

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by  
Velma Korbek, Commissioner,  
Department of Human Rights,  
Complainant,

v.

Clay County,  
Respondent.

**ORDER DENYING  
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Beverly Jones Heydinger on cross motions for summary disposition by Clay County (Respondent or County) and the Department of Human Rights (Department). The Respondent's motion was received on February 7, 2008. The Department's motion was received on February 11, 2008. The Respondent's reply to the Department's motion was received on February 27, 2008. The Department's reply to the Respondent's motion was received on February 29, 2008.

Margaret Jacot, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, represents the Department. Dyan J. Ebert, Quinlivan & Hughes, P.A., P.O. Box 1008, St. Cloud, Minnesota 56302, represents Respondent.

Based upon the record in this matter, and for reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**ORDER**

1. The Complainant's Motion for Summary Disposition is DENIED.
2. The Respondent's Motion for Summary Disposition is DENIED.
3. A prehearing conference shall be held by telephone on April 22, 2008, at 10:30 a.m. to set the matter for hearing.

4. The Department's request to reopen discovery is DENIED; but Clay County shall respond to the Department's requests 2, 4, 6 and 7, limited to Clay County, within 30 days of this Order.

Dated: March 20, 2008

s/Beverly Jones Heydinger

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BEVERLY JONES HEYDINGER  
Administrative Law Judge

## MEMORANDUM

### Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.<sup>1</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.<sup>2</sup> A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.<sup>3</sup>

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.<sup>4</sup> When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.<sup>5</sup> All doubts and factual inferences must be resolved against the moving party.<sup>6</sup> If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>7</sup>

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<sup>1</sup> *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1995); *Louwegie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

<sup>2</sup> See, Minn. Rules 1400.6600 (2004).

<sup>3</sup> *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

<sup>4</sup> *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>5</sup> *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

<sup>6</sup> See, e.g., *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).

<sup>7</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

Summary judgment should only be granted in those instances where there is no dispute of fact and where there exists only one conclusion.<sup>8</sup>

In this instance, where there are cross-motions for summary disposition, the same standards apply, and summary disposition should be granted only where there are no material facts in dispute.<sup>9</sup>

### **Stipulated Facts**

The parties have stipulated for the purposes of this motion to many facts concerning Ms. Parsons' employment. She was employed as a legal secretary in the Clay County Attorney's Office beginning in 1982. She had a good work record and was considered a valuable member of the County Attorneys' staff.<sup>10</sup> Lisa N. Borgen was the Clay County Attorney and supervised Ms. Parsons during the time relevant to this proceeding.<sup>11</sup>

In July 2004, Ms. Parsons was diagnosed with major depression and hospitalized overnight and was prescribed anti-depressant medication. Following the hospitalization she continued to decline and on August 11, 2004, her co-workers took her to the hospital emergency room. At that point, she was not able to do her work. She was granted a one-month leave of absence. She was hospitalized until August 17, 2004.<sup>12</sup>

On August 18, 2004, Ms. Parsons' psychiatrist, Dr. Nadeem Haider, completed a health certification form indicating that Ms. Parsons was unable to work because of illness and should be able to return to work in two weeks.<sup>13</sup>

Ms. Parsons was not able to return to work in two weeks. On September 27, 2004, she attempted to return to work, but she was unable to perform the essential functions of her job. On September 28, 2004, Dawn Schlosser-Greuel, the County's human resources director, sent Ms. Parsons a letter asking Ms. Parsons to submit an updated report of her health status by October 15, 2004, and telling Ms. Parsons to provide 48 hours notice and fitness-for-duty certificate when she was ready to return to work.<sup>14</sup>

On October 7, 2004, Ms. Parson submitted a letter from her psychiatrist stating that Ms. Parsons was disabled and unable to work due to illness, but might be able to return to work in one to two weeks if her symptoms improved. On October 13, 2004, Ms Parsons submitted a note from her psychiatrist stating that she would be able to return to work part time on October 25, 2004, and, if

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<sup>8</sup> *Id.*

<sup>9</sup> See *Wightman v. Springfield Terminal Ry. Co.*, 100 F. 3d 228, 230 (1<sup>st</sup> Cir. 1996).

<sup>10</sup> Affidavit of Lisa N. Borgen (Borgen Aff.), February 4, 2008,

<sup>11</sup> Affidavit of Lisa N. Borgen.

<sup>12</sup> See, Dep. of M. Parsons, Exs. 1, 2.

<sup>13</sup> Dep. of Schlosser-Greuel, Ex. 9.

<sup>14</sup> Dep. of Schlosser-Greuel, Ex. 10.

she did well, that she could return to work full time beginning November 1, 2004.<sup>15</sup>

On October 15, 2004, Ms. Schlosser-Greuel sent a letter to Dr. Haider enclosing a copy of Ms. Parsons' job duties and asking him to affirm that Ms. Parsons could perform the essential functions of her position. The letter also stated, "As you are aware, this is a full-time position. We can accommodate a part-time status for a 1-week period, but [Ms. Parsons] must necessarily return to a full time status thereafter."<sup>16</sup> Dr. Haider called Ms. Schlosser-Greuel and told her that Ms. Parsons could perform the duties on the position description, but he was concerned for how long she could perform. He restated what he had written on October 13, that if Ms. Parsons could return part time and do well that she could increase to full time. Dr. Haider planned to see Ms. Parsons toward the end of the week of October 25, 2004, and agreed to contact Ms. Schlosser-Greuel thereafter to notify her if Ms. Parsons could return to work full time.<sup>17</sup>

On October 25, 2004, Ms. Parsons returned to work part time. She was sent home on October 26, 2004. By letter dated October 27, 2004, Ms. Schlosser-Greuel stated that Ms. Parsons had been sent home because of her "inability to perform essential functions" of her position, and that her Family and Medical Leave Act (FMLA) would expire on November 3, 2004. The letter also stated: "If the request for additional time off is not excessive, we are willing to accommodate the additional leave request. However, if we determine the additional leave time will create an undue hardship on the employer, we reserve the right to deny your request for additional leave."<sup>18</sup>

Also on October 27, 2004, Ms. Schlosser-Greuel sent a letter to Dr. Haider informing him that Ms. Parsons had not been able to perform her routine duties or engage with her co-workers. Once again, Ms. Schlosser-Greuel requested that Dr. Haider provide a statement at the time that he determined that Ms. Parsons could return to work.<sup>19</sup>

On October 28, 2004, Ms. Parsons entered a partial hospitalization program. She received intensive group therapy for six hours each week day and returned home in the evenings. On November 5, 2004, Dr. Haider faxed a letter to Ms. Schlosser-Greuel stating: "It appears that it may take another 1 to 2 months before [Ms. Parsons'] illness may remit to the point that she would be able to return to work."<sup>20</sup>

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<sup>15</sup> Dep. of Schlosser-Greuel, Ex. 12.

<sup>16</sup> Dep. of Schlosser-Greuel, Ex. 13. The job description is not attached to the file copy but is apparently the document marked as Deposition Ex. 1. See Dep. Of Schlosser-Greuel at 12-13.

<sup>17</sup> Dep. of Schlosser-Greuel at 43-45.

<sup>18</sup> Dep. of Schlosser-Greuel, Ex. 14.

<sup>19</sup> Dep. of Schlosser-Greuel, Ex. 15.

<sup>20</sup> Dep. of Schlosser-Greuel, Ex. 16.

On November 8, 2004, Ms. Schlosser-Greuel wrote to Ms. Parson restating that it would accommodate an additional leave request, but “if we determine the additional leave time will create an undue hardship on the employer, we reserve the right to deny your request for additional leave.” The letter also stated that the County had not received an additional request by November 5, 2004, as requested, but extended the deadline to respond to November 12, 2004.<sup>21</sup>

On November 9, 2004, Ms. Parsons contacted Ms. Schlosser-Greuel and requested an additional six weeks off work. She attached a note from the psychiatrist for the day treatment program, dated November 1, 2004, which stated: “Mary Parsons is being treated for a medical condition that would not allow her back to work on November 3<sup>rd</sup>. I anticipate she would need at least 6 weeks off from work before she can return.”<sup>22</sup>

On November 12, 2004, the County sent Ms. Parsons a letter terminating her employment when her remaining hours of sick leave expired on the basis that her FMLA had ended, that she would need at least six weeks of additional leave, and that the County could not accommodate her request for additional leave due to the extreme hardship it posed for the County Attorney’s Office. She was invited to reapply for any open position after her doctor released her to return to full time work.<sup>23</sup>

The County concedes that cost was not a factor in its decision,<sup>24</sup> but the hardship was caused because another employee was on temporary maternity leave, and had been replaced by a temporary employee. Tasks had been restructured for one temporary staff member, but the County Attorney’s Office could not absorb a second temporary secretary because of the time required for training and stress on other staff. In light of the uncertainty of Ms. Parsons’ return date, Ms. Borgen did not believe that the Office could find and train a temporary replacement to assume Ms. Parsons’ job functions.<sup>25</sup>

During the early part of Ms. Parsons’ leave, Ms. Borgen hired a part-time person to work about 10 hours a week during the evenings. Ms. Borgen concluded that the arrangement did not work well because the individual had another full-time job and was not available during the day when the attorneys were present. Ms. Borgen was reluctant to hire a temporary replacement because Ms. Parsons’ return date had been postponed, because twice Ms. Parsons had returned to work but could not function, and because Ms. Parsons’ psychiatrist was uncertain when Ms. Parsons could return to work.<sup>26</sup>

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<sup>21</sup> Dep. of Schlosser-Greuel, Ex. 17.

<sup>22</sup> Dep. of Schlosser-Greuel, Ex. 18.

<sup>23</sup> Dep. of Schlosser-Greuel, Ex. 19.

<sup>24</sup> Borgen Interview Summary, November 20, 2006, MDHR 0278.

<sup>25</sup> Affid. of Borgen.

<sup>26</sup> Affid. of Bergen.

After Ms. Parsons was terminated, the County replaced her with an experienced secretary from a neighboring county.<sup>27</sup>

Clay County has a written policy allowing a leave of absence without pay, including personal leaves for up to twelve weeks, the leave required by the “Family Leave Act”. The Department Head has the discretion to approve or disapprove requests for unpaid personal leave.<sup>28</sup> Ms. Bergen had that authority for the County Attorney’s office.

### **Material Facts in Dispute**

Although there are many undisputed facts, there are important facts in dispute about the essential functions of Ms. Parsons’ position, and whether a temporary secretary would be able to adequately perform them. As a legal secretary, Ms. Parson worked primarily in the office’s juvenile division, but handled other types of cases as well. As part of her job, Ms. Parsons was trained to use the Minnesota County Attorney Practice System (MCAPS) software. This is a complex file management system that tracks information necessary to prepare documentation for filings in civil and criminal cases in which the County Attorney’s Office is involved, and it keeps track of scheduled hearings for the attorneys and staff.

Ms. Borgen stated that it took six months for a legal secretary to learn to use MCAPS efficiently. Its use involved entering correct, timely information and, at the request of one of the attorneys, producing appropriate documents from the system. The legal secretaries were also required to learn the unique deadlines that apply to the work of a county attorney. In addition, Ms. Borgen stated in her affidavit that the legal secretaries were required to learn about the public, private or confidential status of data handled by the County Attorney’s Office so that they understood what information could be disclosed upon request to the public and to partner agencies and what could not. This experience was gained on the job by working with more experienced support staff. Typically, new staff did not have the experience to respond to questions and more experienced staff members shouldered this burden until the new staff member gained familiarity with the office’s responsibilities and the data that it handled.<sup>29</sup>

The position description for Ms. Parsons makes one reference to MCAPS. The fourth task states: “Review MCAPS calendar 2 to 3 days in advance to pull files for specific attorney preparation – 10 %.” Although this task refers to MCAPS it does not explain whether pulling files is an electronic or a manual function. There are other tasks that could involve use of MCAPS, but that is not

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<sup>27</sup> Borgen Interview Summary, November 20, 2006, MDHR 0278.

<sup>28</sup> Dep. of Schlosser-Greuel, Ex. 4 at Section 19 C and D (MDHR 0205).

<sup>29</sup> Borgen Aff. The County has also disclosed that it intends to call Kandiyohi County Attorney Boyd Beccue to testify about the unique job requirements for legal secretaries who work for a county attorney.

apparent from the position description. These include, “Review and inspect incoming mail and materials -25%,” “Maintaining client files and receptionist duties – 20%,” “Review court calendar and identify, locate and retrieve files relative to daily activity, - 15%,” “Prepare files for jury trial – 15%,” “Opening new client files – 5%,” and “Assist Legal Assistant with projects – 5%.”<sup>30</sup> Ms. Borgen’s affidavit does not specify what portion of these tasks involves use of MCAPS, nor is it obvious from the task descriptions.

In direct contradiction of Ms. Borgen’s statement about the significance of MCAPS, Ms. Parsons testified at her deposition that her job involved computer work, phone knowledge and typing. She acknowledged that when a case came in, she entered its name and other information into the computer and gave the file to the attorney. However, she stated that the attorney she worked with would dictate documents such as a complaint, and that about 80 percent of her day was spent transcribing the attorney’s dictation. She stated that the balance of her time was spent doing computer work, answering the telephone and waiting on people who came to the counter when the receptionist was not on duty.<sup>31</sup> Ms. Parsons acknowledged that occasionally she would prepare a misdemeanor complaint directly from the data base on the computer.<sup>32</sup>

Thus, the actual functions of Ms. Parsons’ position are in dispute. According to Ms. Borgen, work with MCAPS was critical to the job, but that is not expressly reflected in the position description and contradicts Ms. Parsons’ statement.

## **Legal Analysis**

A charge of discrimination under the Minnesota Human Rights Act is governed by Minn. Stat. Chapter 363A. Interpretation of the statute is aided by cases interpreting similar standards in the Americans with Disabilities Act (ADA).<sup>33</sup> The statute requires employers to “make reasonable accommodation to the known disability of a qualified disabled person or job applicant unless the employer, agency, or organization can demonstrate that the accommodation would impose an undue hardship on the business, agency, or organization.”<sup>34</sup>

Review of the claim involves several steps. First, the claimant must show she is disabled, as defined under the Human Rights Act. For the purposes of this motion, the parties do not dispute that Ms. Parsons is disabled. She suffers from depression, and for a period of time beginning in July, 2004, she was unable to work because of that depression. Next, one must review the disabled person’s essential job functions to determine whether she is able to perform them with or

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<sup>30</sup> Dep. of Schlosser-Greuel, Ex. 1.

<sup>31</sup> Dep. of Parsons at 12-16.

<sup>32</sup> Dep. of Parsons at 19-20.

<sup>33</sup> *Mallon v. U.S. Physical Therapy*, 395 F. Supp 2d 810, 81-817 (D. Minn. 2005).

<sup>34</sup> Minn. Stat. § 363A.08, subd. 6.

without an accommodation. For the purposes of this motion, it is stipulated that Ms. Parson was a good employee who performed all essential functions of her job prior to the disabling depression. It is also conceded for the purposes of this motion that Ms. Parsons could perform the job if she received an accommodation, in this case, sufficient leave time to restore her mental health so that she could return to work. At the time of her termination, the County invited Ms. Parsons to apply for an open position at any point after her physician approved her for return to full-time employment.

An employee who demonstrates that she was terminated because of her disability has presented a prima facie case of discrimination. The employer must present evidence of a legitimate, nondiscriminatory reason for termination. In this case, the County has offered evidence in support of its claim that it terminated Ms. Parsons because she could not come to work, and that it could neither afford to leave the position empty nor find a temporary substitute for an uncertain length of time of six weeks or longer.

Under the Minnesota Human Rights Act, a “reasonable accommodation may include, but is not limited to “job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and the provision of aides on a temporary or periodic basis.”<sup>35</sup> In reviewing the request for a leave of absence, it is appropriate to consider the length of the requested leave and the employer’s ability to cover that employee’s duties during the projected absence.

When the requested accommodation is a leave of absence, it is implicit that there will be a burden on the employer who will not be receiving the work effort of a trained, experienced person. The employer will need to find and train a new worker to perform the tasks, and this may be hampered further if it is uncertain when the disabled employee will return to work. Moreover, the loss of a co-worker is likely to increase the burden on fellow employees who may be asked to temporarily assume new functions or more work.

Because of the difficulties that frequently accompany an employee’s absence, some courts have held that attendance is essential to most jobs. The Eighth Circuit of Appeals has expressly found that “regular and reliable attendance is a necessary element of most jobs,”<sup>36</sup> and that persons who cannot be at work cannot perform the job. Thus, it concludes, that a person who is not at work is not qualified to perform the job.<sup>37</sup>

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<sup>35</sup> Minn. Stat. 363A.08, subd. 6.

<sup>36</sup> *Kinnaman v. Ford Motor Co.*, 79 F. Supp. 2d 1096, 1102 (E.D. Mo. 2000), quoting *Greer v. Emerson Electric Co.*, 185 F.3d 917, 921-922 (8<sup>th</sup> Cir. 1999).

<sup>37</sup> *Kinnaman v. Ford Motor Co.*, 79 F. Supp. 2d 1096, 1103, n. 9 (E.D. Mo. 2000).

However, some courts have found that there are circumstances when a leave of absence may be a reasonable accommodation.<sup>38</sup>

An employer is not required to grant an accommodation if it will impose an undue hardship on the employer's operation of its business.<sup>39</sup> "Undue hardship" is defined under the Americans with Disabilities Act as: "an action requiring significant difficulty or expense," and includes a list of factors to consider including the nature and cost of the proposed accommodation, the composition, structure and function of the workforce, impact upon the operation and the overall resources of the employer.<sup>40</sup> An employee's request for an extended medical leave, including one of indefinite duration, may be a reasonable accommodation under some circumstances, but may cause an undue hardship under other circumstances.<sup>41</sup>

Here, where the County has offered a reasonable explanation for its actions, the burden shifts back to the Department to demonstrate that the County's claim of undue hardship is a pretext for unlawful discrimination.<sup>42</sup> Although the cost of the accommodation could be a factor, the County has conceded that the cost of hiring a replacement was not a factor in its decision.

To determine whether the requested accommodation will create an undue hardship on the employer or that its claim is a mere pretext for discrimination, one must fully evaluate the facts of the particular case. The length of the requested leave and whether it is determinate or indeterminate, whether there have been a number of successive requests, and the likelihood that the employee will be able to return at the end of the requested leave may be considered, but no one factor is determinative. In addition, one must consider how the "essential functions" of the employee's job can be covered during the absence.

Although the Department contends that Ms. Parsons made a request for a determinate absence of two months, the undisputed facts do not support that claim. The wording of the notes from Ms. Parsons' physician do not offer a reasonably certain prediction and the prior, similarly-worded projections were followed by requests for more leave. Under the facts of this case, the December leave request was more appropriately characterized as indeterminate. Thus, the

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<sup>38</sup> *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1<sup>st</sup> Cir. 2000); *Mallon v. U.S. Physical Therapy, Ltd.*, 395 F. Supp. 2d 810 (D. Minn. 2005).

<sup>39</sup> Minn. Stat. § 363A.08, subd. 6; 42 U.S.C. § 12112 (b)(5)(A).

<sup>40</sup> See 42 U.S.C. 12111 (10)(B).

<sup>41</sup> *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 (1<sup>st</sup> Cir. 2000), and cases cited therein. In the First Circuit, the employer has the burden to show that the requested leave would cause an undue hardship, but in the Eighth Circuit, once the employer presents evidence of undue hardship, the employee must prove that the explanation is a mere pretext. In this case, the employer has met its burden, but the facts concerning pretext are at issue and turn on whether it is difficult to hire a temporary replacement to perform the essential functions of Ms. Parsons' job.

<sup>42</sup> *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1205 (8<sup>th</sup> Cir. 1997); *Mallon v. U.S. Physical Therapy Ltd.*, 395 F. Supp. 2d 810, 816 (D. Minn. 2005).

case turns on whether the County could find a temporary replacement to perform the essential functions of Ms. Parsons' job for a period of up to two months, and possibly for some undefined additional time, or whether its difficulty in doing so imposed an undue hardship.

"Essential job functions" are those that are fundamental to the job and not merely marginal. A job function may be considered essential if the position exists to perform that function, only a limited number of employees are available to perform the job function, and/or the function involves a high degree of specialization.<sup>43</sup>

The parties dispute the essential functions of Ms. Parsons' job and the difficulty finding and training a temporary replacement to do the job. There is no requirement that the County redefine Ms. Parson's job or reallocate essential functions of her position. It follows that the County should not have to redefine the job or reallocate essential functions so that it could create a new temporary position that could be more easily assimilated. "It is well settled that an employer is under no obligation to reallocate the essential functions of a position that a qualified individual must perform."<sup>44</sup>

The County has maintained from the time of Ms. Parsons' termination that additional leave was an undue hardship because the essential functions of Ms. Parsons' job, use of a computer database and responding to public inquiries in a manner that did not violate the Government Data Practices Act, required extensive training. Ms. Borgen's experience was that a temporary secretary hired for a few months or an indeterminate time could not be trained quickly enough to shoulder Ms. Parson's essential job functions. Moreover, she was concerned that the physician's prior predictions had not been accurate and another leave request could follow.

Unlike the employer in *Garcia-Ayala v. Lederle Parenterals*, the County offered evidence and argument to support its claim that the requested accommodation was an undue hardship. In *Garcia-Ayala*, the employer told the employee that she was terminated because her one-year leave of absence had expired, not because a leave would cause an undue hardship. The employer, Lederle, offered no evidence to support a claim that it would be an undue hardship to grant Garcia an additional leave of absence, and, in fact, it replaced Garcia with temporary employees following her dismissal.

In this case, the County has offered evidence to support its claim that a temporary replacement could not perform the essential functions of the job.

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<sup>43</sup> 29 C.F.R. § 1630.2 (n); Befort, Stephen, "The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence," 37 Wake Forest Law Review 439, 444.

<sup>44</sup> *Alexander v. Northland Inn*, 321 F.3d 723, 728 (8<sup>th</sup> cir. 2003); *Kammueler v. Loomis, Fargo & Co.*, 285 F. Supp. 2d 1200, 1211 (D. Minn. 2003), at 1211, quoting *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8<sup>th</sup> Cir. 1998).

However, the County's statements concerning the essential functions of the job vary from Ms. Parsons' deposition testimony. She testified that 80 percent of her job involved transcription from dictation, a task that a temporary secretary could typically perform.

In light of the critical facts in dispute concerning the essential job functions, the undue hardship on the employer cannot be fully evaluated, and summary judgment must be denied.

Although the parties dispute whether Ms. Parsons' recovery and ability to return to work were hindered by her termination, those facts are not material to deciding whether Ms. Parsons' termination was discriminatory or whether granting Ms. Parsons an additional leave of absence as an accommodation would have imposed an undue burden on the County. One must evaluate the facts at the time of the decision to terminate.<sup>45</sup> In the event that it is ultimately determined that she was the victim of discrimination and the termination was not warranted, the facts concerning her recovery may be relevant to determining the damages that she suffered.

The Department also implies that terminating Ms. Parsons when her FMLA leave ran out supports its claim of unlawful discrimination. However, the analysis of a "reasonable accommodation" is distinct from the benefits an employee may otherwise receive. Although the employer may be compelled to provide benefits and its ability to operate during the medical leave may be relevant evidence, it is not determinative of "undue hardship."<sup>46</sup>

### **Department's Request for Additional Discovery**

The parties also dispute the need to reopen discovery to pursue the County's claim concerning MCAPS and its significance. The Department requested detailed information after discovery closed, and the County objected to the burdensome request. However, the County agreed to provide some additional information.

The County has failed to show that discovery should be reopened. The Department was offered the opportunity to depose Ms. Borgen, it will have the opportunity to cross-examine her and Mr. Beccue, and it may question Ms. Parsons and other secretaries in the County Attorney's office about the role MCAPS plays and the training they received for each essential function. The Department can also consult with other county attorneys to develop its cross-examination. The Department should be provided with copies of the training protocol and training records for legal secretaries in the Clay County Attorney's office. If there is no training protocol, the Department may request a written description of the training provided and any manuals developed for MCAPS or

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<sup>45</sup> See, *Browning v. Liberty Mutual Ins. Co.*, 178 F.3d 1043, 1048 (8th Cir. 1999).

<sup>46</sup> *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997).

other job functions, and additional information as set forth in Ms. Jacot's requests numbered 2, 4, 6 and 7. Any additional specific requests may be discussed during the prehearing conference. The case will turn on the essential functions of Ms. Parsons' job and the difficulty of training a replacement.

**B. J. H.**