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EEOC Targets Policies Affecting Disabled Employees

Employer inflexibility frowned upon in enforcement of ADA

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Employers have long been told how critical it is to apply their policies in a fair and consistent manner, including neutral absence-control and leave policies. They have also been reminded that not doing so can result in charges of discrimination.

The strict application of leave policies has recently come under increased scrutiny from the U.S. Equal Employment Opportunity Commission and plaintiffs' lawyers, who claim that modification of leave policies may be required as an accommodation for disabled employees. As recent cases demonstrate, however, the question of what modifications are required and appropriate can be challenging for employers.

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EEOC Focus

The EEOC is the federal agency charged with addressing discrimination in the workplace. Recent statements and lawsuits demonstrate that the EEOC has shifted resources toward cases involving leave polices and practices that do not adequately provide exceptions for disabled employees, contending that such policies violate the Americans with Disabilities Act because they prevent a disabled employee from obtaining a reasonable accommodation.

According to one EEOC regional attorney, the "era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA are over. Just as it is a truism that never having to come to work is manifestly not a reasonable accommodation, it is also true that inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law."

Peter J. Murphy

Acting with the same purpose expressed by that regional attorney, the EEOC has made inflexible leave policies a target of its recent litigation strategy. One recent case arose from Interstate Distributor Company's leave policy, which provided that if an employee needed more than 12 weeks of leave, he or she was automatically terminated without any determination of whether additional leave would be a reasonable accommodation. After being terminated pursuant to that policy, a disabled employee filed a discrimination charge. After investigating that charge, the EEOC brought a lawsuit on behalf the more than 250 employees it believed were impacted by that policy.

In November 2012, Interstate agreed to a settlement that included a payment of $4.85 million to

the affected employees. It was also required to revise the leave policy, provide ADA training to its employees, and hire an independent monitor to ensure compliance with the revised policy. The size and scope of this settlement is not unusual or unprecedented, as the EEOC reached similar settlements earlier against Verizon Communications ($20 million payment and similar non-monetary compliance obligations) and Sears & Roebuck Company ($6.2 million and similar obligations). The EEOC's recent strategic planning documents demonstrate that it will continue to investigate and litigate these cases in the next several years.

Employer Challenges

The application of leave policies also is being challenged in court, and a December 31, 2012 opinion by a federal judge in California offers a good example of why requests for a leave-based accommodation must be adequately discussed with the employee, and not just dismissed upon receipt.

In that case, the court found that a police officer employed by a community college could proceed to trial with a claim that the college improperly denied him additional leave as an accommodation. The employee had anxiety and had previously taken a three-month leave in order participate in group therapy, take medication, and attend a class on reducing anxiety.

After successfully completing a fitness for duty evaluation, the employee returned to work. Two years later, he was ordered to undergo a second fitness for duty evaluation. The doctor concluded that "it is likely that [the employee] will continue to experience psychological distress for the foreseeable future and it is unlikely that he will be able to return to duty in the near term." After receiving this evaluation, the college denied the employee's request for additional leave or a temporary assignment to a different position. The employee then sued under the ADA.

Regarding the request for additional leave as an accommodation, the court found that the doctor's conclusion that the employee could not work for the "foreseeable future" was not sufficiently indefinite as to preclude it from being reasonable. In other words, the court believed that a jury could find that the request for additional leave was a reasonable accommodation under the facts of that case. Although the college may still prevail at trial, this ruling nevertheless demonstrates the challenges that employers face when presented with a request for an unspecified period of leave beyond that allowed by the employer's neutral absence-control policy.

Ensuring compliance with the ADA when addressing leave-based accommodation requests.

In 2013 and beyond, the EEOC and private attorneys will continue to attempt to show that employers are not seriously discussing additional leave as a possible accommodation for disabled employees. To minimize lawsuits and ensure compliance with the ADA, employers must ensure that their leave policies provide flexibility for disabled employees. In addition, employers should continue to engage disabled employees in appropriate, interactive dialogue about a request for modification of a leave policy. As that same regional attorney noted, "[s]ometimes a simple conversation with the employee about what might be needed to return to work is all that is necessary to keep valued employees in their jobs."

Although both state and federal law require these "simple conversations" in an interactive process, neither state nor federal law requires that modifications to leave policies be granted in every case. To the contrary, employers remain free to deny such requests and take appropriate action pursuant to their leave policies, including termination, when the request is not reasonable or would constitute an undue hardship. Until the EEOC issues its expected guidance for addressing leave-based accommodation requests, employers must ensure such decisions are based on an appropriate interactive process. ■