

You Need What?: When Does Your Employee's Request for More Leave Become Unreasonable Under the ADA?

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R. Douglas Taylor, Jr.
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Employee requests for extended leave as a reasonable accommodation of a disability continue to be among the most difficult for employers to evaluate under Americans with Disabilities Act ("ADA"). Consider this all too familiar scenario for many employers: Your employee is nearing exhaustion of all available forms of sick leave, including Family and Medical Leave Act ("FMLA") leave and paid time off, and informs you that he is unable to return to work right now, requires additional medical testing or treatment, and is uncertain when he will actually be able to return to work.

As an employer, you are left with a head-scratching decision to make. Do you terminate the employee because he is unable to return to work at the conclusion of his FMLA leave, which is permitted under that statute? Or, do you extend the employee additional unpaid leave as a reasonable accommodation of his disability under the ADA? For employers caught up in this conundrum, the resolution depends on the facts of each individual situation, and there are very few bright line answers upon which an employer can rely. However, a recent decision of the U.S. Tenth Circuit Court of Appeals in the case of *Punt v. Kelly Services and GE Controls Solutions* provides some helpful guidance.

The Employment Relationship Between GE, Kelly Services and Punt

GE Controls Solutions designs and produces computer hardware and software. The company contracted with Kelly Services, a temporary staffing agency, to fill a need for a full-time receptionist. Kelly Services provided GE with Kristin Punt, who worked at GE from late October 2011 through December 5, 2011. At the start of her assignment as a receptionist, Punt was advised that she was required to "work a 40-hour week, starting at 7:30 a.m. and ending at 4:30 p.m. each day." An "essential function" of Punt's job at GE was to be "physically present at the lobby/reception desk during business hours"

Punt's Medical Condition and Attendance Issues

Just prior to beginning work at GE, Punt learned that she had been diagnosed with breast cancer. In the six weeks she was employed with GE, Punt "never worked a full 40-hour week." Rather, she was absent from work on six different occasions, significantly late for work three times (1.5 hours, 3 hours and 4.5 hours), and left work early on three different occasions (.5 hours, 1.25 hours and 5 hours). Punt provided GE with medical explanations for some of her absences; for most, however, she did not.

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Punt's Request for Leave

GE's relationship with Punt came to a head on December 5, 2011. Punt was scheduled for an MRI that day, but did not go through with it due to claustrophobia. Instead, Punt sent Erin Wilgus, her point of contact at Kelly Services, an email, stating:

After talking to my husband and my doctor it is in my best interest not to come to work this week at all.

Ms. Wilgus emailed Punt: "Please contact me ASAP. I need to let GE know whether you are going to be at work tomorrow."

Punt responded to Ms. Wilgus: stating:

The MRI was very scary! . . . I have so much to take care of this week with tests that I don't know how I can come to work tomorrow. . . . This is looking like very early stage breast cancer that will allow me to come to work and have only five times of radiation.

GE terminated Punt's assignment and notified Kelly Services of its decision. Punt never followed up with Kelly Services about possible work assignments, other than with GE.

Punt's Lawsuit Against GE and Kelly Services

In 2014 Punt sued both GE and Kelly Services, claiming, among other things, disability discrimination under the ADA. GE and Kelly Services filed motions for summary judgment, seeking to have Punt's lawsuit dismissed. The companies were successful. The federal trial court entered summary judgment against Punt, albeit on different grounds – Punt failed to show that GE and Kelly Services actually intended to discriminate against her on the basis of her disability by terminating her – were subsequently taken up by the Tenth Circuit Court of Appeals when Punt appealed the decision.

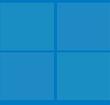
Read more about joint employer liability in temporary employment situations.

Punt's Appeal

On appeal, the Court concluded that GE and Kelly Services did not violate the ADA by terminating Punt in lieu of allowing her additional time off, because Punt had not informed Kelly or GE of the expected duration of her impairment and was too vague about how much time she was going to miss from work. While it is a well-settled law that extended unpaid leave can be a reasonable accommodation under the ADA, the Court concluded that a request for leave is reasonable only when it would "presently, or in the *near future*, enable the employee to perform the essential functions of [her] job." By necessity, this would require the employee to inform the employer of the "*expected duration of the [employee's] impairment*." This, Punt had not done. Because an essential function of Punt's job as a receptionist was the "ability to 'report to work,'" the Court found it presumptively unlikely that she would be able to fill this essential part of her job in the near future.

Employer Lessons to be Learned from the Punt Case

Open-ended leave requests that do not include a reasonably definitive date by which the employee will be able to resume the essential functions of his or her job are presumed to be unreasonable and will not support a claim of disability discrimination under the ADA. As to the question of how much definitiveness may be required of the employee, or how much leave might be reasonable, the outcome is less certain and depends, to a large degree, on the facts of the particular situation. A prudent employer will give careful consideration to the above analysis and should not summarily deny an employee's request for leave as a reasonable accommodation of a disability without first considering the employee's specific circumstances. The employer's goal, at least initially, should be to work with the employee to determine, to the extent possible, a date certain by which the

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employer can expect the employee to be able to perform the essential functions of his job.

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