Is a Job "Vacant" When the Employee is On Leave and Unlikely to Return?

by Dennis J. Merley - Tuesday, November 19, 2019

When the Americans With Disabilities Act (ADA) says that accommodation includes transfer to an existing vacancy, does the term “vacancy” apply when a job is open because the employee is on FMLA and unlikely to return?

Marcus Maxwell worked as a Class B Truck Driver for Washington County, Mississippi. He hurt his ankle getting out of a truck but continued working sporadically while undergoing surgeries on the injured ankle. Eventually, he was released to work light duty but was told there were no light duty jobs available. After being upgraded to “medium duty” work, Maxwell again was told that there were no openings into which he could be transferred.

An Open Question

Thereafter, Maxwell sought to renew his Commercial Driver’s License (“CDL”) with the Department of Transportation but failed the medical exam due to “medications.” He reported this to the company, who promptly terminated him in a letter stating that since he no longer had a valid CDL he could not drive for them, and since there were no other job available, he would be terminated.

Maxwell sued in federal court under the ADA for failure to accommodate, noting that while he was being told there were no openings, an employee (Walsh Wigfall) in another department was on FMLA leave due to a foot ailment. Wigfall apparently was unable to work without wearing very expensive special shoes that he could not afford. The Country tried to convince him to buy the shoes and thought insurance might pay part of the cost. A supervisor even offered to loan him money for the purchase. Wigfall resisted, so when his FMLA leave ended the County fired

him for failure to return from a leave.

A Clear Understanding

Maxwell contended that it was “clear” that Wigfall would not be returning and that the County therefore should have transferred him to Wigfall’s job. The court disagreed, noting that “[a] position is not considered vacant if the employer has a legitimate reason, unrelated to the employee’s disability, for reserving the position for others.”

The court pointed out that Wigfall’s FMLA leave extended for more than a month after Maxwell’s termination and for three months after Maxwell requested reassignment. While it may have been “clear” that Wigfall would not come back, it was not certain. Wigfall continued talking to the County about his treatment right up until the end of his leave and never actually provided definitive word on whether he would return. Indeed, he could have changed his mind at the last second and purchased the shoes permitting him to work.

The Court concluded that an employer need not preemptively terminate an employee on leave just to accommodate a disabled co-worker, and that the employee’s position should not be considered open even though it seems likely that the incumbent will not be returning. Maxwell’s claim was therefore dismissed.

Bottom Line

The Court declined to decide whether the outcome might have been different had the employer known definitively (e.g. with a doctor certifying a permanent disability) that Wigfall would not return. That could be a closer case.

Nevertheless, this decision is useful in instructing employers that while there is any chance that an employee might return from a FMLA (or other) leave, that employee’s job is not considered open with respect to the obligation under the ADA to consider transfer to an existing vacancy as a possible accommodation.

---

220 South 6th St, Suite 2200, Minneapolis, Minnesota 55402 612-339-6321 | 800-989-6321