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Commentary

Ban on Handicap Discrimination Morphs Into Job-Protection Law

Ruling is a serious erosion of employment at-will doctrine

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The interplay among state and federal laws regulating leave from work due to work-related injuries and non-work-related illnesses poses a legal minefield for employers who analyze leave requests under just one of those laws.

A recently decided, but little-noticed case, *Soules v. Mount Holiness Memorial*, 354 N.J. Super. 569 (App. Div. 2002), has only added to this confusion.

Its holding underscores the increasingly difficult position of employers who seek to terminate potentially handicapped employees on extended leaves of absence. It appears to conclude that employers must hold open indefinitely the jobs of employees suffering from long-term illnesses.

When an employee is out of work due to illness or injury, he or she may be protected from termination by, among other laws, the Family Medical Leave Act, 29 U.S.C. §2601; the Americans with Disabilities Act, 42 U.S.C. §12101;

and the New Jersey Law Against Discrimination, N.J.S.A. §10:5-1. Each has a separate purpose, though some overlap. For example, while the FMLA provides protected job leave for 12 weeks and continuation of group medical coverage, the ADA protects against discrimination on account of “disability” and the LAD on account of “handicap.” However, courts have construed the ADA and LAD to permit such individuals more time off than the FMLA requires.

How much time? Generally, it depends on each case, although courts have universally held that leaves may not be indefinite or for an extended period. Thus, a leave in excess of one year is not required, while a one-month leave beyond the FLMA’s 12 weeks is acceptable.

Soules seems to depart from this case law by appearing to prohibit employers from ever terminating an employee who is on extended medical leave. In *Soules*, the plaintiff was absent for eight months to recuperate from cancer surgery. Five months into the leave, the employer terminated him and filled his position, determining it could no longer keep it open. The employee sued under the LAD for handicap discrimination, and the trial court granted the company’s motion for summary judgment, holding that a temporary inability to work while recuperating from surgery or

injury is not a LAD handicap.

Last Nov. 6, the Appellate Division reversed, concluding that the LAD’s definition of “handicap,” and its scope, is not comparable to the definitions and scope of handicap or “disability” under the ADA, the Federal Rehabilitation Act, 29 U.S.C. §701 or comparable state laws.

It is true that the LAD definition of “handicap” is much broader than the ADA’s definition of “disability.” By focusing on this distinction, however, the Appellate Division appears to have ignored the employer’s arguably more powerful argument that regardless of the handicap, the employee was not qualified to perform the essential functions of the job.

Under federal and New Jersey case law, the analysis of “qualification” comprises two inquiries: first, the person must possess the necessary “skill, experience, education and other job-related requirements.” Second, the employee must prove he or she could perform the functions with or without reasonable accommodation. In *Soules*, the Appellate Division seems to have erroneously focused only on the first question.

Under the LAD, it is not enough for the handicapped employee to be able to do the job at some theoretical future time, if the employer cannot, for business reasons, continue to keep the post open until then.

If the concept of reasonable accommodation is to mean anything in the context of a handicapped employee on extended leave, the employer must be permitted to decide whether the employee can perform the job with or without reasonable accommodation *at the time the employer makes the decision whether to terminate the employee.*

If showing up for work is a requirement, and if an extended absence cannot reasonably be accommodated, an employer must be able to terminate an employee, whether in the fifth or 15th month of the leave.

The employer's dilemma is this: an employee goes out on an indefinite, long-term leave for reasons that may qualify as a LAD handicap. At some point after the 12-week FMLA leave expires, the employer decides that keeping the job open would create an undue hardship for the business. Under the Guidelines of the Equal Employment Opportunity Commission, and prior ADA and LAD case law, the employer can terminate the employee and fill the position.

Under *Soules*, however, the employer must first assume that the individual is

able to perform the job — even though the employee, absent from work, clearly cannot. Thus, the employer is foreclosed from considering whether accommodation of the absence is reasonable for business operations. Such a formulation requires an employer to leave open the position indefinitely, or at least until the employee is ready to return to work.

Even under prior state and federal case law holding that leaves as an accommodation may be required in certain situations, there is no blanket requirement that leaves be granted to the extent that a business is financially damaged. By ignoring the employer's right to decide whether continued absence renders the employee unable to perform an essential function, *Soules* changes the purpose of the LAD's handicap discrimination provision from one preventing

handicap discrimination to a job-protection law.

The Legislature clearly did not intend such a result. It provided that employers do not violate the LAD when they terminate a handicapped employee if he or she "in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment."

If an employer can only make the job qualification determination when the employee is ready to return to work, the employee's absence can *never* provide the basis for termination. Such an unfortunate reading of the LAD would not only do little to eradicate the "cancer of discrimination" in New Jersey, but would also present the most serious erosion of the employment at-will doctrine in New Jersey in many years. ■