Is Never Returning to Work a Reasonable Accommodation? Fifth Circuit Says No

March 30, 2017

On March 15, 2017, in Moss v. Harris County Constable Precinct One, the Fifth Circuit Court of Appeals reaffirmed that an employer is not required to accommodate an employee who is requesting indefinite leave as a reasonable accommodation. Robert Moss, who was a deputy with Harris County Constable Precinct One for 16 years, claimed he had been wrongfully discharged in 2013 while on leave following back surgery. Moss claimed his discharge was a result of both his disability and his political speech against then-candidate for constable Alan Rosen. After being discharged, Moss brought discrimination and retaliation claims under the Americans with Disabilities Act (ADA) and the Texas Labor Code (TLC), and also brought a First Amendment retaliation claim under 42 U.S.C. Section 1983.

Moss’s claims stemmed from when he took leave under the Family and Medical Leave Act (FMLA) believing that he had enough benefits and accrued time to remain on leave until June 1, 2013—one day after his retirement date. Moss began his leave under the FMLA on November 7, 2012. In January of 2013, Moss’s doctor instructed him and his employer that he could not return to work for another six months.

On March 25, 2013, Moss sent a letter to Constable Rosen, who had been elected and sworn in while Moss was out on leave, requesting to retire effective May 31, 2013. In response to the letter, on April 16, 2013, Rosen discharged Moss by letter, claiming that Moss had “exhausted all of [his] FMLA comp time, sick time, vacation time and all other accrued time.”

On May 17, 2013, Moss “applied for, and later received, disability benefits under Social Security, testifying he had been permanently disabled as of April 16, 2013, the date he was fired.”

Moss eventually filed suit alleging that he had been wrongfully discharged due to his disability and for engaging in protected free speech. Harris County successfully moved for summary judgment, and Moss appealed the adverse judgment on all his claims.

The Fifth Circuit’s Decision

Focusing on the disability claim, the Fifth Circuit noted that at the time of Moss’s discharge on April 16, 2013, Moss had exhausted all of his FMLA leave and his doctor had instructed him and his employer that he was incapable of returning to work until around July of 2013. Moss was “medically incapable of performing his duties as a deputy constable at the time of his termination and thus was not a qualified individual under the ADA.” Furthermore, the court noted that the ADA only requires an employer to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”
Since there was no accommodation that Harris County could provide to allow Moss to come back to work and perform the essential functions of his job, the court found that Moss was not a qualified individual under the ADA.

Moss attempted to argue in response, among other things, that he remained qualified during his leave because his leave would last only through May 31, 2013, and it was therefore not “indefinite” leave. However, the court zeroed in on the fact that Moss would also retire on that date, and in essence would take leave and never return to work. The court found that this was not a reasonable accommodation as it would never enable him to perform the essential functions of his job, which is the very purpose of a reasonable accommodation.

Additionally, the court pointed out that Moss’s failure to present facts demonstrating that he was qualified under the ADA foreclosed his argument that Harris County impermissibly withdrew from an interactive process when it terminated his employment. The court noted that Harris County’s discharge of Moss could not be a failure to reasonably accommodate him when Moss could not identify any reasonable accommodations that would have enabled him to perform the essential functions of his job.

Key Takeaways

Although taking leave that is limited in duration may be a reasonable accommodation to enable an employee to perform the essential functions of his or her job upon return, taking leave without a specified date to return or, as in this case, with the intent of never returning is not a reasonable accommodation. This case serves as a reminder to employers that providing unprotected leave as a reasonable accommodation may be necessary and appropriate in some circumstances, but each accommodation request needs to be analyzed on a case-by-case basis.