

The Shifting Law Surrounding Leave as a Reasonable Accommodation Under the ADA

by Jessica B. Summers



Jessica B. Summers is an associate at the law firm of Paley Rothman in Bethesda, Md. Summers represents corporations and organizations on a wide range of matters, including establishing and implementing effective employment policies, drafting employment agreements, maintaining employee benefit plans, and addressing corporate planning issues.

It's a classic scenario—an employee is experiencing a medical issue and requests time off but does not have any leave available. Perhaps the employee has already used up all of his or her Family and Medical Leave Act (FMLA) or sick leave or maybe the employee isn't eligible for these types of leave. It is at this juncture that we employment lawyers find ourselves intervening to remind our clients that they may still be obligated to provide the leave as an accommodation under the Americans with Disabilities Act (ADA).

The biggest question that typically follows in this scenario is—how much leave does the ADA require an employer to provide? Federal case law has historically provided minimal help and few bright lines in this area. That is, until the Seventh Circuit Court of Appeals' recent decision in *Severson v. Heartland Woodcraft Inc.*¹ In this case, the court ruled, in no uncertain terms, that the ADA does not require employers to accommodate employees by providing multiple months of continuous leave. The Seventh Circuit left the door open for short or intermittent leave as an accommodation and it remains to be seen whether the other circuits will follow the Seventh Circuit's lead. Nonetheless, even for employers outside the Seventh Circuit's jurisdiction, the decision is notable in that it outlines a strong argument for why extended leaves fall outside the scope of the ADA's accommodation requirements.

Some Background

To understand the Seventh Circuit's decision, it is important to take a quick look at the overarching framework of the ADA's accommodation provision. The law requires employers to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."² Based on this language, employers are faced with three threshold inquiries in determining whether an accommodation is required:

1. Is the person requesting the accommodation a

qualified individual with a disability?

2. Is there a reasonable accommodation that can be offered?

3. Would that reasonable accommodation cause an undue hardship to the employer?

The Equal Employment Opportunity Commission (EEOC) has consistently taken the position that leave "is a form of reasonable accommodation when necessitated by an employee's disability."³ Moreover, the EEOC has stated that an employee who takes leave as a reasonable accommodation is entitled to be returned to his or her same position, unless such restoration would pose an undue hardship to the employer.⁴ This is a stricter standard than applies to leave under the FMLA, which only requires that employees be reinstated to the same or a "similar" position upon their return.⁵

Perhaps because of the EEOC's position, the cases and commentary surrounding leave as an ADA accommodation have typically centered on the question of whether the leave would create an undue hardship for the employer. The EEOC and the courts have agreed that employers are not required to provide employees with indefinite leave (i.e., a request for leave where the employee's return-to-work date is unknown).⁶ Beyond that, the decisions as to when leave is, and is not, required have largely been very fact specific, focusing on issues like whether the employee's position could be filled by a temp,⁷ whether the employer has a practice of allowing for unpaid leaves of absence,⁸ and what type of leave the employee has already been given.⁹

Severson v. Heartland Woodcraft

The *Severson* case involved a fact pattern that is very typical of these types of cases. Raymond Severson worked at Heartland Woodcraft creating retail display fixtures. Severson began experiencing back pain and went out on 12 weeks of FMLA leave. On the last day of Severson's FMLA leave, he got back surgery. Severson then requested an additional three months of leave to recover from the surgery. Heartland denied this request and terminated Severson, inviting him to reapply for any open positions with the company after he had been cleared to return to work. Severson sued

Heartland asserting that its denial of his request for an additional three months of leave was a violation ADA's accommodation requirement. The district court granted Heartland's motion for summary judgment. Severson appealed and the case went before the Seventh Circuit.

In affirming the District Court's decision in favor of Heartland, the Seventh Circuit emphasized that "the ADA is an antidiscrimination statute, not a medical-leave entitlement" and that "[if], as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave statute—in effect, an open-ended extension of the FMLA."¹⁰ Instead of focusing on whether the requested leave would pose an undue hardship for Heartland, as most other courts have done in these types of cases, the Seventh Circuit focused instead on whether the employee was a qualified individual within the scope of the ADA.

Under the ADA a qualified individual is one who "with or without reasonable accommodation, can perform the essential functions of the employment position."¹¹ The court concluded that, where the only proposed accommodation does not allow the employee to perform the essential functions of his or her job, the employee is not a qualified individual for the purposes of the ADA. In other words, regardless of whether it would impose an undue hardship on the employer, because an extended period of leave isn't facilitating the employee's ability to do his or her job, it falls outside the scope of what the ADA requires.

Although the *Severson* decision was considerably more decisive and detailed in its reasoning, the rejection of a multi-month continuous leave as a required reasonable accommodation under the ADA was not entirely surprising coming from the Seventh Circuit. Fourteen years ago, in *Byrne v. Avon Products Inc.*,¹² the Seventh Circuit found that an employee seeking a multi-month leave of absence because of his inability to work due to psychiatric issues was not a qualified person under the ADA. The *Byrne* case focused primarily on whether the employee's period of absence was protected by the FMLA and was more cursory on the ADA issue, without nearly the same level of analysis and insight on the ADA as the *Severson* decision (which is what makes *Severson* notable). Further reinforcing that the *Severson* decision is not an anomaly, just a few weeks later, in the unreported case of *Dolgen v. Indianapolis Housing Agency*,¹³ the Seventh Circuit applied the same reasoning to a similar set of facts to again reject the notion of an extended continuous leave as a reasonable accommodation.

Where Do Things Go From Here?

First, it is important to note that the Seventh Circuit did not entirely close the door on leave as a reasonable accommodation under the ADA. The court recognized that a brief period of leave of a few days or weeks to allow an employee to recover from a medical issue and get back to work might be an appropriate and necessary accommodation. The court found the same to be true of intermittent leave where an employee suffers from a disability that necessitates occasional absences. Accordingly, regardless of their jurisdiction, employers still need to consider the ADA accommodation element when dealing with leave requests.

As for extended continuous leaves of absences, for those employers in the Seventh Circuit, *Severson* provides clear authority that such leave is not required as a reasonable accommodation. For employers outside the Seventh Circuit, the *Severson* case may outline a

compelling argument against extended leave as an accommodation. However, it also flies in the face of a substantial number of district and circuit court cases that have found that leave extending beyond a few weeks may be a reasonable accommodation under the ADA. Some courts, such as the First Circuit, have even gone so far as to reject the application of a "per se rule" that an employee requesting leave is not a qualified individual under the ADA on the grounds that it subverts the individualized assessment that is required when handling an accommodation request.¹⁴

The bottom line is that it is hard to tell at this point whether *Severson* will mark the beginning of a trend or simply a jurisdictional split. Employers outside the Seventh Circuit that do not wish to serve as the defendant in their jurisdiction's test case on this issue should be wary of relying too heavily on *Severson* and should recognize the risks before adopting a blanket policy of denying ADA requests for extended continuous leave without further inquiry. ☉

Endnotes

¹*Severson v. Heartland Woodcraft Inc.*, 872 F.3d 476 (7th Cir. 2017).

²42 U.S.C. § 12112.

³See Equal Employment Opportunity Commission, Notice No. 915.002 (2002), available at <https://www.eeoc.gov/policy/docs/accommodation.html>; Equal Employment Opportunity Commission, EMPLOYER-PROVIDED LEAVE & THE AMERICANS WITH DISABILITIES ACT (May 9, 2016), available at <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm> [hereinafter EEOC EMPLOYER-PROVIDED LEAVE & ADA].

⁴*Id.*

⁵29 C.F.R. § 825.214.

⁶See, e.g., *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); EEOC EMPLOYER-PROVIDED LEAVE & ADA.

⁷See, e.g., *Garcia-Ayala v. Lederle Parenterals Inc.*, 212 F.3d 638 (1st Cir. 2000).

⁸See, e.g., *Nunes v. Wal-Mart Stores Inc.*, 164 F.3d 1243 (9th Cir. 1999).

⁹See, e.g., *Walsh v. UPS*, 201 F.3d 718 (6th Cir. 2000).

¹⁰*Severson*, 872 F.3d at 482.

¹¹42 U.S.C. § 12111.

¹²*Byrne v. Avon Prod. Inc.*, 328 F.3d 379 (7th Cir. 2003).

¹³*Dolgen v. Indianapolis Housing Agency*, 2017 WL 4675734 (7th Cir. Oct. 17, 2017).

¹⁴See *supra* note 7.

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