission (EEOC) took the position that a multi-month leave may be a reasonable accommodation.[2] In its amicus brief, the EEOC argued that a multi-month medical leave should qualify as a reasonable accommodation when the leave is "of definite, time-limited duration, requested in advance, and likely to enable the employee to perform the essential functions of the job when he or she returns."[3] The EEOC has long maintained that a reasonable accommodation "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment."[4] Ultimately, this position did not persuade the Seventh Circuit.

The impact of the Seventh Circuit's decision on short-term leave requests is also unclear. The Seventh Circuit left open the possibility that a medical leave shorter than two or three months could be a reasonable accommodation if an employee is not ready to return to work after FMLA leave or if the employee does not qualify for FMLA leave. For example, intermittent leave or "a couple of days or even a couple of weeks" of time off may qualify as a reasonable accommodation.[5] Most courts have reached similar conclusions.[6]

**Is Use of Medical Marijuana a Reasonable Accommodation?**

Pursuant to Massachusetts state law, an employee had a lawful prescription for medical marijuana to treat her Crohn's disease. As a condition of her employment, she underwent a mandatory drug test, which unsurprisingly resulted in a positive screen for marijuana. Even though the employee informed the employer of the medical reason for her positive screen, the employer terminated her employment for failing the drug test. The employee sued the employer under state law for disability discrimination and claimed that her employer failed to accommodate her medical marijuana prescription. Given that use of medical marijuana is a crime under federal law, is an employee's requested accommodation to continue using medical marijuana per se unreasonable?

In a first-of-its-kind decision, the Massachusetts Supreme Court answered "no" – the fact that an accommodation violates federal law does not automatically make it unreasonable.[7] "To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions."[8] The Court went on to reason that the employer should have engaged the employee in an interactive dialogue to determine whether there was an equally effective alternative to medical marijuana. The Court noted, however, that employers may still raise undue hardship as a defense, particularly for safety-sensitive positions.

Twenty-nine states and the District of Columbia have legalized medical marijuana in some form.[9] Although the U.S. Department of Justice under the Trump Administration is unlikely to decertify medical marijuana as a Schedule 1 drug, other state courts may follow Massachusetts to protect employees with disabilities on the basis of state law.[10]

**Is Hiring an Interpreter a Reasonable Accommodation?**

A deaf nurse relied upon an American Sign Language (ASL) interpreter to communicate with hearing individuals in the workplace. The nurse applied for a job, and received a job offer, conditioned upon a health screening and clearance by the employer's occupational health office. The annual salary for her position was approximately $60,000. The nurse notified the employer that she required a full-time ASL inter-

preter as an accommodation, at an annual cost of $120,000. The employer decided the cost of the ASL interpreter was not reasonable and withdrew its job offer. Is paying a full-time ASL interpreter double the salary of the hearing-impaired employee a reasonable accommodation?

In this case, the District Court of Maryland answered "yes" – the full-time ASL interpreter was a reasonable accommodation because the nurse could perform the essential job functions with the accommodation.[11] Additionally, the Court noted that the $120,000 expense paled in comparison to the overall hospital's operational budget of $1.7 billion.

**Conclusion**

In the words of Judge Lynch of the First Circuit, "these are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes." Although the cases explained above provide guideposts to analyzing the reasonableness of requested accommodations, practitioners and their clients should remember that reasonableness is determined on a case-by-case basis according to the particular facts of the parties' circumstances. ■

**Endnotes:**

[1]*Severson v. Heartland Woodcraft, Inc.,* 872 F.3d 476 (7th Cir. 2017); *see also Delgado Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119 (1st Cir. 2017) (affirming summary judgment to dismiss plaintiff's claim for disability discrimination because plaintiff's request for an additional twelve months of medical leave after she exhausted her FMLA entitlement was not a reasonable accommodation under the ADA); *Hwang v. Kan. State Univ.,* 753 F.3d 1159 (10th Cir. 2014) (affirming motion to dismiss plaintiff's claim for disability discrimination under the Rehabilitation Act because plaintiff's request for an additional six months of leave was not a reasonable accommodation).

[2]Amicus brief filed by EEOC accessible at https://www.eeoc.gov/eeoc/litigation/briefs/severson.html.

[3]*Id*.

[4]EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA (1192), at III-6.

[5]*Severson v. Heartland Woodcraft, Inc.,* 872 F.3d 476, 481 (7th Cir. 2017).

[6]*Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 647 (1st Cir. 2000) ("This court and others have held that a medical leave of absence – Garcia's proposed accommodation -- is a reasonable accommodation under the Act in some circumstances."); *Walton v. Mental Health Ass'n. of Southeastern Pennsylvania*, 168 F.3d 661, 671 (3d Cir. 1999) (stating that "unpaid leave supplementing regular sick and personal days might, under other facts, represent a reasonable accommodation"); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.,* 155 F.3d 775, 783 (6th Cir. 1998) ("[A] medical leave of absence can constitute a reasonable accommodation under appropriate circumstances."); *Humphrey v. Memorial Hospitals Ass'n,* 239 F.3d 1128, 1135 (9th Cir. 2001) ("A leave of absence for medical treatment may be a reasonable accommodation under the ADA."), cert. denied, 122 S.Ct. 1592 (U.S. 2002); *Rascon v. U.S. West Communications, Inc.,* 143 F.3d 1324, 1333-34 (10th Cir. 1998) ("An allowance of time for medical care or treatment may constitute a reasonable accommodation.").

[7]*Barbuto v. Advantage Sales and Marketing, LLC,* 477 Mass. 456, 78 N.E.3d 37 (Mass. 2017).

[8]*Id.* at 456-66.

[9]"State Marijuana Laws in 2017 Map," GOVERNING, accessible at http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html.

[10]But *see Coats v. Dish Network,* 350 P.3d 849 (Colo. 2015) (affirming dismissal of plaintiff's wrongful discharge claim for testing positive for medical marijuana because plaintiff's use of medical marijuana violated federal law and therefore was not protected as a "lawful activity" under state anti-discrimination laws) (not analyzing use of medical marijuana as a reasonable accommodation).

[11]*Searls v. Johns Hopkins Hosp.,* 158 F. Supp. 3d 427, 437 (D. Md. 2016).

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