

Court Says Employer Adequately Accommodated Employee With Flesh Eating Virus

by Laura I. Bernstein - Thursday, February 14, 2019



The Eighth Circuit Court of Appeals (which rules on cases arising in Minnesota) decided a pretty routine disability accommodation case using some eye-opening and thought proving rationales.

Gary Brunckhorst was a long-term employee of the City of Oak Park Heights, Minnesota. In 2014, he contracted Fournier's gangrenous necrotizing fasciitis, a rare, life-threatening disease commonly known as "flesh-eating" bacteria. He underwent multiple surgeries and spent months in care facilities but was left with long-term injuries. During this period, Brunckhorst requested and was granted FMLA leave.

After three months of leave, the City Administrator informed Brunckhorst that he had exhausted his FMLA leave but that he was eligible for up to ninety days of unpaid leave under a city ordinance. Brunckhorst's request for this leave was granted, as were multiple requests for extension of the leave.

Employee Gets Two Options and Chooses Neither

Meanwhile, the Oak Park Heights City Council determined that Brunckhorst's position was no longer needed, in part because its duties had been absorbed by other employees. The City Administrator told Brunckhorst that he could either accept a severance package or move into a different, lower-paying position. Brunckhorst declined both alternatives, stating instead that he wanted to remain in his original position. He therefore remained out on leave.

Eventually, the City Administrator sent Brunckhorst a letter requesting that he submit a request for whatever reasonable accommodations he needed for the new position and that he return to

work in that new job by a specified date or be terminated. Brunckhorst's attorney responded, stating that Brunckhorst should return to his original position on a reduced schedule and be allowed to work from home. However, while the accompanying physician's report confirmed the restriction to four-hour work days, it said nothing about working from home. After continuing efforts to negotiate Brunckhorst's return failed, the City terminated him for failure to return from his leave.

Brunckhorst sued under the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act alleging that the City failed to offer a reasonable accommodation, failed to engage in the required interactive process, and terminated him in retaliation for complaining of disability discrimination. The federal district court granted the city's motion to dismiss and Brunckhorst appealed the dismissal to the Eighth Circuit Court of Appeals.

Court Affirms Dismissal With Some Teasers

The Eighth Circuit **affirmed the dismissal**, but did so with some rather intriguing pronouncements:

– First, they said Brunckhorst was not entitled to reinstatement to his original position because he did not return to work before his FMLA leave expired. Standard accommodation analysis suggests that holding the job open for some period of time after the legally-mandated FMLA leave expires is advisable, and the Equal Employment Opportunity Commission (EEOC) has issued an **Enforcement Guidance Memo** indicating that doing so is required. The Court explicitly declined to follow the EEOC's guidance, dismissing it as non-binding authority.

– In addition, the Court noted that there was no medical reason why Brunckhorst had to be reinstated to the original job since the alternative, lower-paying position offered to him met his medical restrictions. This could be read to suggest that if an employee has been granted a medical leave as an accommodation, an employer does not breach the duty of reasonable accommodation by offering that employee a lesser job upon the employee's return to work. However, it is perhaps more plausible that the Court was just using some imprecise language to dispense with a Brunckhorst's unreasonable demand that he was entitled to reinstatement to a job that no longer existed.

– Finally, the Court reasoned that working remotely was not reasonable or required since Brunckhorst had testified that working from home was merely his preference, not a medical restriction. There was nothing in the medical documentation supporting a need to work from home and Brunckhorst failed to show that he could have performed the essential job functions remotely. Unlike the Court's rulings discussed in the two preceding paragraphs, however, the Court's analysis of the work-at-home accommodation request was quite straightforward and consistent with routine accommodation precedent.

The Court also dismissed Brunckhorst's contentions that he was fired because of the existence of his disability. Given the amount of leave offered to him, as well as the extensive negotiations regarding his return, the Court found it very unlikely that the City was motivated by unlawful motives in terminating him after he rejected their proposal to return him to work.

Bottom Line

The language of this decision is too uncertain to alter standard practices regarding whether to hold a job open as an accommodation once a FMLA leave concludes, or whether an alternative, but lesser-paying position might be a reasonable accommodation upon a return to work. As to the first issue, it is clear that the employer acted very reasonably in holding the job open well after the FMLA leave expired. Thus, the Court may not have been suggesting that the employer need not have held the job open; they have just been responding to the EEOC's fairly extreme position that doing so is absolutely required until it constitutes an undue hardship to do so. We will have to see what the Eighth Circuit says as more such cases come before them.

As to the second issue, the Court was not actually called upon to evaluate whether Brunckhorst should have been returned to his former position instead of getting a different offer because the former job no longer existed. Thus, the Court's musing on whether the two jobs both met the employee's restrictions was not central to the case and is not inherently reliable. We are better off waiting until the Court has the chance to squarely address a case where the employer is called to defend a decision denying reinstatement to the former position when that position was still available.

Still, there is cause for hope that the Eighth Circuit might be open to giving employers greater flexibility in disability accommodation matters.