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## Position Is Not Vacant If It Is Being Held For An Employee On FMLA Leave

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Most employers are well aware of their obligation to consider transferring a disabled employee to an open position for which they are qualified if, due to their disability, they are no longer able to perform the essential functions of their current job. However, it can be less clear what constitutes an open position.

A federal district court in Mississippi recently grappled with this question in a case where a disabled employee argued that he should have been transferred to a position that was temporarily open due to the incumbent being on FMLA leave, because it was “clear” that the second worker would not be returning from leave.

The disabled employee, who was deemed unqualified for his current job because he could not obtain a CDL license due to his medical condition, requested to be moved into the role vacated by the worker on FMLA leave. At the time, the worker on FMLA leave was slated to be off work for at least another month.

The worker on leave had failed to answer the employer’s questions as to whether he intended to return to the job at the expiration of his twelve week leave. Other evidence presented by the disabled employee led the court to conclude that it was “likely” the worker on FMLA leave would not return to work. Despite this conclusion, the court determined that the position at issue was not “open” for ADA purposes, because the employer did not definitively

know the incumbent worker would not return.

The court's decision is not surprising, because it would have been unlawful for the employer to preemptively terminate the worker on FMLA leave even if the employer reasonably suspected that the worker was not going to return.

It is not always easy, however, for an employer to decipher when it definitively knows that an employee is not going to return to work as opposed to when it reasonably suspects it. Employers facing a disabled employee who wants a job left vacant due to another worker's FMLA leave should carefully assess the facts – and consult with legal counsel – before determining whether the position is open for ADA purposes.