

# Employer Must Prove Indefinite Leave Is Undue Hardship Under NYCHRL, Says New York's Highest Court

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Can an employee state a claim for a disability discrimination termination when he advises his employer that his return to work date "is indeterminate at this time" and the employer, without further discussion with the employee to determine the reasonableness of the request, seeks to justify the termination based solely on the wording of the request? In *Romanello v. Intesa Sanpaolo, S.p.A.*, 2013 N.Y. LEXIS 2755; 2013 Slip Op 6600 (N.Y. Oct. 10, 2013), the New York Court of Appeals dismissed plaintiff employee's disability discrimination claim, grounded upon an open-ended leave accommodation request, under the New York State Human Rights Law (NYSHRL or State HRL), but reinstated his disability claim under the New York City Human Rights Law (NYCHRL or City HRL). In so ruling, the Court held the employer "did not meet its obligation under the City HRL to plead and prove that plaintiff could not perform his essential job functions with an accommodation" (*i.e.*, extending his medical leave of absence).

Notably, this case arose on the employer's Motion to Dismiss, in the pleadings stage prior to discovery. While a claim under the Americans with Disabilities Act (ADA), as amended, was *not* raised here, the Court of Appeals ruled that the City HRL "affords protections broader than the State HRL", explaining that "the provisions of the City HRL should be construed broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible".

## Factual Background

Plaintiff Giuseppe Romanello, a long-time executive at Intesa, went out on leave due to a variety of medical issues, including major depression. After five (5) months on leave, Intesa's counsel inquired about his intent to return to work ("the bank would appreciate knowing whether he intends to return to work or abandon his position"). Romanello's attorney responded with a letter stating, among other things, that Romanello "has not at any time evinced or expressed an intention to 'abandon his position' with [Intesa]. Rather, he has been sick and unable to work, with an uncertain prognosis and a return to work date that is indeterminate at this time." Without further discussion with Romanello, Intesa terminated his employment.

Romanello then commenced an action in New York State court alleging that his termination constituted disability discrimination in violation of the NYSHRL and the NYCHRL. Intesa made a motion to dismiss relying upon Plaintiff's counsel's letter. The lower courts dismissed plaintiff's claims under both laws reasoning that Romanello had requested an indefinite leave which is not a reasonable accommodation.

### **The New York Court of Appeals**

The New York Court of Appeals affirmed the dismissal of Romanello's NYSHRL claim, but reinstated his NYCHRL claim. The Court's rationale for distinguishing the two claims focused on the differences in the way the NYSHRL and NYCHRL define "disability", "reasonable accommodations," and the differing burdens an employer and employee bear under the two laws. The Court also reasoned that the legislative findings underlying the NYCHRL made clear that it was to be construed broadly in favor of plaintiffs, particularly at the pleadings stage of litigation.

Turning to plaintiff's State HRL claim, the Court of Appeals explained that the NYSHRL requires that, "the complaint and supporting documentation must set forth factual allegations sufficient to show that, 'upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his] or her job.'" The Court then found that plaintiff's communications with his employer prior to his termination did not offer any indication as to when plaintiff planned to return to work. Accordingly, the Court concluded Romanello had requested an indefinite leave of absence, which is not a reasonable accommodation under the State HRL, and dismissed that claim.

However, since the City HRL was amended to be construed liberally in favor of discrimination plaintiffs, the Court found, on the facts presented, that dismissal of the action was premature. In so holding, the Court ruled:

"Contrary to State HRL, it is the employer's burden to prove undue hardship. And, the City HRL provides employers an affirmative defense if the employee cannot, with reasonable accommodation, 'satisfy the essential requisites of the job' (Administrative Code 87107 [15] [b]). Thus, the employer, not the employee, has the 'pleading obligation' to prove that the employee 'could not, with reasonable accommodation, satisfy the essential requisites of the job.'" (Citations omitted).

Accordingly, the Court of Appeals reinstated Romanello's disability discrimination claim under the City HRL.

### **Lessons Learned**

In circumstances where an employee is on a medical leave of absence and requests additional leave, employers are well-advised to consult counsel before denying the request or terminating the employee. The particular facts of each leave request must be assessed in due regard for the employee's individual circumstances, and under federal, State, and City law requirements. While it is true that under all the disability discrimination laws, the ADA included, a request for "indefinite leave" may be deemed unreasonable, it is important to remember that "indefinite leave" is a conclusion drawn from individual facts – and the facts do matter. It is also important for employers to understand the differences between, and their obligations under, the ADA, the NYSHRL, and the City HRL. Given the history underlying each of the laws, the employer's burden can vary, as this decision makes clear.

The "take-aways" from this case can be summarized as follows for Human Resources managers and their counsel:

1. The employer's obligations and burdens under the federal, State, and City human rights laws can differ based on the framing principles underlying each law, as well as the statutory text;
2. Under the State HRL, a request for "indefinite leave" can be *per se* unreasonable based on its definition of "disability," the facts presented, and the burdens of

pleading and proof;

3. However, given the more expansive definition of "disability" and "reasonable accommodation" found under the NYCHRL, an employer must prove that a request for a seeming "indefinite leave" is unreasonable and poses an undue hardship. In *Intesa*, based on the documentary evidence submitted, the employer failed in its burden;
  
4. The case highlights how important it is to engage disabled employees in an interactive dialogue in determining "reasonable accommodations," particularly where leaves are requested. It is essential that employers gather sufficient documentary evidence to establish, on the facts and circumstances, that the leave request is unreasonable and/or constitutes an undue hardship, especially if the employer wishes to move for dismissal at the pleadings stage.

If you have any questions or concerns regarding the *Intesa* decision, or the reasonable accommodation process, generally, under the ADA, NYSHRL, and/or NYCHRL, please contact your Proskauer relationship lawyer or any of the lawyers listed in this alert.

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