

Beware demotion following disability leave

Before you demote an employee who is returning from a lengthy medical leave, consider whether he might file and possibly win a disability discrimination claim.

That's important even if the employee's leave exceeded the 12 weeks allowed under the FMLA. For example, if your organization offers extended leave and routinely holds positions open for those who take extra leave, then not doing so for another employee may suggest that a demotion was a pretext for disability discrimination.

Recent case: Joseph successfully managed a Michaels craft store for many years, earning excellent reviews and praise from supervisors and subordinates alike. Then he transferred to another location where things did not go so well.

Soon, subordinates were complaining that Joseph either spent all his time in his office or on the phone and didn't help out. Joseph was placed on a performance improvement plan.

Then he took about 24 weeks of medical leave for depression and anxiety. Company policy provided up to 30 weeks of leave, including 12 weeks FMLA, and Michaels routinely held positions open. But when Joseph was ready to return, he was offered only a part-time hourly position, allegedly the only available opening.

He refused and sued, alleging disability discrimination.

The company argued it wasn't obligated to hold Joseph's position open. But the court considered that other employees did return to their old jobs. It said a jury should decide whether offering Joseph that option was the result of disability discrimination. (*Pinskey v. Michaels*, No. 2:15-CV-0184, WD PA, 2016)

Final note: Ordinarily, employees who exceed their FMLA leave allotment aren't entitled to reinstatement. But because more time off can also be a reasonable accommodation, a disabled worker who isn't reinstated may claim refusal to accommodate. Plus, offering reinstatement to some and not all can look like discrimination.