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WHATEVER THE SEVENTH CIRCUIT SAYS, EXTENDED LEAVE CAN STILL BE A REASONABLE ACCOMMODATION IN CALIFORNIA

By David P. Zins

Managing employees' leaves of absence is a tricky business for employers. While laws like the Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) provide a set amount of leave protection and are generally easy to follow, courts and agencies have said that anti-discrimination statutes such as the Americans with Disabilities Act (ADA) and the disability provisions of the California Fair Employment and Housing Act (FEHA) may require an employer to provide additional leave beyond the full extent of the leave laws as a reasonable accommodation of an employee's disability. This result is paradoxical; courts have consistently held that attendance is an essential job function, which an employee on an extended leave obviously cannot perform. Nonetheless, the law has generally been that an extended leave may be a reasonable accommodation if it would likely be effective

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in allowing the employee to return to work at the end of the leave. To terminate employment under these circumstances could thus expose an employer to liability for disability discrimination, failure to accommodate and failure to engage in the interactive process, unless the employer can make the arduous showing that extending the leave would pose an undue hardship or that the leave is essentially open-ended, either explicitly or implicitly.

In a welcome development for employers in Illinois, Indiana and Wisconsin, the Seventh Circuit reached a different result in the second half of 2017. It held that an employee on an extended leave of absence is beyond the protection of the ADA and that leaves of absence are the province of the FMLA, not the ADA. At the end of the year, however, the Ninth Circuit reminded us that this is not the law in California. Employers here still need to consider extending leaves well beyond the FMLA and CFRA entitlements in order to avoid running afoul of the ADA and FEHA.

THE SEVENTH CIRCUIT: "THE ADA IS AN ANTIDISCRIMINATION STATUTE, NOT A MEDICAL-LEAVE ENTITLEMENT."

The Seventh Circuit caused ripples last September with its *Severson v. Heartland Woodcraft, Inc.* opinion, concluding that a multi-month leave of absence was beyond the scope of a reasonable accommodation under the ADA.[1]

The relevant facts are straightforward. The plaintiff had been employed by the defendant, a wood fabricator, since 2006 in various physically demanding positions. He had suffered from back pain since 2005 and, in 2010, was diagnosed with a chronic back condition, which did not hamper his ability to work except when he experienced severe "flare-ups." In June 2013, the plaintiff wrenched his back at home, which aggravated his preexisting condition and caused him to miss work. He requested and received FMLA leave and, throughout the summer, underwent treatment that proved generally ineffective. The plaintiff remained in touch with the defendant's human resources (HR) manager and submitted periodic doctor's notes explaining his continued inability to work and requesting leave extensions, which were approved. In mid-August, the plaintiff told the employer that he had scheduled back surgery on what was the last day of his 12-week FMLA leave. He needed an additional two months to recover after surgery and requested an extension of his leave during this time. In late August, just a day before the plaintiff's scheduled surgery date, the HR manager informed the plaintiff that his employment would end when his FMLA leave expired and invited him to reapply after he recovered from surgery and was medically cleared to work. The plaintiff had the surgery as planned and, when he was cleared to work without limitations three months later, sued the employer for ADA discrimination for failing to accommodate his disability by refusing to allow a two- or three-month leave of absence.

The district court granted the defendant summary judgment on the ground that the plaintiff's proposed accommodation was not reasonable. The plaintiff appealed, and the U.S. Equal Employment Opportunity Commission (EEOC) filed an amicus brief in support of reversal.

The Seventh Circuit affirmed the award of summary judgment for the employer. In affirming the judgment, the court noted that "[t]he ADA is an antidiscrimination statute, not a medical-leave entitlement."[2] For this reason, "[a] multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA."[3] The court explained that a reasonable accommodation, by its statutory definition, is one which allows a disabled employee to perform the essential functions of his position. A long-term leave of absence cannot be a reasonable accommodation because it does not give a disabled individual the means to work, but rather excuses his not working. Unlike intermittent time off or a short leave of absence, "a medical leave spanning multiple months does not permit the employee to perform the essential functions of the job" and removes the employee from the class of persons protected by the Act.[4]

The Seventh Circuit specifically rejected the EEOC's argument that a long-term medical leave should qualify as a reasonable accommodation when it 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 rule would effectively transform the ADA into a medical-leave statute and would amount to an "open-ended extension of the FMLA."[5] That can't be the law, the Seventh Circuit concluded, because the ADA applies only to those who can do the job and long-term medical leave is the domain of the FMLA.

THE NINTH CIRCUIT: "A LEAVE OF ABSENCE CAN CONSTITUTE A REASONABLE ACCOMMODATION."

Of course, the Seventh Circuit's *Severson* opinion is not the law in California. A decision at the end of the year, *Villalobos v. TWC Administration LLC*,[6] is a timely reminder of that unfortunate fact.

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As in *Severson*, the relevant facts in *Villalobos* are not complicated. The plaintiff was employed by the defendant for 24 years as a direct sales representative. In May 2013, the plaintiff initiated a leave of absence based on a claimed disability, which he identified as stress, anxiety and insomnia.[7] He exhausted his protected medical leave in late July but requested (and received) an extension of this leave until early September as an accommodation of his claimed disability. When this extension expired, the plaintiff's doctor sent a note requesting a second extension of his leave until early October. The employer approved this request also, but noted that it might be unable to accommodate a further extension. The plaintiff returned to work in early October and worked for approximately five weeks before initiating another leave of absence due to his alleged insomnia, depression and anxiety. In mid-November, the employer sent ADA paperwork to the plaintiff, who returned it about a month later requesting a leave of absence until late January 2014. The employer granted the request but noted that any further extension would need to be evaluated. In early February, the plaintiff requested yet another extension of his leave, until mid-March. This time, the employer determined it could no longer accommodate the plaintiff's continuing leave requests and terminated his employment in late February.

The plaintiff sued the employer, in relevant part, for disability discrimination, failure to reasonably accommodate and failure to engage in the interactive process, all in violation of FEHA.[8] He also alleged wrongful termination derivative of these claims. The district court granted the employer's motion for summary judgment.

The Ninth Circuit reversed. The court opined that the plaintiff was not outside of FEHA's protection simply because he was unable to work at the time of his termination, "because one form of reasonable accommodation can be an extended leave of absence that will, in the future, enable an individual to perform his essential job duties."[9] More specifically, a leave of absence can be a reasonable accommodation "'where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future.'"[10] Although courts consider whether a requested leave was finite or indefinite in evaluating reasonableness, the plaintiff's planned return to work in March 2014 meant there was a triable issue of fact as to whether the requested leave was finite. The plaintiff's multiple extension requests might prove dispositive in determining whether the plaintiff's request for yet another extension was reasonable, but this too was a factual issue for trial and not summary judgment, per the Ninth Circuit. There was likewise a triable issue as to whether granting the requested further extension would pose an undue hardship because the employer had allegedly allowed at least two other employees to take similar extended leaves.

The *Villalobos* decision does not address the Seventh Circuit's *Severson* decision in any way. But the starting point in *Villalobos*—supported by a body of Ninth Circuit and California authority—is that an extended leave of absence may be a form of reasonable accommodation. This is completely inconsistent with the Seventh Circuit's rationale in *Severson*.

WHAT LESSONS CAN CALIFORNIA EMPLOYERS LEARN FROM THE *SEVERSON* AND *VILLALOBOS* DECISIONS?

The *Severson* and *Villalobos* decisions point to several lessons for California employers seeking to manage leaves of absence without violating the ADA and FEHA:

- **An extended leave of absence, beyond the time provided under the FMLA and CFRA, may be a reasonable accommodation in California.** Of course, this is not a new legal development, but it is the most important takeaway for employers from the *Severson* and *Villalobos* decisions. Even after an employee has exhausted his protected leave under the FMLA and CFRA, the ADA and FEHA may nonetheless require a California employer to provide additional leave as an accommodation for an employee's disability.

- **Even in California, indefinite leaves of absence are not reasonable.** As a general matter, an employer is not required to wait indefinitely for an employee's condition to improve. However, *Villalobos* teaches that an employee's repeated requests to extend an ongoing leave are not the same thing as an indefinite leave, at least for purposes of summary judgment. If it includes a proposed return-to-work date, an employee's request is most likely not a request for "indefinite" leave as a matter of law. Relatedly, an employer generally need not provide repeated leaves of absence for an employee with a poor prognosis of recovery, but the mere fact that a medical leave has been repeatedly extended does not mean that it would continue indefinitely.

- **Whether an extended leave of absence is reasonable depends in part on the employee's prognosis.** According to *Villalobos*, an extended leave of absence is not a reasonable accommodation under FEHA if it is not "likely" the employee would be able to return to an existing position at some point in the foreseeable future. Other case law suggests a

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less rigorous standard. In *Humphrey v. Memorial Hospitals Association*, for example, the Ninth Circuit noted that "the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation."[11] Rather, the employer must attempt an accommodation so long as it "could have plausibly enabled a handicapped employee to adequately perform the job."[12] Under either standard, however, it is relevant to an employer's reasonableness determination how likely or plausible are an employee's post-leave chances of being able to return to an existing position. If the employer is not certain about an employee's prognosis for recovery, the employer should seek clarification from the employee or the employee's medical provider.

- **Even *Severson* says that intermittent time off or short-term leaves can be reasonable accommodations.** The Seventh Circuit noted that intermittent time off or short-term leaves may be analogous to part-time or modified work schedules, which are statutory examples of what a reasonable accommodation may include under the ADA. These statutory examples are equally operative in the Ninth Circuit, and California employers should recognize that intermittent time off or short-term leaves may be forms of reasonable accommodation.

- **The employer's duty to engage in the interactive process is continuing.** In finding triable issues of fact as to the employer's alleged failure to engage in the interactive process, the *Villalobos* court emphasized employers' "affirmative" duty to engage in the interactive process on a "continuing" basis, "which is not exhausted by one effort."[13] Despite granting all of the plaintiff's earlier requests to extend his leave of absence, the employer in *Villalobos* was denied summary judgment because it denied the employee's final request. The court also faulted the employer for not communicating with the employee between the date of his final extension request and the date he was terminated and for not telling him that he would be terminated if he failed to return to work by the end of his most recent accommodation. The lesson here appears to be that employers should never stop communicating with employees on leave and that the interactive process requires the employer to keep considering additional potential accommodations throughout the process. A corollary observation is that extended leaves of absence are often just one of many potential accommodations an employer and employee should consider as they engage in the interactive process.

- **Arguing that a requested leave would pose an undue hardship can be undermined by evidence that other similar leaves have been granted.** The employer in *Villalobos* was denied summary judgment of its undue hardship defense because of plaintiff's contrary evidence that the employer had provided similar extended leaves to other employees. In determining whether to grant a requested leave extension, employers should consider how it compares to other leave requests they have previously granted or denied.

- **Talk to your lawyer.** This last lesson is the most important. Employers should always consult counsel when managing extended leaves of absence and determining whether proposed accommodations would be reasonable. In this evolving and fact-intensive area of law, seemingly minor differences between two situations can be outcome determinative.

CONCLUSION

The Seventh Circuit's *Severson* opinion is not the law of the Ninth Circuit. Unless the Ninth Circuit reconsiders, the likeliest route for relief for California employers is review by the U.S. Supreme Court, which often takes cases where the Circuit courts are split on an important point of law. Meanwhile, California employers must continue to consider extended leaves of absence as potential reasonable accommodations under the ADA and FEHA, separate and apart from an employee's leave entitlement under the FMLA or CFRA. We can help as you navigate the challenging issues that abound in this area.

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1 872 F.3d 476 (7th Cir. 2017).

2 *Id* 3d at 479.

3 *Ibid.*

4 *Id.* at 481.

5 *Id.* at 482.

6 No. 16-55288, 2017 U.S. App. LEXIS 26728 (9th Cir. Dec. 26, 2017).

7 Some of the facts described here have been pulled from the district court opinion, which describes the factual background in greater detail. *Villalobos v. TWC Admin. LLC*, No. 2:15-cv-02808-R-PLAx, 2016 U.S. Dist. LEXIS 21334 (C.D. Cal. Feb. 16, 2016).

8 California courts look to federal precedent governing analogous federal anti-discrimination laws when interpreting FEHA claims. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 354 (2000). Thus, a direct comparison of *Severson* (interpreting the ADA) and *Villalobos* (interpreting FEHA) is appropriate.

9 *Villalobos*, 2017 U.S. App. LEXIS 26728 at *4 (citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999)).

10 *Id.* (quoting *Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245, 263 (2000)).

11 239 F.3d 1128, 1135-36.

12 *Ibid.*

13 *Villalobos*, 2017 U.S. App. LEXIS 26728 at *8-9.

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