

# EMPLOYMENT LAW

## A L E R T

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

### ***\$6.2 Million ADA Settlement Puts Emphasis on Need for Flexible Leave Policies***

October 1, 2009

This week, the EEOC announced court approval of a \$6.2 million settlement with Sears, Roebuck & Co. in a class action disabilities case. The EEOC claimed that Sears regularly failed to make accommodations and applied its leave policy in an inflexible way.

Sears denied any wrongdoing, but the EEOC said that Sears kept employees out on leave rather than conducting an individual assessment about whether the employee could return to work or whether a brief extension of the leave could make a return to work possible. Then, when the employee's leave time expired, Sears fired the employee for exceeding all available leave time.

This case places emphasis on an employer's need to be flexible – and engage in the “interactive process” – with employees who are out of work on leave and facing the expiration of available leave time. An employer's inflexible response – without any individual inquiry into the circumstances of that employee's situation – likely runs afoul of the ADA. Further, with the ADA now greatly expanded under its newly passed amendments (which took effect January 1, 2009), this flexible approach is even more important.

#### **Relatively Routine Beginning, With a Disastrous End**

The case began as a fairly routine, single employee charge of discrimination. The former employee claimed that he was disabled after an on-the-job injury but could have returned to work before his leave expired. The former employee claimed that, rather than being flexible in his situation, Sears did not return him to work and fired him at the end of his available leave time.

In its investigation, the EEOC claims that it uncovered evidence that hundreds of other employees had been treated the same way, situations in which Sears had not made accommodations for employees on leave, or even offer a brief extension of the leave, to try to return the employees to work. Based on this investigation, the EEOC expanded the reach of the case from the single employee to a class action.

The EEOC then filed a nationwide, class action against Sears on behalf of all of these former employees, alleging a violation of the ADA. An Illinois federal district court announced approval of the multi-million dollar settlement on September 29.

**Lessons To Learn**

1. Review of an employer's leave policy and review of the application of that policy are very important. The EEOC did not claim that Sears' leave policy in and of itself was a violation. Rather, Sears' inflexible application of that policy, according to the EEOC, did violate the law. In light of the EEOC's position, however, an employer should review its leave policy to make sure that it does not contain language suggesting an inflexible approach. In fact, an employer would be wise to have its leave policy expressly state a flexible approach – such as an intention to discuss with the employee what options may be available at the end of the available leave time. Likewise, an employer should review the application of its policy to make sure its practice in applying the policy does not reflect a practice of inflexibility.
2. Companies should establish a system of notification and follow-up with employees who are out on leave. This system should involve initial communication at the time leave begins explaining the period of leave available, the employee's status during leave (job-protection, benefits, etc.) and set a date certain for follow-up if the employee remains on leave. This system also should include the requirement that before an employee is terminated for expiration of available leave, there is some "interactive communication" with the employee exploring available options.
3. Employers should seek guidance in "sticky" situations. Especially with the expanding ADA, seeking guidance in dealing with employees who are out on leave and demanding return, or who are facing expiration of their leave time, is very important.

If you have any questions in light of this alert, or need any assistance in conducting a review of existing policies or their implementation, please contact one of our labor and employment lawyers listed below.

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