

When a Leave of Absence Becomes Indefinite, Employers Can Fill the Position

By Lois M. Kosch

One of the most perplexing issues employment lawyers face is how long an employer must hold open a position to reinstate an employee who has been on a medical-related leave of absence. Advising an employer becomes even trickier when an employee repeatedly requests extension of the leave of absence such that it becomes, for all intents and purposes, a request for indefinite leave.

Outside of clearly articulated reinstatement rights in laws like the Family Medical Leave Act or the Pregnancy Disability Act, neither the courts nor the Legislature have provided much guidance on this issue. However, the recent Court of Appeals decision in *Williams v. Genentech Inc.*, 139 Cal.App.4th 357 (2006), builds upon earlier case law on this issue and provides a framework for analysis. The case also tells us, perhaps for the first time, that an employer does not have to hold a job indefinitely and may fill a position where various criteria are met.

Plaintiff Rochelle Williams had worked as a receptionist at Genentech for 10 years when her supervisor criticized her for the way she handled an incident. Following a meeting with her supervisor, she began to cry uncontrollably and hyperventilate and was transported to the hospital. She was diagnosed as suffering from stress and exacerbation of asthma and went on a medical leave.

As is often the case, her leave was initially to last just one week but was extended by doctor's notes several times, usually for about a month at a time. Genentech initially placed her on leave under the Family Medical Leave Act and then allowed her to continue on leave after the FMLA leave expired. However, Genentech's written policies stated that where leaves of absence extend beyond the 12 weeks of FMLA, the company could not guarantee that the employee's position would be available upon return to work. The policies also provided that if an employee's position were filled during leave the employee would have 60 days following return to work to locate another position within the company. Genentech would pay the employee for the first 30 days of that 60-day period.

In Williams' absence, the company used floaters to cover her position, with unsatisfactory results and the position was not amenable to hiring a temporary employee from an outside agency. When her doctor extended her leave for six weeks beyond the expiration of her FMLA leave, plaintiff was notified that the company could no longer hold her position and would be hiring a replacement. She was also told when she was ready to return to work that she would be entitled to search for a new position within the company.

Seven months after starting her leave, Wil-



liams was released to return to work with no restrictions. Per Genentech's policy, she had 60 days to secure a new position or she would be terminated. She was provided with information on internal job search services and was referred to a Genentech recruiter to assist her with the job search. During the 60 days following her return to work, there were no vacant receptionist positions. She interviewed for other positions but was not hired because she lacked the necessary education and/or experience. Having failed to secure another position within the 60 days, her employment was terminated.

Williams sued, alleging disability discrimination for filling her position while she was on a leave of absence and for failing to hire her to a vacant position upon her return to work. The trial court granted summary judgment in favor of Genentech, which the Court of Appeal affirmed.

The plaintiff argued that Genentech had discriminated against her by filling her position while she was on medical leave and thus failed to accommodate her disability as required by the Fair Employment and Housing Act.

Under FEHA, an employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions if the employer can do so without undue hardship. *Pri-*

liman v. United Air Lines Inc., 53 Cal.App.4th 935 (1997). FEHA provides a non-exhaustive list of possible reasonable accommodations, including such things as making facilities accessible to and usable by disabled individuals, job restructuring, offering part-time or modified work schedules and reassigning to a vacant

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position. (Government Code Section 12926(n); 2 Cal.Code Regs Section 7293.9(a).)

Under *Genentech*, "a finite leave of absence can be a reasonable accommodation under the FEHA provided it is likely that, at the end of such leave, the employee will be able to perform his or her employment duties."

The court noted that holding a job open for a disabled employee who needs time to recuperate is in itself a form of reasonable accommodation and may be all that is required where it seems likely the employee will be able to return to his or her position within the foreseeable future. However, in this case, the plaintiff continued to extend her leave repeatedly such that the employer had no idea of when or if she would return to work. This is tantamount to a request for an indefinite leave of absence.

Reasonable accommodation, the court said, "does not require the employer to wait indefinitely for an employee's medical condition to be corrected."

Ultimately, the *Genentech* court found the decision to terminate Plaintiff was nondiscriminatory and the employer was not required to grant an indefinite leave of absence as an accommodation to a disabled employee.

The court relied on a few key facts in reaching its determination, which are instructive to employers who find themselves in similar circumstances. These include:

1. At the time Genentech filled the position, the plaintiff was still on leave and unable to perform the essential functions of her job;

2. Williams lacked the necessary education and experience for the lab positions she applied for;

3. She could not show any evidence of pretext since she was unaware whether anyone who interviewed her knew she had been on a disability leave, and none of the interviewers made any comments suggesting they would discriminate against a person with a disability or who had been on disability leave.

4. Since there were no vacant receptionist positions in the 60-day period following her return to work, and no other positions for which she was qualified, Genentech's decision to terminate her pursuant to its policy was legitimate

and nondiscriminatory.

The court therefore rejected the plaintiff's arguments that seven months of leave was an insufficient accommodation and that the company failed to accommodate her disability by not holding her position open for her until she was released to work.

In this case, the court was sympathetic to the difficulties an employer faces when it has an employee on medical leave and each time the employer expects the employee to return to work it gets instead another note extending the leave for four to six more weeks. Some positions are very difficult to cover over long periods of time and trying to work around such absences can be even more frustrating where the employer has no firm idea of when to expect the employee back at work.

Genentech suggests that an employer may defeat a claim of disability discrimination, failure to accommodate where it decides it can no longer hold open a position for a disabled employee where 1) the employee's job-protected leaves of absence (such as FMLA) have expired; 2) the employee is arguably requesting indefinite leave; 3) the employer has a legitimate business need to fill the position; and 4) the employee whose position needs to be filled is not able to perform the essential functions of the position at the time the employer feels it would be an undue hardship to continue to keep the job open.

Employers should continue to evaluate leave termination situations carefully before deciding whether to fill a position because these inquiries are likely to continue to be very fact-specific. Courts will consider such elements as the size of the employer, the number of people employed in plaintiff's position, the employer's overall leave policies, and whether or not the position can be filled with individuals from a temporary agency during plaintiff's leave. See *Garcia-Ayala v. Lederle Parenterals Inc.*, (1st Cir. 2000) (may not be an undue hardship for the employer to hold a secretarial position open for a long period of time where it could hire temps to fill the position in the secretary's absence) and *Nunes v. Wal-Mart Stores Inc.*, (9th Cir. 1999) 164 F.3d 1243 (may not be an undue hardship for an employer to hold a job open for a lengthy period of time where its own benefits policy allowed employees to take up to one year of leave and it regularly hired seasonal employees to fill positions.)

While *Genentech* provides some assurance that jobs do not need to be held indefinitely, the employer must still consider whether hiring a replacement may be viewed as disability discrimination.

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