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Tenth Circuit: More Than Six Months of Leave Almost Never Required as a Reasonable Accommodation

Labor & Employment Practice Group

July 22, 2014

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For years employers have been searching for guidance on how much leave—after paid time off and FMLA leave are exhausted—must an employer provide as a reasonable accommodation before termination becomes an option. Indeed, this issue is among the thornier matters managers and human resources professionals confront.

Earlier this summer, the U.S. Court of Appeals for the Tenth Circuit provided just the guidance employers yearned for when it decided *Hwang v. Kansas State University*, 2014 WL 2212071 (10th Cir. 2014), holding Kansas State University did not violate the Rehabilitation Act of 1973 (a statute identical in all material respects to the Americans with Disabilities Act) when it terminated Grace Hwang's employment pursuant to the university's policy that limited employees to no more than six months of leave.

Factual Background

Hwang was employed as an assistant professor at Kansas State University, and by all accounts, was a good teacher suffering through a horrible year. Shortly after agreeing to teach three terms at the university (fall, spring and summer sessions), Hwang was diagnosed with cancer and began treatment. The university granted Hwang a six-month (paid) leave of absence in accordance with the school's policy. As the six month period drew to a close, Hwang's physician recommended that she seek additional leave and Hwang asked that her employer extend her leave through the end of the spring semester. The university declined Hwang's request and terminated her employment after she failed to return to work following six months of leave.
Hwang sued the university, claiming the school failed to provide her a reasonable accommodation when it declined to give her more than six months of leave. The trial court dismissed Hwang's complaint, and she appealed to the Tenth Circuit.

The Ruling

Although Hwang argued "all inflexible sick leave policies, even ones granting as long as six months' leave, necessarily violate [the law]," the Tenth Circuit had no trouble affirming the lower court's ruling. The court explained that a brief leave of absence may be legally required because the leave allows the employee to perform the essential functions of the job. Anything longer, the court opined, would not likely be defensible because reasonable accommodations are about providing things that allow employees to work, not to not work. Of course, drawing the line between a "brief" absence and one that is so long as to be unreasonable depends on the particular facts of a given situation. However, it depends in large measure on the essential functions of the job in question, the nature and length of the leave sought and the impact on fellow employees.

Even considering these variable factors, the court found it "difficult to conceive how an employee's absence for six months—an absence in which [the employee] could not work from home, part-time, or in any way in any place—could be consistent with discharging the essential functions of most any job in the national economy today." Although the court recognized Hwang's situation was unfortunate and in no way of her own making, it affirmed that other forms of social security—not the Rehabilitation Act or ADA —aim to

address her situation. The Rehabilitation Act and ADA, in contrast, "seek to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disabled persons to work—not to turn employers into safety net providers for those who cannot work."

Practical Guidance

The *Hwang* decision is enlightening in that it provides an indication of where the Tenth Circuit believes the outer boundary of a reasonable leave of absence lies. However, the court stopped short of providing a bright-line rule and left room for the unusual case in which more than six months of leave might be required. Therefore, employers should remain committed to the ADA's interactive process before concluding that any accommodation is unreasonable. In addition, employers should seize the opportunity to review their leave policies and confirm that they are being administered evenhandedly.

If you have questions about your leave policies or a particular request for a leave of absence, please contact Daniel Johnson or any other member of Crowe & Dunlevy's Labor & Employment practice group.

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