

### (Sick) Leave from Duty:

#### A reasonable accommodation or paying an employee not to work?

When an employee is diagnosed with a serious medical ailment or disability that requires the employee to be out of work for a prolonged period of time, how much leave must an employer provide? This is a complex issue facing employers, especially given the need to provide disabled employees a “reasonable accommodation” to perform the functions of their job as laid out by the Rehabilitation Act and Americans with Disabilities Act. Is a failure to give a disabled employee sick leave a violation of these federal statutes and, if so, how much leave needs to be given before a reasonable accommodation becomes an employer paying an employee not to work? These are the questions that were addressed by the Tenth Circuit in the recent decision of *Grace Hwang v. Kansas State University*.<sup>1</sup>

#### Background

Grace Hwang worked as an assistant professor at Kansas State University (KSU), where she taught classes on a year-to-year contract. Prior to the beginning of the 2009 fall term, Ms. Hwang was diagnosed with leukemia and began to receive treatment. After this diagnosis, Ms. Hwang was granted six months paid leave of absence from the university due to her illness.

Near the end of this leave period, Ms. Hwang asked the school for additional leave. According to her complaint, KSU refused to grant additional leave to her due to a policy that did not allow for more than six months of leave for an employee. KSU allegedly offered Ms. Hwang the option of receiving long-term disability, with resignation a condition of that receipt, or taking a continued leave without pay, with no guarantee that her contract would be renewed upon its expiration. Ms. Hwang decided to take the long-term disability, but argued that she was effectively terminated due to the six-month leave policy. Ms. Hwang proceeded

to file suit against KSU in federal court claiming that her treatment by the university violated the Rehabilitation Act.

#### Decision

To make a claim of discrimination under the Rehabilitation Act, a plaintiff must show that she is disabled; must show that she can perform the essential functions of the job with a reasonable accommodation for her disability; and must show that the employer failed to provide a reasonable accommodation despite a request for an accommodation by the employee. The Tenth Circuit found that Ms. Hwang was clearly disabled under the definition provided by the Rehabilitation Act. However, the Tenth Circuit also found that Ms. Hwang was not able to perform her job functions, even with a reasonable accommodation.

In its opinion, the Tenth Circuit thought it clear that a person unable to work for six months or more, like Ms. Hwang was in this case, could not perform a job's essential functions. Further, the Court found that the reasonable accommodation requirement was enacted to compel employers to provide accommodations that allow a disabled employee to work, not to force employers to keep a job open for an employee who clearly cannot work. Here, the Court distinguished Ms. Hwang's request for more than six months of leave from briefer absences which still might allow an employee to perform his or her essential job functions.

The obvious question: How long must an employee absent due to a disability before that employee can no longer perform his or her essential job functions? The Tenth Circuit refused to provide a bright-line test as to this issue. Instead, the Court stated that the answer to that question would depend on the duties essential to that particular job, what type of leave was being sought, and how

<sup>1</sup> \_\_\_ F.3d. \_\_\_, 2014 WL 2212071 (10th Cir. 2014).

that leave would affect other employees of the employer. While the Tenth Circuit refused to define a clear timeframe after which a disabled employee will be deemed unable to perform his or her job function, it did state that after six months of disability an employee would be deemed unable to perform the essential job functions of almost any job.

Ms. Hwang attempted to rely on the Equal Employment Opportunity Commission's guidance manual to argue that KSU's "inflexible" six-month maximum on sick leave in itself violates the Rehabilitation Act. The Court summarily dismissed this argument, finding that an "inflexible" leave policy is not necessarily discriminatory nor is it necessarily a failure to reasonably accommodate.

In fact, the Court surmised that a clearly-stated leave policy might in fact benefit employees as it could lessen the risk of discriminatory treatment, which would potentially be harder to detect when the determination of leave was more discretionary. This is not to say that a strict, clear leave policy might not present issues, especially if such a leave policy provides for unreasonably short sick leave periods. However, the Court was clear that an "inflexible" leave policy is not enough to violate the Rehabilitation Act. Further, the Court found no clear facts alleged in the complaint showing that KSU treated Ms. Hwang differently than any other similarly-situated employee.

Finally, Ms. Hwang argued that KSU retaliated against her by failing to explain her post-employment health benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA). The Court found that COBRA required qualifying employers to provide to an employee with notice of his or her potential COBRA benefits within 30 days of the termination of employment. The Court held that no alleged facts supported a retaliation claim, as Ms. Hwang alleged that KSU failed to provide her notice within the statutory time period. Ms. Hwang also claimed retaliation as she was not hired for positions she applied for at KSU

following her termination. The Court found no facts suggesting that the university did not hire Ms. Hwang due to her disability or due to some ill will possessed by the university.

## Conclusion

The Tenth Circuit dismissal of Ms. Hwang's amended complaint stands for the proposition that the Rehabilitation Act (and, in turn, likely the Americans with Disabilities Act) requires employers to provide a reasonable accommodation to enable a disabled employee to work, not to keep that employee's job open when that employee clearly cannot work. While the Court did not offer a bright-line amount of time after which requested sick leave becomes an unreasonable accommodation, the Court did state that if an employee is to miss more than six months due to a disability, the employee was unable to perform the essential functions of his or her job, a requirement under the Rehabilitation Act.

Employees with medical conditions that require extended absences from work are difficult situations for any employer. It is important for an employer to clearly lay out its leave policy to its employees. When an employee requests an extended leave period due to a disability, the employer should explain its leave policy and the options available to the employee. The open sharing of information between the parties will minimize the risk of a confrontation between the employer and employee regarding leave down the road. Finally, employers should make sure that all leave policies enacted are consistently applied to all employees. Disparate treatment of employees can lead to liability issues for the employer, even if the leave policy itself is compliant with federal law.

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