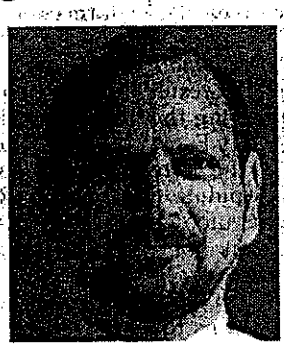
placed on probation for 3 years.

OUTSIDE COUNSEL

By John A. Beranbaum

Accommodating Leaves of Absence Under ADA



In the decade following the enactment of the Americans with Disabilities Act of 1990, courts interpreting the statute have focused their attention on the definition of a "qualified individual with a disability," the threshold question of who enjoys the protections of the Act.

In the ADA's second decade the dominant issue is shaping up to be the scope of an employer's duty to make reasonable accommodation to its disabled employees. Among the host of issues needing resolution is under what circumstances must an employer grant an employee a leave of absence to accommodate a disability.

Under the ADA, an employer is required to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. An accommodation is a change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Reasonable accommodations serve to remove workplace barriers for individuals with disabilities — whether those barriers are physical obstacles or rules or procedures.[1]

An employer's refusal to make reasonable accommodation for a qualified individual with a disability constitutes unlawful discrimination.[2]

An employer is not required to change or modify the work environment if to do so would cause "undue hardship." Undue hardship is defined as "an action requiring significant difficulty or expense."[3] Undue hardship refers not only to financial difficulty, but also to accommodations that are unduly extensive, substantial or disruptive, or those that would fundamentally change the nature or operation of the business.[4]

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Accommodating Leaves of Absence Under ADA

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Although the ADA does not explicitly list employee leave of absence as an approved accommodation, courts agree that an employer may be required to permit a disabled employee to use accrued paid leave or take additional unpaid leave for necessary medical treatment.[5]

The EEOC makes an important distinction between an employer's duty to provide paid and unpaid leave. As to paid leave, an employer must allow a disabled employee to exhaust accrued leave time, but does not have to provide additional leave beyond what is provided to similarly-situated, non disabled employees.[6]

By contrast, even where the disabled employee has exhausted all the unpaid leave permitted by company policy, the employer may not automatically deny additional leave.[7] Rather, the employer must consider a disabled employee's request for extended leave on an individualized basis.[8]

Courts are inclined to find a requested leave of absence "reasonable" where the request is for a definite and relatively short period of time.[9] While no hard and fast rules exist, a leave request for more than a year likely will be found unreasonable as a matter of law.[10]

The reasonableness of a requested leave depends, in part, upon the likelihood that the employee will be able to perform her job at its conclusion. A disabled employee seeking a leave of absence need only show that the time off could plausibly have enabled him or her to perform the job; the employee is not required to prove that the leave will certainly or most likely allow him or her to perform the essential functions of the job.[11]

A reviewing court will also consider whether the leave request is open ended or has a discernible end point. For a requested leave to pass the reasonableness test, the employee need

The First Circuit reversed, finding that the lack of certainty as to plaintiff's return date was not fatal: "Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular leave date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness ... departs from the need for individual factual evaluation."[13]

In *Powers v. Polygram Holding, Inc.*,[14] Judge Conner of the Southern District for New York denied the employer's motion for summary judgment, finding that the request for an additional 17 weeks leave of absence by an employee suffering from mental illness was not unreasonable as a matter of law.

Although the plaintiff was unable to predict with certainty the date of his return, the court found that his doctor's "reasonable estimate" was sufficient: "[N]o person recovering from clinically diagnosed mental illness, especially while suffering symptoms of this illness, can give an absolute date as to when his symptoms will ameliorate to the point that he will be able to return to work. To require such certainty ... would be to eviscerate much of the protection afforded under the ADA."

An employer's assertion that a requested leave of absence would pose an undue hardship must be analyzed on a case-by-case basis. The following factors, some of which are generally applicable to any request for a reasonable accommodation, should be considered when evaluating whether an employee's proposed leave of absence would pose an undue hardship:

- the nature and net cost of the accommodation;
- the effect on the employer's expenses, resources or other operational impact;
- the importance of the employee's

rejected the undue hardship defense where a company representative testified that disability leaves did not financially burden IBM because the company "recognized that it was always more profitable to allow an employee time to recover than to hire and train a new employee."[18]

By contrast, in *Walton v. Mental Health Ass'n of Southeastern Pa.*, the Third Circuit held that a program director's three-months leave of absence for depression created an undue hardship and, along with her allegedly poor performance, justified her discharge.[19]

Although not commented upon by the court, the program director's key position, and the fact that her absence came at a critical juncture for the nonprofit agency (when the employer feared that the program sponsor would withdraw funding because of the agency's declining job placements of mental health consumers) supported the undue hardship determination.

Employee leaves of absence are different from most other workplace accommodations. Most reasonable accommodations enable the disabled employee to perform the essential functions of his current job.

By contrast, a disabled employee needs an accommodation in the form of a leave of absence because, at least for a discernible period of time, he is unable to perform the current job's essential functions. Employee leaves of absence stretch the boundaries of the right to reasonable accommodations, and accordingly have engendered much litigation with more undoubtedly on the way.

(1) See 42 U.S.C. 12111(10); 29 C.F.R. pt. 1630 app. 1630.2(o); EEOC Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (EEOC Guidance) at text accompanying n. 1-5.

(2) See 42 U.S.C. 12112(b)(5)(A).

(3) See 42 U.S.C. 12111(10)(A).

(4) See 42 U.S.C. 12111(10); 29 C.F.R. 1630.2(p); 29 C.F.R. pt. 1630 app. 1630.2(p).

(5) See *Garcia-Ayala v. Lederle Parenterals, Inc.*

whether the leave request is open ended or has a discernible end point. For a requested leave to pass the reasonableness test, the employee need only give a fair estimate of his or her return date; a precise return date is not required.

However, where an employee can give no indication as to when he or she might be able to return to work, and, instead, demands that the position be held open indefinitely, a court will deem that unreasonable as a matter of law.[12]

A recent First Circuit case makes the point that an employee does not necessarily have to give an exact return date for the requested leave to be considered reasonable.

In *Garcia-Ayala*, the plaintiff, a secretary, had cancer that caused her to take 14 leaves of absence during 13 years of employment. The employer had a policy of reserving a job for one year when employees took disability leave.

Ms. Garcia-Ayala underwent bone marrow surgery and, after being out of work 15 months, she was fired on grounds that her one-year reservation period had expired three months earlier. She requested a two-month leave extension, or five months after the reservation period allegedly ended, at the conclusion of which her doctors expected her to return to work. The employer denied plaintiff's request for additional leave.

The district court entered summary judgment for the employer, holding that because her doctors could not give a definite return date, plaintiff was impermissibly seeking an indefinite leave of absence.

- the effect on the employer's expenses, resources or other operational impact;
- the importance of the employee's job for the operation of the employer's business;
- the employer's need for the employee's job functions to be performed during the leave period;
- the employer's capacity (and the ensuing cost) to have the employee's job functions covered by someone else during the leave.[15]

Applying these factors, courts have carefully scrutinized employers' undue hardship defenses, focusing on the true costs to the company of an extended leave.

For example, in *Rascon v. U.S. West Comm's, Inc.*, the Tenth Circuit relied upon the employer's own leave policies in rejecting the undue hardship defense. The employer had asserted that to give an employee with post-traumatic stress disorder more than three consecutive 30-day unpaid leaves of absence was unduly burdensome because other employees had to cover for him during his absence. The court gave short shrift to the employer's undue burden argument in light of a company policy that actually allowed for longer leaves than given to the plaintiff.[16]

In *Garcia-Ayala*, the First Circuit found that providing additional leave to the cancer-stricken plaintiff would not have imposed an undue hardship, since the employer used temporary employees to replace plaintiff during her absences, without problem or additional expense.[17]

In *Criado v. IBM*, the First Circuit

(2) See 42 U.S.C. 12112(b)(5)(A).
(3) See 42 U.S.C. 12111(10)(A).
(4) See 42 U.S.C. 12111(10); 29 C.F.R. 1630.2(p); 29 C.F.R. pt. 1630 app. 1630.2(p).
(5) See *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000) (collecting cases); 29 C.F.R. 1630 app. 1630.2(o).
(6) EEOC Guidance at text accompanying n. 46.
(7) See, e.g., *Ralph v. Lucent Techs., Inc.*, 135 F.3d 166, 171-72 (1st Cir. 1998) (holding that a four-week additional leave, beyond a 52-week leave, for mental breakdown was reasonable); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999).
(8) *Garcia-Ayala*, 212 F.3d at 650; cf. *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122 (2d Cir. 1999) ("the question of whether a requested accommodation is a reasonable one must be evaluated on a case-by-case basis"); cf. 42 U.S.C. 12111(9)(B); 29 C.F.R. 1630.2(o)(2)(ii) (modifying workplace policies is a form of reasonable accommodation).
(9) See, e.g., *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998) (finding a genuine issue of material fact in dispute as to whether an eight-week leave of absence followed by a request for an additional one-month leave was reasonable); *Nunes*, 164 F.3d 1243 (employee's request for additional one to two months leave, after having been on leave for seven months, may be reasonable).
(10) See *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000) (holding that denial of additional leave was not unreasonable where employer had already provided plaintiff with paid leave for a year and unpaid leave for five months, with no clear prospect of her recovery); but see Garcia-Ayala, 212 F.3d 638.
(11) *Humphrey v. Memorial Hosps. Assn.*, 239 F.3d 1128, 1136 (9th Cir. 2001).
(12) *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106 (10th Cir. 1999); *Mitchell v. Washingtonville Central Sch. Dist.*, 190 F.3d 1, 9 (2d Cir. 1999); *Nowak v. St. Rita High Sch.*, 142 F.3d 999, 1004 (7th Cir. 1998).
(13) Id. at 648; see also *Criado v. IBM Corp.*, 148 F.3d 437 (1st Cir. 1998) (affirming that plaintiff's request for additional leave was not unreasonable even though she did not give a specific return date, but rather provided a doctor's letter stating that her condition would improve enough for her to return to work if she were given more time).
(14) 40 F. Supp.2d 195, 202 (S.D.N.Y. 1999).
(15) 42 U.S.C. 12111(10)(B); 29 C.F.R. 1630.2(p).
(16) *Rascon*, 143 F.3d 1324, 1334 (10th Cir. 1998)
(17) *Garcia-Ayala*, 212 F.3d 638.
(18) 145 F.3d at 443.
(19) 168 F.3d 661 (3d Cir. 1999).