Bond

INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

DECEMBER 4, 2017

"Brute Reason" or Lack of Nuance: Seventh Circuit's Twin Holdings That a Long Term Leave is Not a Reasonable Accommodation May Not Be a Panacea in Other Jurisdictions

In one of his more pithy lines, Oscar Wilde wrote, "I can stand brute force, but brute reason is quite unbearable. There is something unfair about its use. It is hitting below the intellect." Oscar Wilde, *The Picture of Dorian Gray*.

For employers dancing on the head of the ADA's pin of reasonable accommodations, the Seventh Circuit's two decisions holding that a multi-month leave of absence is not a reasonable accommodation under the Americans with Disabilities Act is like a tropical breeze in the dead of winter. The brute reason of the opinions is compelling, but will other circuits find the per se rules established in them simply too rigid?

In the first case, *Severson v. Heartland Woodcraft, Inc.*, the employer granted an employee with a chronic back condition 12 weeks of leave under the Family and Medical Leave Act. Two weeks before the leave expired the employee informed the employer, Heartland, that he needed surgery on the date his leave was set to expire with a recovery period of at least two months. Heartland notified the employee that his employment would be terminated at the end of his FMLA leave, but that he could reapply for a position when he was medically cleared. The employee sued and the Equal Employment Opportunity Commission submitted an amicus brief on his behalf. The Seventh Circuit directly addressed and expressly rejected the EEOC's position that a long term leave of absence can and should be considered a reasonable accommodation. In so ruling, the Court erected a monument to brute reason:

> "Perhaps the more salient point is that on the EEOC's interpretation, the length of the leave does not matter. If, as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave statute — in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term 'reasonable accommodation.'"

Just a few weeks later, the Seventh Circuit, in *Golden v. Indianapolis Housing Agency*, addressed the issue again, this time on particularly heartbreaking facts. The plaintiff had taken 16 weeks of leave due to ongoing treatment, including a mastectomy, for breast cancer. Despite the fact pattern that seemed to be undeniably sympathetic to the plaintiff, the Court followed its prior decision in Severson, holding:

> "While we sympathize with Golden's plight, clear circuit precedent controls this case. Under Severson . . . an employee who requires a multi-month period of medical leave is not a qualified individual under the ADA or the Rehabilitation Act."

There was, however, a concurrence with the Court's own brute reason. Judge Rovner concurred that the Court was bound by *Severson*, but argued:

> "The ADA, by its terms, is meant to be flexible and to require individualized assessments of both the reasonableness of an employee's requested accommodation and the burden on employers. Holding that a long term medical leave can never be part of a reasonable accommodation does not reflect the flexible and individual nature of the protections granted employees under the Act."

Employers outside of the Seventh Circuit's jurisdiction would be wise to pay careful attention to the concurrence in *Golden* and consider whether the views expressed by Judge Rovner may win the day in other circuits. Right now, the *Severson/Golden* majority decisions are only binding in the Seventh Circuit, and have no applicability to local disability statutes such as the New York City Human Rights Law which permits open-ended long term leaves as reasonable accommodations. In New York, employers must still engage in the interactive process with employees who request leaves beyond the FMLA period. Going through that process and being able to articulate an undue hardship that may result from granting a multi-month leave is still the law and best practice in New York.

If you have any questions about this information memo, please contact Howard Miller, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS