LEAVE OF ABSENCE

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A question that frequently seems to concern employers is how to handle a situation in which an employee asks for time off but is not eligible for Family and Medical Leave Act (FMLA) assistance and has no paid time off remaining. As Arkansas is an at-will state, many Arkansas employers would consider simply terminating the employee and hiring someone new. However, federal law dictates that employers with fifteen or more employees must gather more information before terminating the employee. The *Browning* case dealt with issues surrounding both the application of the Americans with Disabilities Act (ADA) and the FMLA. The *Browning* Court directed employers to ask the right questions and consider all aspects of the situation in light of applicable law. Specifically, the employer in the *Browning* case would need to consider the question of whether the employee was a "qualified individual" under the ADA, meaning, the employee could perform the essential functions of the job with or without reasonable accommodation. Such analysis is necessary when you are dealing with an employee requesting medical leave.

Federal law has made it clear that employers need to gather information upon receiving leave requests; however, there are several issues that employers must be aware of. The ADA, FMLA, and the EEOC guidelines provide useful guidance. The *Browning* case shows that an employer needs to determine whether its employee meets the definition of a "qualified individual" entitled to protection under the ADA. The ADA defines "qualified" and creates a two-step process for employers to determine whether an individual is qualified: (1) does this individual possess the requisite skills, education, certification or experience necessary for the job, and (2) can the individual, despite his or her impairments, perform the essential functions of the job either with or without reasonable accommodation. Past performance alone will not prove that an employee meets the definition of "qualified" when it is clear that the employee's abilities are diminished or deteriorated.

In establishing his or her qualification, the burden is upon the employee to show that with or without reasonable accommodation he or she can perform the essential functions of his or her job as it existed before the disability. Reasonable accommodation is defined in ADA regulations as: "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position."

The *Browning* case also notes that a leave of absence for medical care or treatment can be a reasonable accommodation; however, the employer does not have a duty to accommodate the employee unless the employee will be presently qualified if the accommodation is provided. Accommodation in the form of a leave of absence could be used in a block of time or intermittently. However, leaves of absence for an indefinite duration are often found not to be reasonable accommodations under the ADA, as a matter of law. Based on these rules, an employer should carefully perform its own analysis as to whether the employee falls within the definition of "qualified individual" under the ADA and whether any requested time off will be considered a "reasonable accommodation."

Employers should also pay careful attention to the EEOC guidelines on leave to ensure that they have considered all issues relevant to a question of leave. The EEOC guidelines require an employer to provide an employee with a leave of absence if there is no other effective accommodation and the leave will not cause an undue hardship on the employer. An undue hardship means that the accommodation would be too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business. Employers should carefully assess whether granting a leave of absence would create undue hardship upon them, keeping in mind that the EEOC and many federal courts require substantial proof of such undue hardship.

The question of whether a leave of absence or termination is the appropriate response to a request for leave can be a difficult decision. Employers must keep legitimate business concerns in the forefront of all decision-making, but they should also keep all applicable federal and state requirements in mind whenever leave requests are made. Employers who avoid hasty decisions and assess each situation carefully will limit their liability to employment discrimination claims.

Browning v. Liberty Mutual Insurance Company, 178 F.3d 1043 (8th Cir. 1998). It should be noted that the Arkansas Civil Rights Act (ARCA) may apply to such situations and the ARCA applies to employers with nine or more employees during twenty or more weeks in the year. *See* A.C.A. § 16-123-102.
29 C.F.R. § 1630.2(m).
29 C.F.R. § 1630.2(o)(1)(ii).
Windsor v. Parkway Sch. Dist., 2008 U.S. Dist. LEXIS 3176 *20 (E. D. Mo. 2008) and *Walsh v. United Parcel Serv.,* 201 F.3d 718, 727 (6th Cir. 2000).