

HR QUESTION ? of the month



Indefinite Leave. Can You Terminate?

Question: Our employee has tendonitis. His condition has not seen any improvement, if anything he has experienced regression. To date we have conducted two ergonomic assessments. We made the recommended adjustments following both assessments. We have also accommodated the employee throughout his employment with modified duty and modified schedule as dictated by the employee's physician and the employee's feelings for what he can undertake day to day. The employee's work hours since December of 2016 have averaged 20.65 hours/week. Because of this reduction in work hours and the volume of work he is producing, we have hired a new full-time employee to handle what the employee has not been producing, as well as to meet the overall increased work load demands of our engineering department. We have three employees in this group and our work volume is such that we need all three to be productive 40 hours each week. However, we are not able to spread this out evenly and the other two engineers are having to work in excess of 40 hours to handle the volume that the employee is unable to produce. This employee sent an email today advising that "both of his hands are pretty messed up now, to the point that I cannot move them without being in a lot of pain. I cannot work anymore and I do not know if or when I will be able to. The medications I've been given are doing a bad job of dulling the pain, and it continues to get worse. I have a physical therapy appointment on Monday and a primary care appointment on Tuesday. I don't know if they will help to get me back to work, and I don't know when that will be." We are really struggling with how to move forward properly with this employee and would really appreciate some guidance here.

Response: It appears that the employer has taken reasonable and appropriate measures over the last few months to reasonably accommodate the subject employee, but he has now advised that he "cannot work anymore" and further that he does not "know if or when" he will ever be able to do so again. You indicate that he has advised the employer that he has an upcoming physical therapy appointment, but that he doesn't "know if they will help to [him] back to work, and [doesn't] know when that will be."

In some cases a full-time leave of absence can be a form of reasonable accommodation under the federal Americans with Disabilities Act (ADA), and employers need to consider this type of action in determining whether a qualified individual with a disability can be accommodated. That said, the federal Equal Employment Opportunity Commission (EEOC) has made clear that employers do not have to grant indefinite leave as a reasonable accommodation to employees with disabilities. Indeed, the EEOC

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has expressly stated that "[a]lthough employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration. Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations." See <https://www.eeoc.gov/facts/performance-conduct.html> and particularly question 21 (at example 38 the EEOC states that if an employee on leave "is unable to provide information on whether and when he could return to another job that he could perform," then "[t]he employer may terminate this worker because the ADA does not require the employer to provide indefinite leave.") Similar guidance is provided at question 44 at <https://www.eeoc.gov/policy/docs/accommodation.html> where the EEOC further states that "[p]roviding leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation. However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave. In certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position. If an employee cannot provide a fixed date of return, and an employer determines that it can grant such leave at that time without causing undue hardship, the employer has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship."

Thus, if the employer is able to accommodate the subject employee with leave that lacks a fixed date of return, it should do so. If, however, an employee is unable to state whether or when he will ever be able to return to work (and assuming no fixed date is offered after his next therapy appointment) and accommodating would visit an undue hardship upon the employer, the EEOC supports an employer in terminating the employment relationship. If the latter situation is now upon the employer, as noted it can discharge the subject employee. In letting him go, the employer should remind the employee of its efforts to provide reasonable accommodation over the last few months, and be candid with him as to the employer's inability to do so moving forward without undue hardship, in view of the indefinite nature of the leave now needed.

The employer should, however, ensure that the employee knows that he remains eligible for (although not guaranteed) reemployment should his condition improve to the point that he is able to work again. If this occurs and he is interested in returning to the workplace, he can and should let the employer know of this situation and then the employer should consider him for positions that are then available and within his capabilities, if there are any. The employer is not required to establish a new

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job for this individual nor "bump" any current employees to create a vacancy for him if there is not an available position at the time the employee indicates he is interested and able to return to work. If there is such a position, of course the employer consider him for rehire, but even in this scenario the employer is not required to give the employee preference over other candidates, especially any who may be objectively more or better qualified for whatever position is then open. Indeed, the employer is entitled to hire the best qualified candidate for any available position, regardless of disability or prior-employment status. That said, as noted, at the time of separation, the employee should be apprised that he is at least eligible to apply for rehire (though again should not be promised or guaranteed an offer), rather than advising him that he will not be considered for reemployment in the future at all, which can be construed as an unlawfully discriminatory decision in itself and can subject the employer to a potential claim down the road.

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