

Retirement after FMLA isn't accommodation

An employee who has run out of FMLA and other leave may still be entitled to a reasonable accommodation of more time off. However, that right is only available if the employee has an estimated date by which he will be able to return and perform the essential functions of the job with or without an accommodation.

But what happens if the employee wants to retire at the end of the leave? That makes a request for more leave unreasonable, according to a recent decision.

Recent case: Robert needed back surgery and began missing work in November 2012. He first used FMLA leave and then other accrued time off. Then, in January 2013, Robert's doctor said he needed six more months to recover well enough to do his job.

On March 25, 2013, Robert sent his boss a note saying he wanted to retire on May 31, 2013. That was one day before he was scheduled to return to work per his doctor's certification. He was terminated in April after the employer concluded that he was out of FMLA and other leave and was not entitled to extended unpaid ADA reasonable accommodation leave because he was never going to return.

Robert sued, alleging ADA accommodation violations. But the court sided with the employer on the ADA claim, reasoning that because Robert had indicated he was retiring and never intended to return, the extended leave would have been futile. (*Moss v. Harris County*, 5th Cir., 2017)

Final note: Always consider whether an employee who has exhausted available FMLA and other leave may be disabled and entitled to more unpaid leave.

But don't accept a certification that says the employee's return date is uncertain. Press for a date. If one is not forthcoming, then extended leave likely is unreasonable, and therefore not an accommodation that you are required to offer.