

When employee has used up FMLA leave, consider additional time off under the ADA

It's a perennial puzzle: How should employers handle it when an employee has an FMLA-covered serious health condition that is also an ADA disability? *Answer:* Consider FMLA leave the *minimum* amount of unpaid leave the employee can take.

Courts have concluded that additional time off can be a reasonable ADA accommodation.

The problem is determining how much more leave a disabled employee may be entitled to. Is one week enough? A month? A year? Obviously, at some point the additional time becomes unreasonable.

One court-approved measure is that a doctor can estimate when the employee will be able to return to work. Indefinite leave is unreasonable. A specific period of recommended leave may be reasonable.

Recent case: Kim held an important position at the Federal Reserve Bank of Philadelphia. She and two other managers oversaw coin inventory and the alarm system. When Kim hurt her shoulder, she requested FMLA leave. The bank told her to have her doctors certify her condition. They did, and Kim used up her FMLA leave entitlement for the year.

When Kim didn't immediately return, the bank contacted her for more information on her leave. She said she was suffering from migraine headaches and needed more time off. The bank again asked for Kim's doctors to certify her condition, along with an anticipated return date. This time, doctors told the bank Kim's migraines were so severe that she would not be able to work. They didn't provide a return date or even an estimate.

The bank told Kim she was being terminated. She immediately offered to return to work the next day. Perhaps surprised, the bank asked whether her doctor's recommendation had changed since the last certification. She said it had not, but nonetheless insisted she could work immediately. The bank told her she would be terminated anyway.

Kim sued, alleging failure to accommodate under the ADA.

The court tossed out her case. It reasoned that the bank wasn't obligated to reverse the termination when there was no medical documentation supporting Kim's return. (*Ryans v. Federal Reserve Bank of Philadelphia*, No. 11-7154, ED PA, 2013)

Extra leave after FMLA? How to handle requests for more time off

Here's how to handle extra time-off requests when an employee has been out on FMLA leave:

- If you are an FMLA-covered employer (with 50 or more employees), grant any remaining FMLA leave for the year.
- Request a return-to-work certification showing the employee is able to perform the job's essential

functions. If she can't, consider whether her condition might be an ADA disability. That is, does the condition substantially impair a major life function such as eating, walking or breathing? If so, more time off may be a reasonable accommodation. Other options include a reduced schedule or more breaks.

- If a doctor recommends more time off, be sure that recommendation spells out the anticipated length. If it's indefinite, you can reject the request. If it's specific, decide whether it would be reasonable under the circumstances. Do you have the staff and flexibility to provide the leave?

Before you fire, consult your attorney.