

# Louisiana Employment Law Letter

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## RACE DISCRIMINATION

### The double whammie: employee presses his luck

*An employer placed an employee who couldn't perform his job's essential functions on unpaid sick leave. The employee, who had trouble deciding whether he was restricted, sued his employer, alleging race and disability discrimination. He claimed he was treated differently than similarly situated employees. How did the employer respond? Let's take a look.*

#### *Facts*

Robert Mason, an African-American, began working for United Airlines as a foodservice porter. He later qualified for a promotion to a customer service representative (CSR) job, in which he was transferred to several different cities. While working as a CSR in Los Angeles, he hurt his back. Despite his injury, he continued working and took a transfer to Chicago.

A year later, Mason finally got around to having surgery on his lower back. After six months of paid leave, he returned to work -- but with the restriction that he couldn't lift any "heavy" items. United accommodated him and made sure he didn't have to lift any heavy objects.

One year later, Mason again had back surgery. After another six-month paid medical leave of absence, he returned to work with the same restriction as before -- no "heavy" lifting. Once again, United made sure he didn't have to lift anything heavy.

Another year later, Mason had back surgery for a third time. You know the story by now. He took another six-month paid medical leave, and when he came back to work, he had the same doctor's restriction as before -- no "heavy" lifting. But we bet you can't guess what happened next.

A year later, Mason asked for and was given a fourth paid medical leave. But this time, he didn't limit his hiatus to a mere six months. Rather, he stayed out on leave for nearly *two years*. When he finally was released to return to work, he wasn't allowed to lift anything over 30 pounds.

Shortly after Mason returned to work, he requested a transfer to Dallas, where CSRs had to be able to lift more than 30 pounds. Apparently, moving to Dallas was more important to Mason than protecting his "injured" back because the same month he returned from his medical leave, he went to a United doctor and asked for a medical release with no lifting restrictions. The doctor gave him the release, and he transferred to Dallas -- restriction-free. Once in Dallas, Mason asked to work in "baggage services," which required him to lift bags that weighed more than 30 pounds.

One year later, Mason went to see his doctor again. This time, his doctor placed him on even stricter work restrictions. He couldn't bend, twist, or lift anything over 20 pounds. At that time, even United's doctor agreed. From that day forward, Mason could perform only "sedentary" work that involved no lifting, pushing, or pulling objects over 20 pounds.

### ***Employee's luck runs out***

After learning of the permanent restriction, United decided Mason couldn't continue working as a CSR. Lifting -- something he simply couldn't do -- was absolutely essential to the job. So it gave him 90 days to find a suitable job within the company. If he couldn't, he would be placed on extended *unpaid* sick leave. Unfortunately, given Mason's limitations, there were no suitable jobs available in Dallas, where he wanted to stay, and the prospect of medical leave *without pay* was more than he could take. So he sued.

### ***Employee tries again in court***

In his lawsuit, Mason claimed United placed him on leave and reassigned him because it thought he was disabled, which he disputed.

Mason also sued United for race discrimination, claiming it treated him less favorably than four injured white CSRs. According to him, the company never placed any of the injured white employees on extended unpaid leave as it did with him.

### ***No whammies, no whammies, stop!***

The court dismissed the disability discrimination claim. Remember, Mason denied he was actually disabled but claimed United "regarded" him as disabled and discriminated against him by placing him on unpaid leave, unlike other employees. But the court pointed out that to win on that claim, he needed to show that even with his bad back, he could still perform the essential functions of his job. He just couldn't do that. To work as a CSR, he had to be able to do some lifting, bending, or stretching, even if the lifting was minimal or the weight was low. In this case, he couldn't lift anything at all. Mason's doctor said he had to be totally sedentary, and he simply couldn't prove that he was qualified for the job. The Americans with Disabilities Act protects only "qualified" individuals with disabilities. That means that even with the impairment, as it actually exists or as the employer perceived it, the employee still must be able to perform the essential functions of the job with or without a reasonable accommodation.

The appeals court affirmed the dismissal of Mason's race discrimination claim. To win that claim, he needed to show United treated him less favorably than people outside his protected class (*i.e.*, not black) who were "similarly situated" (*i.e.*, held the same job, had similar injuries, and the like). The four injured white employees weren't similarly situated to Mason. Remember, he was completely unable to do his job -- he couldn't lift, bend, or stretch at all. The white employees' physical restrictions weren't nearly as severe. Unlike Mason, they could still perform the essential lifting duties associated with their jobs. *Mason v. United Airlines, Inc.*, No. 01-10218, 2001 U.S. App. LEXIS 26418 (5th Cir. Dec. 12, 2001).

***Avoid paying big bucks, only whammies***

In this case, United bent over backward to accommodate (and compensate) an employee with a bad back. Some thanks it got when Mason sued even though he could no longer do his assigned job and was unwilling (despite his earlier globetrotting) to relocate. So how did this employer avoid paying big bucks, and how can you? Consistently applying your policies and procedures and treating similarly situated employees the same are the best ways to reduce your exposure to disability discrimination. When an employee can show that you treated him less favorably than someone of a different race, age, gender, or other protected characteristic under like circumstances, you may face an expensive lawsuit or even an adverse judgment even though you intended no harm and had no ill will toward the employee. Don't press your luck -- carefully consider your employment decisions and treat like employees the same. It could mean the difference between big bucks and whammies.

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