

# Supreme Court of Kentucky

2011-09

## ORDER

IN RE: Amendments to the Personnel Policies for the Kentucky Court of Justice,  
AP Part III

Effective January 1, 2012, Section 3.03, Disability Accommodations, and Section 7.04, Family and Medical Leave, of the Personnel Policies for the Kentucky Court of Justice, AP Part III, are amended as follows:

### **SECTION 3.03 Disability Accommodations**

(1) Statement of Policy

The COJ is committed to complying fully with the Americans with Disabilities Act (ADA) and the Kentucky Civil Rights Act, which prohibits discrimination based on disability and ensure equal opportunity in employment for qualified individuals with disabilities. The COJ ADA Coordinator processes requests for reasonable accommodations consistent with current ADA law and, where appropriate, ensures reasonable accommodations are provided in a prompt, fair, and efficient manner. The ADA Coordinator also processes grievances related to the ADA.

(2) Application to Officials

This policy applies to elected and appointed officials, as well as all employees.

(3) Definitions

The following definitions apply to this section:

(a) "Reasonable Accommodation" means modifications or adjustments to:

- (i) a job application process that enables a qualified applicant with a disability to be considered for the position desired;
- (ii) the work environment, or the manner or circumstances under which the position held or desired is customarily performed, to enable a qualified individual with a disability to perform the essential functions of that position; or

- (iii) enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities.
- (b) "Disability" means, with respect to an individual:
- (i) a physical or mental impairment that substantially limits one or more of an individual's major life activities;
  - (ii) a record of such an impairment; or
  - (iii) being regarded as having such an impairment.
- (c) "Major Life Activities" include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. These also include the operation of a major bodily function, including but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.
- (d) "Qualified Individual with a Disability" means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.
- (e) "Essential Functions" means the fundamental job duties of an employment position. A function can be essential if, among other things: the position exists specifically to perform that function; there are a limited number of other employees who could perform the function; or, the function is specialized and the individual is hired based on his or her ability to perform it. This term does not include the marginal functions of the position.
- (f) "Undue Hardship" means a specific accommodation would require significant difficulty or expense. Determination of undue hardship is made on a case-by-case basis, considering factors that may include, but not be limited to, the nature or cost of the accommodation needed and the impact of the accommodation on the operations of the office or agency.

(4) Request for Reasonable Accommodation

- (a) An employee may request a reasonable accommodation from his or her appointing authority either verbally or by completing form AOC-ADA-1, Request for Accommodation. Upon receipt, the appointing authority or designee must submit the request and the completed form to the ADA Coordinator at the AOC office in Frankfort.
- (b) A verbal request for an accommodation must be confirmed in writing by the employee within seven calendar days by completing form AOC-ADA-1. An employee must submit the completed form to his or her appointing authority.
- (c) The COJ may require medical information when an employee has requested a reasonable accommodation to determine whether an employee has an ADA-covered disability and if the employee can continue to perform his or her essential job functions. When the disability and the need for accommodation are obvious, the COJ will not seek any further medical information. When the disability or need for accommodation is not obvious, the COJ may ask the individual for reasonable documentation about his or her disability and functional limitations.
- (d) Upon request, the employee must have his or her licensed health care professional complete form AOC-ADA-2, Request for Reasonable Accommodation Medical Report (Medical Report), with instructions that the health care professional forward the Medical Report to the ADA Coordinator. The employee also must complete form AOC-ADA-3, Consent to Release of Medical Information, and provide it to his or her health care professional so that the health care professional may release the Medical Report to the ADA Coordinator.
- (e) Medical information obtained in connection with the reasonable accommodation process will be kept confidential and placed in a file separate from the employee's personnel file.
- (f) Failure to provide appropriate documentation or to cooperate with the efforts of the ADA Coordinator to obtain such documentation may result in denial of the reasonable accommodation.

(5) Disability Determination and Need for a Reasonable Accommodation

- (a) Before addressing the merits of the accommodation request, the ADA Coordinator first must determine whether the employee is a qualified individual with a disability under the ADA.

- (b) If the ADA Coordinator or designee reasonably believes that the employee is a qualified individual with a disability, the ADA Coordinator will work with the employee to identify potential reasonable accommodations. The ADA Coordinator must determine:
  - (i) Whether the accommodation is needed;
  - (ii) The effectiveness each potential accommodation would have in enabling the employee to perform the essential functions of the position;
  - (iii) If the requested accommodation is effective and whether providing the accommodation would pose an undue hardship on the office or agency;
  - (iv) If there would be an alternative accommodation that would not pose an undue hardship on the office or agency;
  - (v) If there is no alternative accommodation, whether there is an equivalent vacant position for which the employee is qualified and may be reassigned, unless to do so would pose an undue hardship on the office or agency; and
  - (vi) If there is no vacant equivalent position, whether there is a vacant lower-level position for which the employee is qualified and may be reassigned, unless to do so would pose an undue hardship on the office or agency.
  
- (6) Notification to Grant or Deny Reasonable Accommodation Request
  - (a) The ADA Coordinator or designee must provide the employee with written notification and an explanation of the decision to grant or deny the request.
  - (b) The reasonable accommodation granted may not be the accommodation requested by the employee. The ADA Coordinator or designee has the ultimate discretion to choose between effective accommodations. If the reasonable accommodation cannot be provided immediately, the ADA Coordinator must inform the employee when it will be provided.
  - (c) If a reasonable accommodation request is denied, and the employee is not satisfied with the result, the employee may file a complaint with the Equal Employment Opportunity Commission (EEOC), the Kentucky Commission on Human Rights, or the applicable local human rights commission.

## SECTION 7.04 Family and Medical Leave

### (1) General

- (a) This section shall be construed in a manner consistent with the Family and Medical Leave Act of 1993, 29 U.S.C.A. 2601, *et. seq.*, as amended by the National Defense Authorization Act, and 29 CFR Part 825, and any subsequent amendments.
- (b) The COJ recognizes that the FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under the Act. The FMLA also makes it unlawful for any employer to discharge or discriminate against any person for opposing any practice made unlawful by the FMLA or for involvement in any proceeding under or relating to the FMLA.
- (c) All documents relating to family and medical leave will be maintained in a file separate from an employee's personnel file and will be confidential.

### (2) Employee Eligibility

- (a) The Family and Medical Leave Act applies to employees who have:
  - (i) been employed for at least 12 months; and
  - (ii) worked at least 1,250 hours during the 12-month period immediately before the use of FMLA is to begin.
- (b) An employee is eligible for Family and Medical Leave if the employee:
  - (i) has a serious health condition that causes him or her to be temporarily unable to perform the essential functions of the employee's position;
  - (ii) has a child born to him or her, adopts a child or has a child placed in his or her home for foster care;
  - (iii) is caring for a newborn child, adopts a child, or has a child placed in his or her home for foster care, within one year of the birth, adoption or placement;
  - (iv) is caring for his or her spouse, parent, child (defined as biological, adopted or foster child, stepchild, legal ward, or child of a person standing in *loco parentis*) who has a serious health condition;

- (v) meets certain qualifying exigencies arising out of his or her spouse's, child's, or parent's deployment, covered active duty status, or notification of an impending call or order to covered active duty status, in or to a foreign country ("qualifying exigency leave"). Qualifying exigency leave only applies to families of members in the Armed Forces, including the National Guard and Reserves, and certain retired members of the military. Qualifying exigency leave includes: short notice deployment; certain military events and related activities; certain childcare and school activities; addressing certain financial and legal arrangements; attending certain counseling; rest and recuperation; attending certain post-deployment activities; and additional purposes arising out of the call to duty, as agreed on by the employee and employer; or
  - (vi) is caring for his or her spouse, son, daughter, parent or next of kin (nearest blood relative) who is a covered service member. A covered service member includes a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or a veteran who was a member of the Armed Forces, including the National Guard or Reserves, at any time during the five years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.
- (c) A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.
- (d) Subject to certain conditions, the continuing treatment requirement may be met by:
- (i) a period of incapacity of more than 3 consecutive calendar days that requires in-person treatment by a health care provider within the first seven days of the first day of incapacity and:
    1. a second visit to a health care provider within 30 days of the first day of incapacity unless extenuating circumstances exist; or

2. a regimen of continuing treatment (i.e., prescription medication, further medical visits, etc.) under the health care provider's supervision;
    - (ii) incapacity due to pregnancy;
    - (iii) incapacity due to a chronic serious health condition that requires periodic visits for treatment (at least twice per year); or
    - (iv) other conditions to the extent required by law.
  - (e) A medical condition will be deemed a serious injury or illness for purposes of 2(b)(vi) if the injury or illness was incurred or aggravated in the line of active duty and causes the member to be medically unfit to perform the duties of the member's office, grade, rank or rating, and for which the service member is:
    - (i) undergoing medical treatment, recuperation or therapy;
    - (ii) in outpatient status; or
    - (iii) on the temporary disability retired list.
  - (f) An eligible employee as defined in 2(b)(i-v) is entitled to 12 weeks of unpaid family and medical leave during a 12-month period. An eligible employee as defined in 2(b)(vi) is entitled to 26 weeks of unpaid family and medical leave during a single 12-month period. Each 12-month period shall start from the date family medical leave is first used.
  - (g) A week of family medical leave will equal the amount of time an employee normally works each week.
  - (h) For part-time employees, a weekly average of the hours worked during the 12 weeks before beginning family leave will be used to determine their normal work week.
- (3) Request for Family and Medical Leave
- (a) An employee must provide the appointing authority with a request for family and medical leave at least 30 calendar days before the leave is to begin if it is foreseeable based on an expected child birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or a family member, or the planned medical treatment for a serious injury or illness of a covered service member.

- (b) If the employee is unable to make the request at least 30 calendar days before the leave is to begin due to a medical emergency or change of circumstances, he or she must provide the appointing authority with a request for family and medical leave as soon as practicable under the facts and circumstances of the particular case (generally the same day the employee learns of the need for leave or the next business day).
- (c) An employee must request family and medical leave by completing the Application for Family and Medical Leave and submitting the application to his or her appointing authority absent unusual circumstances. The appointing authority will forward the application to the AOC HR Department. In all circumstances, when giving notice of the need for leave, the employee must provide sufficient information for the COJ to determine if the leave qualifies for FMLA protection. Failure to provide sufficient notice may result in FMLA leave being delayed or denied.
- (d) Once an employee has requested FMLA leave, the AOC HR Department will inform the employee within five business days, absent extenuating circumstance, whether he or she is eligible for such leave. If the employee is eligible, the employee will be instructed as to whether any additional information is required, and as to his or her rights and responsibilities under the FMLA. If the leave is not eligible, the AOC HR Department will provide at least one reason for the ineligibility. (Form WH-381).
- (e) An employee who requests family and medical leave for purposes of tending to their own or a family member's serious health condition, or a seriously ill or injured covered servicemember must supply a certification by a health care provider within 15 calendar days after the request for leave, using the appropriate Certification of Health Care Provider Form, which includes the following:
  - (i) the employee is in need of care;
  - (ii) the employee is needed to care for a family member; or
  - (iii) the presence of the employee is necessary to the immediate family member in need of care.

The AOC HR Department will notify the employee, in writing, if it finds the certification incomplete or insufficient and will specify what additional information is necessary to make the certification complete and sufficient. The employee will then have seven calendar days to provide a corrected certification (unless the deadline is not practicable under the circumstances despite the employee's diligent and good faith efforts).

If the COJ has reason to doubt the validity of the certification provided, it may require the employee to obtain a second opinion from a physician selected by the COJ at the COJ's expense. If the second opinion is in conflict with the first, the COJ may require the employee, at the COJ's expense to see a mutually agreed upon health care provider for a final and binding opinion.

Periodic recertifications may be required to the extent permitted by law.

- (f) If an employee requests intermittent family and medical leave due to a serious medical condition of the employee or family member, the employee must supply a Certification of Health Care Provider Form from a licensed health care provider stating that intermittent leave is medically necessary and indicating the expected duration of the leave. Employees taking intermittent leave must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the business of the COJ. In order to better accommodate an employee's need for intermittent leave, the COJ may transfer an employee to an alternate, available position for which the employee is qualified at equivalent pay and benefits.
- (g) If the leave is to address a qualifying exigency, the eligible employee must complete a Certification of Qualifying Exigency Form, accompanied by the required supporting documentation and a copy of the covered military member's deployment and/or covered active duty orders within 15 calendar days after the request for leave.
- (h) An employee who fails to timely complete a sufficient certification form may be denied FMLA leave, and will be subject to the COJ's other applicable leave and/or attendance policies. Appropriate certification forms are available from the AOC HR Department.
- (i) A licensed health care provider is a:
  - (i) doctor of medicine;
  - (ii) doctor of osteopathy;
  - (iii) podiatrist;
  - (iv) dentist;
  - (v) clinical psychologist;
  - (vi) licensed clinical social worker;

- (vii) optometrist;
- (viii) chiropractor;
- (ix) nurse practitioner;
- (x) nurse midwife;
- (xi) physician's assistant; or
- (xii) certified Christian Science practitioner.

(4) Approval of Family and Medical Leave

- (a) An employee who has requested family and medical leave must be notified in writing if he or she has been granted or denied family and medical leave within five business days after the AOC HR Department receives the completed and sufficient medical certification and application. At that time, the AOC HR Department will inform the employee whether the leave will be designated as FMLA leave, and if so, the amount of leave that will be counted against the employee's leave entitlement. (Form WH-382)
- (b) An employee may request to use paid leave concurrently with FMLA leave. Any paid leave taken for this reason will count against his or her FMLA leave entitlement.
- (c) The AOC HR Department may require an employee to use paid leave concurrently with FMLA leave, even if the employee does not request it.

(5) Benefits During Family and Medical Leave

- (a) Any combination of working days, paid leave, or family medical leave used by the employee within a month will entitle the employee to state-paid contributions for life insurance and health benefits in the following month.
- (b) Employees must use their family and medical leave days consecutively if they are unable to work and elect to use family and medical leave as their only qualification for state contributions for life insurance and health benefits.
- (c) Employees on family and medical leave will be responsible for their share of contributions for life insurance and health benefits. The contributions will be due at the same time the contributions would be made by payroll deduction.

- (d) Employees who have used all of their paid leave and family and medical leave and remain unable to work for more than 100 hours in the month may only continue group health and life insurance benefits for the following month by paying the total cost of the state's contribution and their self contributions for the benefits.
  - (e) Employees will be granted a 30 calendar day grace period to make their contribution for life insurance and health benefits and must be notified by the AOC HR Department in writing 15 calendar days before any benefits expire.
  - (f) If the employee does not make the contribution within the 30 calendar day grace period, the employee's life insurance and health benefits will end on the date the grace period ends. Life insurance and health benefits will be restored 30 calendar days after the employee returns to work.
  - (g) For each month that an employee is on leave without pay status for more than 100 hours in that month, the employee's annual or probationary increment will be postponed one month.
- (6) Return From Family and Medical Leave
- (a) Before returning from family medical leave, the employee must submit a Notice of Intention to Return from Leave Form to his or her appointing authority. The appointing authority will forward the form to the AOC HR Department.
  - (b) An employee may be required to present a fitness-for-duty certificate to the AOC HR Department prior to being restored to employment. If such certification is not timely received, the employee's return to work may be delayed until certification is presented.
  - (c) Upon returning from family and medical leave, the employee will be reinstated to his or her previous position or an equivalent position. An "equivalent position" will be virtually identical in terms of pay, benefits, working conditions, including privileges, prerequisites and status, and involve duties that are substantially similar to the employee's previous position.
  - (d) On the first day of the employee's return to work, his or her benefits will be reinstated as applicable.
  - (e) The COJ reserves the right to deny restoration to any key employee if it determines substantial and grievous economic injury will result if the employee is reinstated. Key employees are salaried employees and are

among the highest paid 10 percent of all employees within 75 miles of the employee's worksite.

(7) Enforcement

- (a) An employee may file a complaint with the U.S. Wage and Hour Division, Department of Labor or may bring a private lawsuit against an employer.
- (b) The FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

(8) Questions

All questions and concerns relating to this policy should be directed to the AOC HR Department.

All sitting; all concur.

Entered this 15th day of December, 2011.

  
CHIEF JUSTICE