



## **Court Confirms that Request for Additional Leave of an Unspecified Duration is Not a Reasonable Accommodation Under the ADA**

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**By Mark Wilkinson**

When it comes to employee leaves of absences, compliance with the overlapping requirements of the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) can challenge even the most seasoned of human resources professionals. A recent federal court case highlights some of the pitfalls awaiting employers when an employee asks for additional leave as an accommodation under the ADA. (*Valdez v. McGill*)

In *Valdez*, a warehouse supervisor, Rocky Brown, took FMLA leave for a surgery related to colon cancer. (Brown later died and his personal representative, Gabriella Valdez, appealed the case on his behalf.) When Brown returned to work, he again took FMLA leave—this time intermittent leave—to address several of his reoccurring health issues. This occurred for about a year until Brown presented a note from his physician advising that he still had cancer, as well as bronchitis and fatigue, and that he could not work for two weeks. One day before Brown's anticipated return to work (based on his doctor's note), the company notified him that he had exhausted the 12 weeks of FMLA leave available to him. That same day, Brown obtained another note from his physician advising that he "may return to work" in three more weeks. Upon review of this note, the company terminated Brown's employment because of his poor work performance and excessive absences. Brown sued claiming, among other things, that the company failed to accommodate his disability and that it should have given him more leave time as a reasonable accommodation under the ADA.

In the last few years, the Equal Employment Opportunity Commission (EEOC) has seized on this issue and aggressively pursued its position in litigation that an employer has an obligation to provide additional leave as a reasonable accommodation; but even the EEOC has recognized that employers have no obligation to provide leave of an indefinite duration.

In *Valdez*, the court confirmed that additional leave can be a reasonable accommodation, but only where the employee gives the employer an anticipated return date. If the employee asks for additional leave of an unspecified duration, it does not constitute a request for a reasonable accommodation, and the employer has no obligation to accept it. In *Valdez*, for example, the court found that the company reasonably concluded that Brown's anticipated return to work was uncertain because he failed to return by the date specified in his first doctor's note and his second note equivocally stated he may return in return in three weeks. In light of Brown's unchanged diagnosis (colon cancer, bronchitis, and fatigue), frequent absences, and failure to return by the date specified in the first note, the court held that Brown's return date was uncertain, and the employer had no obligation to provide him additional leave.



Employers regularly deal with employees who have a moving target for a return to work date following FMLA leave or a similar leave of absence. For instance, the employee may present a doctor's note with a return to work date, but then the date comes and goes without the employee's actual return to work. Often, the employee requests an extension of leave, and the process repeats itself. In this sense, the Valdez decision is a victory for employers in that it requires employees to regularly communicate with their employer and provide clear information (typically from their health care provider) that they will be able to return to work now or in the near future. When they use vague terminology as the plaintiff did here, it then begins to look like a request for "indefinite" leave, which employers do not need to accommodate.

While this decision certainly is good news for employers, managers should tread lightly since courts in other jurisdictions could have handled this case in a very different manner. Employers must also remain mindful of the ADA's interactive process, which requires employers to communicate with the employee about their need for leave and to conduct an individualized assessment of the employee's request for leave.

### **More Information**

Mark S. Wilkinson  
msw@franczek.com  
312.786.6171

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