

# Managing the Absent Employee

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**Presented by:**

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# Radio Commercial For Local Retailer

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- **Female Voice** (talking on the phone sounding stuffed up and coughing): “I just don’t think I can make it into work today. I am so sorry.” (Hangs up Phone)
- **Male Voice** (laughing): “That was awesome honey. Now we can go shopping and get all the great Christmas bargains while everyone else is at work.”

# I couldn't make it to work because

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- I had a headache from going to too many garage sales.
- A deer bit me (during hunting season).
- My hair was hurting my head.
- I thought I had won the lottery, but it turns out I didn't.
- I was poisoned by my mother-in-law.

# I couldn't make it to work because

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- I'm too fat to get into my work pants.
- A buffalo escaped from the game reserve and kept charging me every time I tried to get to my car.
- I accidentally flushed my car keys down the toilet.
- My wife said I had too many chores to do around the house.

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# **Why is Managing the Absent Employee so Difficult?**

# Laws Affecting Absences

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- FMLA
- ADAAA
- State Leave Laws
- Workers Comp.
- Basic discrimination laws
- Retaliation laws

# Policies Affecting Absences

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- FMLA policy
- ADAAA policy
- Sick Leave policies
- Vacation Leave policies
- PTO policies
- Short-term disability
- Long-term disability

# Case Study

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# The Basic Facts

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- Cindy Lou Who began working for Grinch Industries in 1994.
- She works in the Grinch's copy center providing customer service, making copies, assisting with and repairing the copy machines, keeping machines stocked with paper and toner; making bound booklets, printing documents, and scanning documents.
- Other employees fill in at the copy center when needed and when Cindy is absent.

# Cindy's Absences Begin

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- On April 25, 2009, Cindy was injured in an off-duty motorcycle accident.
- She was treated at the hospital for a concussion, broken collarbone, broken ribs, and road rash and then released to go home. She was unable to work.
- As a result of the road rash Cindy got a staph infection that delayed surgery to repair her collarbone by one month.

# Cindy's Absences Begin

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- Cindy had surgery on May 27, 2009.
- She began physical therapy approximately two and a half months later.
- Cindy's physical therapy 2-3 times a week required that she take pain medication that affected her driving ability.
- Cindy's doctor says she cannot work during the time she is undergoing physical therapy.

# Application of Policies

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- Grinch Industries placed Cindy on FMLA for the full twelve weeks.
- Cindy provided periodic medical notes on her status and complied with all policy requirements.

# Application of Policies

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- Cindy's FMLA expired on July 27, 2009.
- At the end of FMLA leave, Cindy informed the Company that she was only able to use one arm and one hand, could not perform her job duties in the copy center, and needed more time off.

# Case Study Questions

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- Can you terminate Cindy Lou?
- If not, why not?
- If not, what can you do?

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Courts are basically in uniform agreement with the EEOC that under the ADAAA “the use of accrued paid leave or unpaid leave is a form of reasonable accommodation when necessitated by an employee’s disability.”

*EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02)

# The General Rules

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- An employer must engage in an interactive problem solving process with the employee to determine if reasonable accommodations are available that would allow the employee to fully perform the essential functions of the job.
- A reasonable accommodation (which may be additional unpaid leave) must be provided unless it causes an undue hardship for the employer.



# Case Study Questions

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- If you decide to grant more leave time, do you have to hold Cindy's job?
- For how long?
- If the leave request is indefinite, is it reasonable?

# The General Rules

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- Whether the length of leave is “reasonable” requires an individualized assessment.
- One case said 17 months was reasonable. Another said 4 months was not reasonable.
- There is no one-size leave fits all.
- The EEOC met in June of 2011 to discuss providing guidance on leave as a reasonable accommodation.
- We are still waiting . . .

# Lessons Learned From EEOC Meeting

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- Leave may be a reasonable accommodation even if there is no fixed date for return as long as the employee can provide an estimated return date.
- Leave may be a reasonable accommodation even if the employee has to revise the return date because of changed circumstances.
- There is no duty to provide leave as a reasonable accommodation when there is no possibility the employee will be able to return to work.

# Let's Go Back To Our Case Study

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- Cindy's FMLA expired on July 27, 2009.
- At the end of FMLA leave, Cindy informed the Company that she was only able to use one arm and one hand, could not perform her job duties in the copy center, and needed more time off.
- What did the Company do in the real Cindy Lou Who case?

# HR Takes Action

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- Grinch's HR Director offered to return Cindy to work in a sedentary job that provided the same pay and benefits.
- Cindy declined the alternative job because she did not feel physically or mentally able to do the job.

# Case Study Questions

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- What if Cindy's doctor says she could return to her regular job in approximately one month?
- Can you still offer Cindy a transfer to another position as an accommodation?

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Courts do not favor demoting an employee or sending him or her to a career “Siberia” as a result of limitations requiring reasonable accommodations. On the contrary, reassignment is considered an accommodation of “last resort” and adjustments to work schedules and even time off as leave to recover should be considered first.

# Back to Cindy Lou Who . . .

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- Cindy qualified for and began receiving long-term disability benefits.
- On October 28, 2009, Cindy sent a note to Grinch Industries stating she could return to work on November 23, 2009 with minimal restrictions of no lifting of more than 10lbs, limited overhead reaching, and limited pushing/pulling.
- Cindy believed she could do her job even with these restrictions.
- **Company policy/practice was to administratively terminate any employee off work on LTD for 3 months.**



# Case Study Questions

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- Can an employer have a set policy that requires termination after a certain number of months on leave?
- Can an employer require that an employee only return to work when they are 100% fit?

# ADAAA Requires an Individualized Inquiry

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- Enforcing *per se* employment policies that mandate termination of employees after a set period of time on leave violate the ADA, as individualized assessments are “essential” to disability claims.

# ADAAA Requires an Individualized Inquiry

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- A related *per se* policy that has been held to violate the ADA is one where employers require that employees be “fully healed” or “100%” to return to work after leave.

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***“Trucking Co. To Pay \$4.8M To  
End EEOC Disability Bias Suit”***

***November 12, 2012***

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The EEOC's suit claimed the Company violated the ADAAA by automatically terminating any employee who needed more than 12 weeks of leave, rather than determining whether it would be reasonable to provide additional leave as an accommodation for an employee's disability.

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- The EEOC further alleged that the company violated federal law by refusing to make exceptions to a “no restrictions” policy that did not allow employees to return to work with any medical restrictions.

# THE EEOC COMMENTED . . .

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“This settlement demonstrates the need for employers to have attendance policies which take into account the need for paid or unpaid leave as a reasonable accommodation for employees with disabilities,” Nancy Sienko, the field director for the EEOC's Denver office, said in a statement.

# Back to Cindy Lou Who . . .

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- On October 28, 2009, Cindy sent a note to Grinch Industries stating she could return to work on November 23, 2009 with minimal restrictions of no lifting of more than 10lbs, limited overhead reaching, and limited pushing/pulling.
- Cindy believed she could do her job even with these restrictions.



# Case Study Questions

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- Do you have to consider Cindy's request for additional leave time?
- How would you go about determining if Cindy has a disability? Does it matter that her situation is temporary?
- What steps would you go through to decide whether granting the additional time off is a reasonable accommodation?
- What factors can you consider to see if more leave time is an undue hardship?

# EEOC GUIDANCE

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A request from an employee for a reasonable accommodation does not necessarily mean the employer is required to provide it. "A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer."

# Don't Forget!

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- “Although employees must initiate this discussion process, the ADA does not require employees ‘to use the magic words ‘accommodation’ or even ‘disability.’”
- Simply asking for continued employment can be a sufficient request for an accommodation. Calling HR and asking to return to work on light duty sufficient to be request for accommodation.

# How does the employer respond?

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- “When a qualified individual with a disability requests a reasonable accommodation, the employer and employee should engage in flexible, interactive discussions to determine the appropriate accommodation.”
- ***Griffin v. United Parcel Service, Inc.* (5<sup>th</sup> Cir. 2011)**

# Keep In Mind

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- There is no set period of leave that is required under the ADAAA other than a “reasonable” period causing no undue hardship.
- What may be reasonable in one situation may not be reasonable in another.
- The burden is on the employer to show additional leave time is an undue hardship.

# Undue Hardship Analysis

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- Does the accommodation involve significant expense for the business (focus on the resources and circumstances of the entire company not a department or particular site)?
- Is the accommodation unduly disruptive to business operations?
- Factors to consider: the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation.

# The Real Story

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- On November 10, 2009, Cindy Lou Who received a letter from Grinch Industries stating the following:
- “Given that you are unable to perform the tasks of your job, we have found it necessary to hire someone to fill the vacancy created by your need to take long term disability.”
- “Due to your long term disability, we must terminate your employment.”

# Cindy sues!

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# Undisputed Facts

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- HR Manager and General Counsel made the termination decision.
- Prior to the termination HR did not discuss with Cindy her impairments, condition, or intentions to return to work on November 23, 2009.
- HR did not conduct an interactive process with Cindy to determine whether any of her job limitations could have been accommodated.

# Undisputed Facts

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- HR did not request additional medical information or consult an occupational physician to determine whether Cindy could perform her job duties with the limited restrictions.
- Grinch Industries did not consider offering Cindy additional leave time to November 23, 2009 as a reasonable accommodation.
- The job description did not distinguish between essential and nonessential functions.

# What The Judge Said . . .

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- The termination letter constituted “direct evidence” of discrimination based on a disability and, therefore, Cindy’s Motion For Partial Summary Judgment on her ADA claim is granted!

## But The Judge Had More To Say . . .

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- Cindy alleged she could have performed the essential functions of her job with the reasonable accommodation of additional leave time.
- Sixth Circuit case law establishes that providing leave can qualify as a reasonable accommodation.
- Employer's leave policy said unpaid leave could be an accommodation decided on a case-by-case basis.

# But The Judge Had More To Say . . .

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- The employer has not shown that providing Cindy additional unpaid leave would have caused it an undue burden.

# Deposition Testimony

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Q. Would it have been a hardship on the company to allow Cindy to stay as an employee until November 23, 2009?

A. No. No.

Q. At any point did you discuss additional leave as an accommodation?

A. No.

# Deposition Testimony

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Q. Did you consider the impact on the financial resources of the company in determining whether to allow her additional time off through November 23<sup>rd</sup>?

A. No.

Q. Did you consider the overall financial resources of the Company in determining whether to allow the additional leave?

A. No.

# Deposition Testimony

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Q. When you decided not to allow Cindy until November 23<sup>rd</sup> to return to work, at any time in that decision-making process, did you make an assessment as to whether that would have caused difficulty or expense to the company?

A. No.



# Deposition Testimony

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Q. Did you engage in any interactive conversation with Cindy to determine what, if any, accommodations she needed to return to work on November 23<sup>rd</sup>?

A. No.

Q. I'm asking you if the company considered whether it would be a reasonable accommodations to extend her leave to November 23<sup>rd</sup>?

A. No.

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# **Why is Managing the Absent Employee so Difficult?**

# Lessons Learned

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- We all know we must provide up to 12 weeks of FMLA leave if it applies.
- We all know we must provide additional leave under some state laws if they apply.
- We may need to provide additional leave beyond FMLA and state law as a reasonable accommodation under ADAAA UNLESS it imposes an undue hardship on the business. Case-by-case analysis.

# Lessons Learned

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- Leave may be a reasonable accommodation even if there is no fixed date for return as long as the employee can provide an estimated return date.
- Leave may be a reasonable accommodation even if the employee has to revise the return date because of changed circumstances.
- There is no duty to provide leave as a reasonable accommodation when there is no possibility the employee will be able to return to work.

# Best Practices

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- Get your leave policy house in order
- Develop a flow chart/checklist to guide HR in how the policies are to be applied along with the applicable legal requirements of FMLA, ADA, state law, and workers compensation.
- Develop an HR review system for extended leaves to monitor progress and continually review return to work potential.

# Best Practices

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- Consider a periodic HR committee review of difficult leave situations for “lessons learned.”
- Seek legal review from a qualified employment attorney for tough situations.
- Develop a documentation system that will represent your company well before the EEOC and in Court.

# What Questions Do You Have?

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