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SPECIAL

Two Cautionary Tales for Employers Considering Termination Following An Extended Medical Leave of Absence

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Two recent decisions from the United States District Court for New Jersey illustrate the difficulties confronting employers considering the termination of an employee during an extended medical leave of absence. In each case, the key question before the courts was the scope of the obligation imposed on employers by the New Jersey Law Against Discrimination (LAD) and the Federal Americans with Disabilities Act (ADA) to engage in an “interactive process” with disabled employees to identify reasonable accommodations that must be considered prior to termination. In both cases, the court concluded that the employer violated the rights of the disabled employee by terminating their employment during a medical leave of absence before fully exploring alternative accommodations.

The Decisions: In *Brown v. Dunbar Armored, Inc.*, Ronald Brown claimed his employer violated the LAD by failing to engage in the interactive process prior to terminating his employment after he fully exhausted his twelve-week leave entitlement under the Family Medical Leave Act (FMLA).

Brown was placed on an FMLA medical leave following coronary bypass surgery. Following ten weeks of leave, Brown’s physician indicated he could return to “light duty.” Brown claims he requested to return to work on light duty until he was able to return to full duty. The employer rejected Brown’s request and terminated his employment during the 13th week of his medical leave. The employer maintained that Brown did not request an extension of his medical leave and was terminated when his protected leave under the FMLA was exhausted. On the same day Brown was terminated, his physician reiterated that Brown could return to light duty and estimated a return to full duty five weeks later, two months after his twelve-week FMLA leave entitlement expired.

The court concluded that the employer did not engage in the interactive process with Brown in good faith prior to terminating his employment. The court observed that the LAD requires employers to initiate the interactive process with the employee to “identify the potential reasonable accommodation that could be adopted to overcome the employee’s precise limitations resulting from the disability.” The court concluded that Brown’s request for light duty work, even if unreasonable¹, triggered the employer’s duty to engage in the interactive process to determine if reasonable accommodation could be made. Moreover, although the employer did not have a date certain when Brown could resume full duties when it made the termination decision, it was not excused from considering the possibility of a temporary leave of absence as a form of reasonable accommodation where, as here, the employer was provided with a general estimated date when Brown would be fit to return. The court cautioned that if an employer “chooses not to engage in this process, it proceeds at its own risk.”

(cont’d ➔)

In *Ellis v. Ethicon*, Ellis likewise charged her employer with failing to engage in the interactive process required by the ADA. Ellis had an initial nine-month medical leave for cervical strain and 1½ years later was placed on a second leave for related reasons. Six months into the second medical leave, one of Ellis’s treating physicians recommended that she be permitted to work three days a week from home and provided the employer with a detailed, gradual return to work plan. Shortly thereafter, another of Ellis’s physicians recommended that these accommodations be maintained “indefinitely.” Believing that Ellis’s work-from-home restrictions were permanent, the employer rejected the recommendations as unreasonable and offered Ellis a part-time position. Ellis rejected that offer and requested a meeting with her employer and her doctor to “iron out accommodations.” The employer declined to meet and instructed Ellis to secure revised accommodations from her physician before it would engage in further discussion. Ellis did not submit revised accommodations and was terminated in the seventh month of her medical leave.

At trial, the jury found that the employer engaged in the interactive process in bad faith, rejecting its argument that the process was discontinued when Ellis failed to provide revised accommodations from her physician. On reconsideration of the verdict, the court observed that once an employee has requested accommodation, the employer is obligated to undertake all reasonable efforts to identify reasonable accommodation through “a flexible, interactive process that involves both the employer and the employee.”

The court faulted the employer for rejecting Ellis’s work-from-home proposal without seeking further explanation about whether her physician’s recommendation of an “indefinite” accommodation meant that it was to be maintained permanently. In fact, at trial the physician testified that the recommendation was not permanent in nature when it was proposed. Moreover, Ellis’s supervisor testified that she would have considered permitting Ellis to work at home had she known that this would be a temporary, not permanent,

accommodation. The court also faulted the employer for failing to explore other alternative accommodations once Ellis rejected the offer of a part-time position. As a result, the court concurred with the jury, finding that the employer acted in bad faith during the interactive process.

The Take-Away: Employers are not necessarily free to terminate employees at the exhaustion of an employee’s FMLA leave entitlement. They must engage in a good faith interactive process with the employee to determine what, if any, accommodations can be made to enable the employee to return to work. This process may include consideration of whether the employee can return to work with an additional, temporary leave of absence and whether that leave can be reasonably accommodated. It may also include an obligation to make further inquiry to the employee’s physician to clarify the duration of any recommended accommodations. Only after engaging in this process, exploring alternative accommodations and finding the accommodations unreasonable should the employer consider terminating the employee. The employer cannot point to the employee’s failure to provide alternative accommodation proposals as an opportunity to “pull the plug” on the interactive process.

The courts continue to find room to place added burdens on employers when it comes to protection of employee rights. Employers that fail to heed these burdens “proceed at their own risk.”



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Anthony P. Sciarillo of the EdLaw Group at edlawgroup@lindabury.com.

¹ To date, the courts have generally held that an employer is not obligated to create a light duty position for the employee as a form of reasonable accommodation, but must consider the employee for any pre-existing light duty position for which he/she is qualified.