Bloomberg BNA

Daily Labor Report®

NUMBER 137 JULY 18, 2016

Disabilities

FMLA Leave Request May Also Double As Request for Accommodation Under ADA

Employee requests for medical leave may or may not double as requests for disability-based job accommodations under federal law, but employers shouldn't get hung up on the potential distinction.

That's what Chicago management-side attorney Jeff Nowak says he tells his clients.

How to handle an employee with a medical condition is one of the toughest issues U.S. employers have to deal with, Nowak said.

The best approach is to talk with employees about ways to keep them on the job, rather than have them go on leave, he said. There may be something you can temporarily change about the job that can keep an employee working and obviate the need for leave without getting into the nuances of federal employment law, he said.

Legal Issue Before Third Circuit. Nowak, a co-chair of Franczek Radelet P.C.'s labor and employment practice, made his comments July 13 in response to questions about *Capps v. Mondelez Global, LLC*, 3d Cir., No. 15-3839, . In that case, the U.S. Court of Appeals for the Third Circuit appears poised to decide whether a request for medical leave under the Family and Medical Leave Act also triggers an employee's rights to accommodation under the Americans with Disabilities Act.

According to the Equal Employment Opportunity Commission, which filed an amicus brief in *Capps*, a single request for FMLA leave is enough to put an employer on notice of a potential need for an ADA job accommodation. The agency cites in support of its position its own interpretation of the ADA as well as Department of Labor regulations interpreting the FMLA.

The EEOC has consistently maintained that position throughout the years, including in a 1995 fact sheet posted to its website and most recently in the May 9, 2016, resource document Employer-Provided Leave and the Americans with Disabilities Act.

In *Capps*, mixing technician Fredrick Capps with Illinois-based multinational confectionery, food and beverage conglomerate Mondelez International Inc. requested intermittent leave for flare-ups of a degenerative bone disease that limited his ability to walk, sit, stand and work. The company granted Capps at least three six-month periods of intermittent leave but later challenged his use of leave on certain days after learning he had been arrested for driving under the influence on one of the days he called out sick.

Mondelez later fired Capps, and he sued asserting claims under the ADA and the FMLA. The U.S. District Court for the Eastern District of Pennsylvania granted summary judgment to the company. It rejected Capps's ADA failure-to-accommodate claim on the grounds that he never actually requested a job accommodation from Mondelez.

Although Capps repeatedly requested, and repeatedly was granted, intermittent leave under the FMLA, ''a request for FMLA leave is not alternatively a request for a reasonable accommodation'' under the ADA, the district court ruled as a matter of law.

Capps appealed the dismissal of all of his claims, and the EEOC filed an amicus brief limited to the ADA issue. The district court relied on a single, unpublished opinion that conflicts with the EEOC's and the Labor Department's views on the interaction between the FMLA and the ADA, the EEOC argued.

Moreover, the EEOC's and the DOL's positions are consistent with the views of multiple federal appeals courts that ''the same request for leave can implicate both the FMLA and the ADA,'' the job rights enforcement agency urged in its amicus brief.

'Two Big Mistakes.' ''The EEOC is exactly right'' on the law, Ramit Mizrahi, a Pasadena, Calif.-based plaintiffs' attorney, told Bloomberg BNA July 12. The district court in *Capps* ''made two big mistakes,'' she said.

First, it mistakenly held that by requesting FMLA leave, a person ''somehow'' is indicating that he is unable to perform the essential functions of his job and thus isn't qualified for coverage under the ADA, Mizrahi said. ''Court after court has found that's not the issue,'' she said, and that the question is whether the worker can perform the job when he isn't out on leave.

The inference from the district court's reasoning is that a person with a medical condition who isn't eligible for FMLA leave could be fired based on a temporary inability to perform the job, she said.

The second mistake made by the district court, she said, is holding that a request under the FMLA for leave to care for one's self isn't automatically a request for an ADA accommodation. ''The first mistake led to the second mistake,'' Mizrahi said.

The DOL's FMLA regulations, 29 CFR § 825.702(a), make clear that the federal medical leave law doesn't

 ISSN 0418-2693

modify or subtract from an employee's rights under the ADA, Mizrahi said.

Nearly every federal appeals court has recognized that leave can be a reasonable accommodation under the ADA, she added. If an employee puts an employer on notice of a need for medical leave, that triggers the ADA's interactive process for identifying a job accommodation, she said.

It seems pretty clear that in *Capps*, the employer should have been on notice of the plaintiff's ADA needs, Mizrahi said.

Open Issue? What's less clear, however, is whether a federal court has ever truly decided—consistent with the EEOC's position—that a single request for FMLA leave triggers the ADA accommodation process. Neither the EEOC's amicus brief nor Mondelez's response brief cites a published ruling that appears to be right on point, and *Capps* doesn't really address the question in his brief.

''I can't say whether courts embrace'' the EEOC's view, Mizrahi said. Nowak similarly told Bloomberg BNA that he didn't ''know off-hand of a court that's specifically addressed the issue.''

He said the common argument of employers against the EEOC's view is that the ADA isn't a leave-of-absence law because providing an employee with leave doesn't help the employee perform his or her job duties. ''It actually takes the employee away from the job,'' Nowak said.

By pointing to its own interpretation of the ADA and the FMLA, the EEOC engages in circular logic, Nowak said. The agency is arguing that ''we've taken this position, so it must be valid,'' he said.

''I and other employment counsel would argue otherwise,'' Nowak said. He noted, however, that there is ''a fair amount of case law'' holding that employees who require leave from the job still may be ''qualified'' workers under the ADA.

But a regular, reliable ''presence'' to perform, whether at the office or remotely, is essential to all jobs, he said. That makes ''the idea that the ADA naturally provides for leave a faulty argument,'' Nowak said.

'Distinction Without a Difference?' Nevertheless, while lawyers can debate the legal point, ''I wonder whether it's a distinction without a difference,'' Nowak said.

In any given instance, he explained, an employer's human resources staff likely isn't going to know whether it's dealing with an FMLA-qualifying or an ADA-qualifying situation. And HR is better off not getting caught up in the legal nuances, Nowak said.

''I encourage employers to use the opportunity'' of an employee coming forward with a medical problem or an FMLA-leave request to engage the employee in a conversation to see what can be done to keep the employee working, he said.

The company's initial focus shouldn't be on labelling the employee as FMLA- or ADA-qualifying ''one way or the other,'' Nowak said. If the employee truly needs FMLA leave or leave as an ADA accommodation, that's going to come out through discussions about what else might be done, short of leave, to assist the worker, he said.

Nowak cited as an example an employee who discloses a back injury and says she needs FMLA leave to deal with her condition. ''It may be that if you explore'' the worker's situation more closely, it will turn out that she doesn't really need leave and that some sort of temporary assistance with bending, lifting or the like will be enough to keep her on the job, he said.

He said the employer's focus should be on trying to understand the employee's medical situation and how it's affecting his or her ability to do the job. From there the employer can try to determine if there's a temporary job modification or alteration that can keep the worker performing some or all of the job duties. If there isn't, then leave may be the answer, Nowak said.

''I see employers struggle with this issue, at times, because they don't approach the situation from the standpoint of how to help the employee do the job,'' he said.

The issue typically arises where employees have exhausted their FMLA leave and the employer is left to consider whether it can provide them with additional leave beyond what the FMLA requires, or whether doing so would impose an undue hardship on its business, Nowak said.

It may also be the case that an employee returning from FMLA leave is thereafter intermittently absent, which also poses difficulties for an employer, Nowak added.

He said when the intermittent absences are anticipated or planned—such as a predictable chemotherapy schedule, for example—it's much easier for the employer to handle. However, when the intermittent absences are sporadic and unanticipated, ''that will be harder to handle'' and the employer will have an easier time proving undue hardship if sued under the ADA, he said.

Potential Consequences of Third Circuit Ruling. The Third Circuit heard oral argument in the *Capps* case July 12, so an answer to this thorny legal issue may come soon.

Mizrahi cited two primary concerns with an employer-friendly ruling by the appeals court—one that rejects the EEOC's view that a request for FMLA leave is also a request for ADA accommodation and upholds the lower court.

The first concern would arise in situations in which the employee isn't eligible for FMLA leave because he either hasn't worked for the employer long enough or the employer isn't large enough to be covered by the FMLA, Mizrahi said.

Since the employer has a legal basis to deny the employee FMLA leave in such situations, if that's all the employee asked for, the failure to request a job accommodation would provide the employer with ''a way to get around'' its ADA obligations, she said.

  DLR ISSN 0418-2693

The second concern would arise where the employee is protected by the FMLA, she said, because that law doesn't provide workers with the same reinstatement rights as the ADA. Specifically, under the federal disability rights law, workers are entitled to full reinstatement in their position following leave or another accommodation such as a temporary transfer, absent a showing of undue hardship, while under the FMLA they're only entitled to reinstatement in a comparable job, Mizrahi said.

That means that if requests for FMLA leave don't also trigger the ADA's accommodation process, workers won't get ''their full rights'' under federal law, she said, since upon returning from leave they can be placed in a comparable position, rather than the job they held when they went out on leave.

Nowak said his advice to employers won't change regardless of how the Third Circuit rules: They should make every effort to keep an employee working rather than going on leave. Such an approach keeps the employee productive and serves both the employee's and the employer's best interests, Nowak said.

BY PATRICK DORRIAN

To contact the reporter on this story: Patrick Dorrian in Washington at pdorrian@bna.com

To contact the editor responsible for this story: Susan J. McGolrick at smcgolrick@bna.com