MB&J | MORGAN BROWN&JOY

www.morganbrown.com

CLIENT ALERT: Are Extended Leaves of Absence Reasonable Accommodations? A Federal Appeals Court Recently Said No – By Sean O'Connor and Jon Persky

When an employee is out of work due to a serious illness or injury, how long and under what conditions does the employer need to hold that employee's job open? This can be a vexing question, involving overlapping federal law, state law, and decisions by the courts and administrative agencies like the Equal Employment Opportunity Commission (EEOC) and Massachusetts Commissions Against Discrimination (MCAD).

The general consensus is that employers should avoid cut-offs based strictly on the passage of time, and instead should make individual decisions based on each employee's circumstances. A recent decision by the United States Court of Appeals for the Seventh Circuit (Illinois, Indiana, and Wisconsin) has added some complexity to the equation.

Extended absence as a reasonable accommodation for a disability was not clearly addressed by the Americans With Disabilities Act ("ADA"), and was complicated with the enactment of the Family and Medical Leave Act ("FMLA") in 1993. As most larger employers are aware, FMLA provides eligible employees with up to 12 weeks of unpaid, job-protected leave when they are unable to work because of a serious health condition, amongst other reasons. Employers have long been counseled, however, not to simply terminate employees who fail to return to work after the expiration of their FMLA leave, and not to terminate non-FMLA-protected employees when they are temporarily unable to work due to a serious health condition.

Employers have an obligation under the ADA and similar state laws, such as the Massachusetts Law Against Discrimination ("Chapter 151B"), to engage in an "interactive process" to determine whether a "reasonable accommodation" exists that will permit the employee to perform the essential functions of the job. Both the federal EEOC and the MCAD take the position that a leave of absence, even if it exceeds or is not protected by the FMLA, may be a required reasonable accommodation if it would not impose an undue burden on the employer.

However, a recent federal appeals court decision contradicts this consensus view. On September 20, 2017, the United States Court of Appeals for the Seventh Circuit held in *Severson v. Heartland Woodcraft, Inc.* that the Americans With Disabilities Act ("ADA") does *not* require employers to place a disabled employee on a long-term job-protected leave of absence, as a reasonable accommodation for the employee's disability.

The plaintiff in *Severson* was a laborer and mechanic performing a job that required frequent lifting of at least 50 pounds. While on an FMLA leave due to a back injury, the employee notified the company that his doctor had recommended surgery and he would be unable to return to work before his FMLA leave ended. Approximately three months after the FMLA leave expired, the doctor certified the employee to return to work without restriction. By that time, however, the company had already

terminated his employment.

The main question before the Seventh Circuit was whether an extended post-FMLA leave of absence was a reasonable accommodation under the ADA. The three-judge panel answered this question in the negative. Noting that the ADA defines "reasonable accommodation" as one that allowed the disabled employee to "perform the essential functions of the position," the court held that "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." Because the ADA is "an antidiscrimination statute, not a medical-leave entitlement," the court held that the ADA does not create an affirmative right to extended leave. The court noted that Congress had, by enacting FMLA, already set the parameters of an employee's individual right to extended medical leave. The court further clarified that its decision applied only to "multimonth" leaves of absence and not to intermittent or short-term leaves, which may still be protected under ADA as analogous to a "modified work schedule."

The *Severson* decision is not *carte blanche* for employers to categorically deny requests for extended non-FMLA medical leave, for several reasons. First, the *Severson* holding has been questioned even within the Seventh Circuit itself. In *Golden v. Indianapolis Housing Agency*, decided by the Seventh Circuit one month after *Severson*, one judge filed a concurring opinion acknowledging that the court was bound by *Severson* but criticizing it as incompatible with the ADA's statutory mandate. The concurring judge said it was "nonsensical" for the court to distinguish between short-term or intermittent leave, which may be protected as a reasonable accommodation, and extended leave, which after *Severson* is "per se" unprotected "regardless of whether the leave would cause any hardship to the employer."

Second, the holding of *Severson* has not been adopted by the United States Courts of Appeals for the other Circuits, including the First Circuit whose jurisdiction includes Massachusetts. The First Circuit held as recently as May 2017, in *Echevarria v. AstraZeneca Pharmaceutical LP*, that a leave of absence or an extension to an existing leave of absence can constitute a reasonable accommodation depending on the circumstances of the particular case. The *Severson* holding also has not been adopted by Massachusetts courts, including the Supreme Judicial Court, or by the MCAD. To the contrary, the MCAD has been firm that an employer's refusal to consider an extended leave of absence as a reasonable accommodation can constitute disability discrimination. The EEOC agrees, and argued as much in *Severson*.

With this in mind, Massachusetts employers should continue to engage in the interactive process with disabled employees who are either about to exhaust their FMLA leaves, or who have to take a non-FMLA-protected leave of absence for a personal medical condition. All cases are fact-dependent and there are no bright-line rules. In considering whether a leave constitutes a reasonable accommodation, employers should assess whether the proposed leave is reasonably brief, definite in duration, and tied to medical benchmarks correlated with the employee's treatment or recovery. We encourage employers presented with these issues to work with their MBJ attorneys in developing a course of action that complies with applicable law.

Sean P. O'Connor is a partner and Jonathan D. Persky is an associate at Morgan, Brown & Joy, LLP.

www.morganbrown.com

They may be reached at 617-523-6666 or at soconnor@morganbrown.com or jpersky@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was originally published on December 18, 2017.