should Marcus continue his [alleged] bad behavior. The spectrum of potential discipline ranges from a written warning ensuring that Marcus understands he is to avoid any conduct that could give even the perception of this type of behavior moving forward, to immediate termination. If these allegations went public, would the County be comfortable standing behind the decision it made?

First Important Take Away: Immediate Training and Bystander Empowerment

If Marcus has not already been dismissed from his employment, to go along with his severe warning/reprimand, he should be required to attend harassment and awareness training. For most employers and municipalities, directing an alleged offender to training seems like an obvious [minimal] response. However, prevention is part of an employer's defense against a claim of supervisor sexual harassment. Written policies and self-guided auto-pilot online "tutorials" only go so far. The goal is not simply mass exposure to the law and the material, the goal is understanding and actual prevention. All employees (including supervisory employees) should receive a uniform message as an initial step, followed by separate training sessions for employees in supervisory roles. This training should include topics such as reporting to appropriate individuals when rumors are abuzz, not unlike the rumors that the County Attorney and Carla were aware of in the County of Pristine. This training should include interactive analysis of real-world scenarios (e.g., talk about the County of Pristine!).

Employees should be encouraged to confront unwelcome situations in the workplace directly. Employees should also have a clear roadmap of the various (at least two) reporting resources to whom a complaint can be made. While it may not be advisable to implement a policy whereby a non-supervisor employee would actually be disciplined for failing to report harassment in the workplace, it's important that all employees understand that withholding information may mean that the employer escapes liablity.

Presently, a growing number of workplace trainers are incorporating the concept of bystander empowerment into their harassment training methods to employees and management. The crux of this concept is to re-educate the majority of employees or managers that would traditionally ignore or "bystand" witnessed harassment. Such training focuses on taking affirmative steps towards productively and contemporaneously addressing inappropriate workplace behavior before it either turns into full-fledged harassment (or continued harassment). Depending on workplace culture and the employer's policy and enforcement on anti-harassment measures, the County under these facts is a good candidate for having a bystander empowerment component added to its harassment training –both for employees and administration/management.

Two Additional Take Always

1. The County should have a qualified internal I.T. manager or independent forensic expert immediately capture and preserve screen shots of all electronic information that may be sitting in the employer's servers. Presuming that the County's employee handbook establishes that such information shall be considered employer property, the scope of such a search would include but not be limited to all emails, word processing documents, and texts (if connected to the county servers through employer-issued mobile phones or software) that are relevant to the allegations or denials of harassment.

2. Carla should avoid providing promises of confidentiality to reporting parties as a means of enticing disclosure. Doing so will result in an unfulfilled and false assertion if any of the employees file an administrative claim or lawsuit against the County. As part of the subpoena or disclosure process, the employer is required to turn over copies of its written notes or witness statements made during the internal harassment investigation.

For future reports of harassment, the County should consider contacting its external employment counsel or a third-party workplace investigator to evaluate the allegations of harassment against Marcus. That approach may create better separation and a stronger position, provided that law or regulation allows such information to be kept confidential. If, however, the County maintains a practice of conducting reports of harassment internally through its Human Resources department, then it should avoid guaranteeing that the statements are confidential. Carla should, instead, inform the County employees being interviewed that any statements made to her during her workplace investigation fall under the anti-retaliation policy found in its employee handbook.

Notes

1. 42 U.S.C. §2000e-2(a); 29 C.F.R. § 1604.11.
2. 29 C.F.R. § 1604.11.
3. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, https://www.eeoc.gov/policy/docs/harassment.pdf (last modified Mar. 29, 2010).
4. *Id.*
5. EEOC, Harassment, https://www.eeoc.gov/laws/types/harassment.cfm (last visited Jan. 23, 2018).
6. *Id.*
7. EEOC, Facts About Sexual Harassment, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Jan. 23, 2018).
8. *Id.*
9. *Id.* 42 U.S.C. § 2000e(b).
10. EEOC Compliance Manual, 2-III(A), https://www.eeoc.gov/policy/docs/threshold.html#2-III-A (last visited Jan. 23, 2018).
11. *Id.*
12. EEOC Compliance Manual, 2-III(B), https://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-iii-(b) (last visited Feb. 28, 2018).
13. 29 C.F.R. § 1604.11(d).
14. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, https://www.eeoc.gov/policy/docs/harassment.html (last visited Feb. 28, 2018).
15. EEOC, Facts About Sexual Harassment, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Jan. 23, 2018).
16. Employers also should not require that non-supervisory employees participating in the investigation keep the details confidential, but that is a topic for another article addressing the National Labor Relations Act and the prohibitions against "chilling" an employee from discussing the terms and conditions of their employment. https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm
17. *Id.*
18. *Id.* at II.
19. *Id.*



Amicus Corner

Claims for Indefinite Medical Leave – Can the Supreme Court Provide a Bright Line Rule?

By: Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

One of the most vexing problems for employers is the interplay between the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). Many employers mistakenly terminate an employee's employment once she has exhausted her FMLA leave even though she still requires additional leave. Such an assumption forgets that the ADA potentially allows for additional leave as a reasonable accommodation and that the employer is, at the very least, required to engage in an interactive dialogue with the employee to determine how much leave the employee requires and if the request is reasonable or in the alternative, if granting the additional leave poses an undue hardship to the employer. See e.g., *Delgado Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 128 (1st Cir. 2017) (noting that a leave of absence or a leave extension can constitute a reasonable accommodation under the ADA "in some circumstances."); *Moss v. Harris Cnty. Constable Precinct One*, 851 F.3d 413, 419 (5th Cir. 2017) (indicating that "taking leave that is limited in duration may be a reasonable accommodation to enable an employee to perform the essential functions of the job upon return"); *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003) (noting a leave of absence might be a reasonable accommodation in some cases).

EEOC guidance similarly provides that unpaid leave should be considered as a reasonable accommodation even when the employer does not ordinarily offer such leave as an employee benefit and even where the employee has exhausted leave under the FMLA or other state laws.

But how much leave is too much leave under the ADA? At what point can an employer, who is stretched thin by a lengthy absence say that the leave request would pose an undue hardship? Employers have struggled with these questions and courts are generally reluctant to provide bright lines. One area that has seemed relatively clear was that a request for indefinite medical was not an accommodation the employer had to provide. Indeed, even the EEOC counsels employers that they have "no obligation to provide leave of indefinite duration."

While the EEOC views the issue of an indefinite leave as imposing an undue hardship, some courts indicated that such a request renders the employee not "qualified" under the statute. After all, the ADA requires that the employee be qualified – that is to say, the employee must be "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of" the relevant "employment position." 42 U.S.C. § 12111(8); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 396 (2002). These courts conclude that if employees request indefinite medical leave, they are not "qualified" because they cannot perform the essential functions of the job. See *Moss*, 851 F.3d at 418-19 (concluding that a request for "indefinite leave" meant that the employee "could not establish that he could 'perform the essential functions of his job'..." and therefore the employee was not qualified under the ADA); *Minter v. District of Columbia*, 809 F.3d 66, 69-70 (DC Cir. 2015) (indicating that a physician's certificate providing that an employee was "totally disabled" and that the disability was "indefinite" meant that the employee was "indisputably not a 'qualified individual'" under the ADA"); *Peyton v. Fred's Stores of Arkansas, Inc., 561 F.3d 900, 903 (8th Cir. 2009)* (holding that an employee who requests indefinite leave "cannot as a matter of law, be considered 'otherwise qualified' under the ADA). Still other courts finding that claims for indefinite leave are incompatible with the ADA reason that these requests are facially unreasonable. *See Robert v. Bd. of County Comm'rs of Brown County, 691 F.3d 1211, 1218-1219 (10th Cir. 2012)* (concluding "the only potential accommodation that would allow [the employee] to perform the essential functions of her position was an indefinite reprieve from those functions—an accommodation that is unreasonable as a matter of law"); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225-26 (11th Cir. 1997) (holding request for indefinite medical leave was unreasonable as a matter of law within the meaning of the ADA).

Regardless of how the courts have analyzed the question, however, the overwhelming majority have concluded that employees cannot bring claims under the ADA where their request involves an indefinite medical leave. Unfortunately, employers in the Sixth Circuit (and perhaps the First and Ninth as well) have a different rule to contend with. The Sixth Circuit has steadfastly indicated that there should be no per se rule that an unpaid leave of indefinite duration could never constitute a "reasonable accommodation" under the ADA. *See Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (1998). In other words, the Sixth Circuit has rejected such a bright line rule.

More recently, Nashville, Tennessee fell victim to the Sixth Circuit's rule (or lack thereof). Metropolitan Government of Nashville and Davidson County v. McMahon involves a public health nurse who worked for Nashville's health department and who suffered from

depression and anxiety. She took a medical leave and exhausted her FMLA leave while out on leave. She was then transferred to another clinic away from the "toxic environment" (she claimed her supervisor was causing her depression and anxiety) and worked successfully in the new clinic for four months. Unfortunately, there was not an open position at the second clinic and the nurse with whom she had swapped locations had agreed to move only for a short duration. Ms. McMahon was then transferred back to the original clinic, but under a different supervisor.

However, even though she was working for a different supervisor, she ended up going out on another leave after about a month, asking for leave of indefinite duration. Specifically, her physician provided a letter stated that it was "not possible to predict" when she could return. Nashville wrote her a letter explaining that there were unpaid leave days available under the rules and under their policies, but that her current request must be denied because it was for "indefinite duration." Nashville informed Ms. McMahon that she had to return to work at the expiration of her paid leave. McMahon did not request any of the allowable unpaid leave days and never provided a return-to-work date. Instead, she resigned, stating that she "should not be working for [Nashville] at this time." Had she not resigned, she would have had a disciplinary hearing per union rules, where the topic of her requested leave would have been discussed.

McMahon sued, claiming Nashville's termination of her employment and failure to provide a reasonable accommodation violated the ADA. The district court denied summary judgment and the case went to a jury, which returned a verdict in her favor the ADA claim. On appeal, the Sixth Circuit rejected Nashville's argument that McMahon was not a qualified individual under the ADA due to her request for an indefinite leave. The Sixth Circuit concluded that she was qualified to perform her job under the ADA based on her having successfully done so for four months at the alternate location after her prior medical leave. The court noted that there was "no basis to conclude that another period of leave would not restore her ability to return to work." The Sixth Circuit similarly rejected Nashville's argument that a request for indefinite leave is not a reasonable accommodation, reasoning that Nashville should have proposed some form of definite leave in response to her request, given that she had unpaid leave available to her under Nashville's own policies.

Nashville has petitioned the Supreme Court for certiorari on the issue of whether a disabled employee who requests indefinite leave is not qualified under the ADA, as a matter of law, which Nashville notes is a question on which the circuits are split.

IMLA is filing an amicus brief in support of Nashville in this case. As the nation's largest employer (collectively) local governments have a significant stake in employment discrimination cases, particularly where, as here, a court seeks to expand the scope of liability under the ADA. As the petition points out, claims for leave of an indefinite duration are quite common, and they can put a tremendous strain on employers should they be required to hold the position open for the person on an indefinite leave. Holding jobs open for an indefinite period is not only costly and difficult for employers, but it is unfair to the remaining employees who have to shoulder more burdens while they wait for the position to be filled or for the person to return, without knowing when that will be. Studies show that workers who are covering for the absent employee are often more stressed themselves and their morale suffers.

In addition, a rule that someone requesting indefinite leave is not a qualified individual under the ADA would result in more cases being dismissed at the summary judgment or even 12(b)6 stage, cutting down on litigation costs for local governments, which can be significant under the ADA. In its amicus brief, IMLA argues that employees with disabilities should be accommodated where possible (and where it is not an undue hardship), but requests for indefinite leave are simply too burdensome and disruptive for employers; therefore, the Court should accept the Petition and provide a bright line and uniform rule for employers around the country on this important issue. **ML**

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