June 28, 2019

Chronically Absent Employee Is Not Entitled to Accommodation That Would Result in More Absences

When a disability causes absences from work, are employees entitled to intermittent leave—i.e., more absences—as an accommodation? Not if regular attendance is an essential function of the job, according to a recent decision by the Connecticut Appellate Court. The general rule is the same under the federal Americans with Disabilities Act, the New York State Human Rights Law and the New Jersey Law Against Discrimination—a reasonable accommodation cannot eliminate an essential function of an employee's job.

The Connecticut case, *Barbabosa v. Board of Education*, involved a classroom paraprofessional named Dianna Barbabosa, who worked in various schools in the Town of Manchester beginning in 2007. Throughout her employment, Barbabosa had issues with absenteeism and tardiness. As early as 2008, she was issued a formal written warning regarding her excessive absences, followed by verbal warnings in later years. Barbabosa received satisfactory annual performance reviews, but each year's review also noted concerns about her attendance.

In 2014, Barbabosa requested intermittent FMLA leave for her occasional asthma flare-ups, which triggered bronchitis, migraine headaches and fibromyalgia. The request was denied because she had not met the FMLA's hours of service requirement. Barbabosa also requested intermittent sick leave, which was granted to the extent of her remaining sick time. At the end of her approved leave, Barbabosa returned to work, but her unplanned absences soon resumed. She was suspended without pay for 30 days because of her excessive absenteeism.

Barbabosa sued the Manchester Board of Education, alleging that she is disabled, that the Board of Education was aware that she is disabled, that she requested a reasonable accommodation in the form of finite absences from work, and that the Board of Education violated the Connecticut Fair Employment Practices Act by suspending her because of her disability and failing to provide a reasonable accommodation. The Connecticut Superior Court granted summary judgment for the Board of Education, and Barbabosa appealed.

On appeal, Barbabosa argued that she was qualified for her position, as demonstrated by her generally positive performance reviews, and that her request for an intermittent leave of absence constituted a reasonable accommodation that did not eliminate an essential function of her job. The Connecticut Appellate Court rejected both arguments.

For both her disability discrimination claim and her failure to accommodate claim, Barbabosa was required to show that she was qualified for her position, meaning that she was able to perform the essential functions of the job with or without a reasonable accommodation. Since the annual performance reviews showed that Barbabosa met her employer's expectations when she was at work, the question became whether attendance at work is an essential function of her job. The Appellate Court concluded that attendance is an essential function because the position requires interaction with schoolchildren, which can only occur when the employee is present at school. In reaching that conclusion, the court relied on provisions of the collective bargaining agreement, Barbabosa's disciplinary notices, her annual performance evaluations and testimony from union officials.

Based on the same evidence, the Appellate Court also concluded that Barbabosa's requested intermittent leave of absence was not a reasonable accommodation because it would eliminate the essential job function that it purported to address—regular attendance. The court explained that permitting Barbabosa to take intermittent leave would exacerbate her existing attendance issues and would undermine her ability to perform an essential function of her employment—regular attendance.

As a result, the court concluded that Barbabosa was not able to perform an essential function of her job with or without her proposed accommodation, and it affirmed the Superior Court's award of summary judgment to the Board of Education.

As the decision in *Barbabosa* demonstrates, cases involving requests for disability-related accommodations are very fact-specific. While regular attendance is an essential function of many jobs, that is not always the case, and whether it is in any particular case will depend on the facts concerning the position at issue. Clearly, the plaintiff's long history of well-documented attendance issues, which were noted in her oral and written warnings and in her annual performance reviews, was crucial to the decision in *Barbabosa*. Just as regular attendance may not be an essential function of every job, employers should not conclude from *Barbabosa* that intermittent leave can never be a reasonable accommodation for an employee's disability. In any given case, both issues will depend on the facts surrounding the particular employee and position at issue. Anytime an employee requests an accommodation for a disability, the employer should evaluate the request on its own merits and engage in an interactive process with the employee to try to identify an appropriate accommodation.

Would you like to receive our *Employment and Labor Quarterly Update?* Sign up here.

Authors



Glenn W. Dowd
Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com



Howard Fetner
Counsel

New Haven, CT | (203) 752-5012

hfetner@daypitney.com