

# Thinking About Terminating an Employee Who is Unable to Return to Work After 12 Months of Leave.... Think Again!

## Labor & Employment Law Update

on February 18, 2014

On Tuesday, February 11, 2014, Judge Sara L. Ellis of the United States District Court for the Northern District of Illinois ruled that the EEOC could continue to pursue its ADA claims and challenge the United Parcel Service, Inc.'s ("UPS") return-to-work rule of discharging employees who cannot return to work after twelve (12) months of continuous leave (*EEOC v. UPS, Inc.*, No. 09-CV-05291, N.D. Ill. 2/11/14).

In this case, UPS had maintained a leave of absence policy, which provided ***in part*** that employees will be "administratively separated from employment" after twelve months of leave. UPS administratively terminated the plaintiff after she was unable to return to work. The EEOC filed suit alleging that the policy maintained by UPS was an inflexible twelve-month leave policy, and in effect acted as a "100% healed" policy and improper qualification standard to screen out a class of individuals with a disability.

UPS defended against these claims by arguing that its attendance policy was permissible under the ADA as an essential job function of its workforce. Although, it is well established in the Seventh Circuit that regular attendance can be an essential job function under the ADA, the Northern District Court distinguished these prior rulings.

What is interesting about this recent decision is how the EEOC framed its ADA claim. The EEOC did not plead its claim under Section 102(b)(6) of the ADA in terms of essential job functions, but rather contended that the challenged return-to-work rule was a 100% healed policy and an impermissible selection criteria or qualification standard under the ADA.

Given the EEOC's method of pleading, the Court reasoned that the policy "can be considered a qualification standard – a medical requirement that an individual must meet in order to maintain his or her position with UPS – and not an essential job function." The Court further reasoned that "because such a

requirement falls within the definition of a 'qualification standard,' and the EEOC has alleged that the policy applies to qualified individuals with disabilities, the EEOC may proceed on its §12112(b)(6) claim."

As we have previously blogged, the Seventh Circuit and the Northern District are continually expanding their interpretations of the ADA and its amendments. Even though this particular ruling is based on the sufficiency of the complaint's allegations – not its merits – it is still a notable development.

Bottom Line: Let this ruling serve as reminder to all employers of their duty to conduct individualized assessments in each and every return to work situation. Employers should communicate with each employee to determine whether he or she can return to work with or without a reasonable accommodation. Routinely applying a one-size-fits-all return to work rule may later give rise to liability if interpreted as a "100% healed" policy.

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