

Employment Practices Liability

April 23, 2019

CT Appellate Court Holds Additional Leave of Absence is Not a Reasonable Accommodation When Weighed Against Attendance as an Essential Job Function

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In *Barbabosa v. Bd. of Educ. of Manchester*, AC 41304 (Apr. 23, 2019), the Connecticut Appellate Court affirmed the Superior Court's decision to award summary judgment to the Manchester Board of Education in a disability discrimination and failure to accommodate case. The Appellate Court upheld the findings that there was no genuine issue of material fact that attendance was an essential function of Plaintiff's position, Plaintiff could not perform that essential function with or without a reasonable accommodation, and Plaintiff's requested accommodation of intermittent leave was not reasonable because it would eliminate that same essential function.

Factual Background: Plaintiff was hired as a fulltime one-on-one paraprofessional with the Manchester Board of Education (BOE) in 2007. As a paraprofessional, plaintiff was responsible for assisting professional staff members by working directly with the students to meet their needs.

Plaintiff was a member of the union, and under the collective bargaining agreement, Plaintiff was entitled to three personal days and fifteen sick days each year, as well as other types of leave subject to approval. Plaintiff had well-documented attendance problems. In 2008-2010, Plaintiff received satisfactory performance reviews, yet concerns regarding her attendance were noted. Likewise, in 2011 and 2012, Plaintiff's reviews indicated that she was meeting expectations, but she needed to improve attendance. Finally, the Court noted that Plaintiff's performance reviews from 2014-2016 continued to indicate that Plaintiff was not consistently on time and that her "excessive absences continue to affect the management of the teachers' classrooms... When she is absent, this affects their planning and the lesson negatively."

During the 2012-2013 school year, Plaintiff was absent for twenty full days and five partial days. Then, between July 2013 and April 2014, the Plaintiff was absent for seventeen full days and six partial days. As a result of these absences, Plaintiff received verbal warnings, which were later confirmed in writing. Plaintiff explained that she "was suffering from asthma flare-ups that trigger bronchitis, migraine headaches, [and] fibromyalgia that causes excruciating joint and muscle pain with flare-ups, which causes her to not be able to work or move her arms over her head." In her complaint, she further indicated that she suffers from fibromyalgia, anxiety, depression, asthma, and rheumatoid arthritis. She sought intermittent FMLA for December 23, 2013 through December 23, 2014, but the request was denied because Plaintiff had not worked the requisite number of hours in the previous 12 months to qualify for FMLA leave. However, Plaintiff also sought an "intermittent" short-term sick leave from Manchester Public Schools for "five consecutive days or longer." Plaintiff's request for short-term leave was granted to the extent she had remaining sick time available under the collective bargaining agreement.

However, the medical notes demonstrated that Plaintiff was absent on 21 occasions between September 17, 2013 and March 31, 2014 for

reasons unrelated to the disabling conditions alleged by the Plaintiff. Accordingly, the Defendant suspended the Plaintiff for 30 days without pay for "excessive absenteeism."

Plaintiff sued on theories that the Defendant failed to accommodate her and discriminated against her on the basis of her disability in connection with the suspension she received.

Court's Analysis: In order to show a *prima facie* case of disability discrimination, Plaintiff must show that: 1) she suffers from a disability; 2) she is "qualified" for the position, or in other words, she can perform the essential functions of her job with or without a reasonable accommodation; and 3) the defendant took an adverse employment action against her because of her disability. For a failure to accommodate claim, Plaintiff satisfies a *prima facie* case by showing that: 1) she suffers from a disability; 2) she is qualified for the position; and 3) the employer, despite knowing of the plaintiff's disability, did not reasonably accommodate plaintiff.

The Court's analysis focused on two issues: 1) whether Plaintiff submitted evidence upon which a reasonable factfinder could conclude that Plaintiff satisfied the second element of her *prima facie* case, namely whether she was "qualified" for the position, and 2) whether there was a genuine issue of material fact as to whether Plaintiff's requested accommodation of intermittent leave was reasonable. The Appellate Court agreed with the Superior Court's conclusion that the undisputed evidence submitted by the Defendant established that there was no genuine issue of material fact that attendance was an essential function of being a paraprofessional with the Defendant, Plaintiff was not able to perform that essential function, and Plaintiff's request for ongoing intermittent leave was not a reasonable accommodation because it would eliminate that same essential function of the position.

The Court reiterated that attendance is an essential function of nearly every job because "[a]n employee who is unable to come to work on a regular basis is unable to satisfy any of the functions of the job in question, must less the essential ones." The Court further relied upon federal precedent finding that "federal discrimination law does not require employers to tolerate chronic absenteeism even when attendance problems are caused by an employee's disability."

With this law as a backdrop, the Court found that the documentary evidence submitted demonstrated that there was no genuine issue of material fact as to whether attendance was an essential function of Plaintiff's job and that Plaintiff was unable to perform that essential function. Indeed, Plaintiff's poor attendance was well-documented. First, the language of the CBA, as well as deposition testimony, provided evidence that attendance was critical to lesson planning and the students' education. Second, Plaintiff received several letters addressing the importance of her attendance in relation to the overall educational environment. Finally, Plaintiff's reviews demonstrated that there were ongoing concerns regarding her attendance.

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While Plaintiff argued that her positive performance reviews created a genuine issue of material fact as to whether she was qualified for the position, the Court indicated that “the fact that plaintiff was meeting the defendant’s performance expectations while attending work... does not create a genuine issue of material fact as to whether her attendance at work was an essential function.” In other words, Plaintiff was able to perform her duties when she went to work, but she was “absent far too often.”

Finally, the Court concluded that although a leave of absence has been recognized as a reasonable accommodation in some instances, it was not reasonable under these facts “because that proposal would eliminate the very essential job function it purports to address.” The Court stated: “Put another way, we fail to see how it is possible to perform the essential function of attending work through an accommodation that provides for even more absences from work.” Finding otherwise would result in a conclusion that “would only exacerbate her existing attendance issues and would further undermine her ability to perform an essential function of her employment, namely, maintaining regular attendance.” Thus, the requested accommodation was not reasonable as a matter of law.

Conclusion: This decision begins to define the blurry line between a leave of absence as a reasonable accommodation and the fact that attendance is an essential element of nearly every position. However, this Court’s decision does not address the situation where a finite or a limited leave of absence would allow the employee a limited amount of time off, which would ultimately allow the employee to return to work without any further extended absences. Accordingly, employers should consult their attorney when employees are seeking leaves of absences for disability related purposes.

Furthermore, the Court relied heavily on employee records, including performance evaluations, and other documentation. This decision highlights the importance of documenting performance deficiencies throughout an employee’s tenure. Proper documentation is often the key element to defeating baseless claims of discrimination. Accordingly, employers who utilize performance evaluations should use that opportunity to provide positive feedback, as well as constructive criticism, where necessary, and individual goals for the future.

Cindy Cieslak is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including discrimination, harassment, and wage and hour issues. If you have questions about this legal update, please contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Communications Associate at jsmith@ccm-ct.org.

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