

ADA & FMLA: Absence does not make the heart grow fonder

A federal court in Texas has concluded that attendance can be considered an essential function of a job. A disabled worker who can't make it to work with some regularity simply isn't qualified; no amount of accommodation can fix that problem.

The case is *Wolf v. Lowe's Companies, Inc.* (SD TX, 2018). In March, the trial judge dismissed a lawsuit filed by a former salesperson who alleged disability discrimination and failure to accommodate under the ADA, as well as retaliation under the FMLA. The court held that the plaintiff had failed to establish a *prima facie* case under the ADA because her excessive absenteeism and tardiness prevented her from being qualified to perform her job.

Excessive absences, tardiness

Tamara had worked as a sales specialist for Lowe's for approximately nine years, beginning in March 2005.

On several occasions from November 2005 through December 2013, she received written warnings and negative remarks on her performance evaluations for excessive absences and tardiness, and for her inability to complete assignments on time, among other performance issues.

On Dec. 7, 2013, Lowe's administered a "final notice" to Tamara due to her continued "excessive attendance problems."

FMLA leave, then a lawsuit

In the spring of 2014, Tamara informed her supervisors and the HR department that she suffered from major depressive disorder, attention deficit disorder, cerebral palsy, polyarthritis and fibromyalgia. She submitted two notes from her psychiatrist confirming these diagnoses. Tamara alleged these conditions affected her work attendance. Tamara then applied for and received intermittent FMLA leave.

While allowing for job-protected intermittent leave, Lowe's continued tracking absences and tardiness unrelated to Tamara's serious FMLA health conditions.

It continued to hold her accountable for other, preexisting performance deficiencies. To remedy those issues, Lowe's placed Tamara on several performance improvement plans.

Lowe's ultimately terminated Tamara on Aug. 22, 2014.

Tamara filed a lawsuit noting that before her illnesses, she received positive performance reviews.

Her suit alleged Lowe's fired her because of her illnesses and in retaliation for requesting intermittent leave for symptoms related to her illnesses in violation of the ADA and the FMLA.

Lowe's moved for summary judgment on Tamara's ADA claims.

Not qualified for the job

The judge observed that Tamara was excessively tardy and absent during the entirety of her employment with Lowe's. She was written up for attendance issues on numerous occasions, and admitted that her attendance was an issue throughout her employment.

Citing long-standing 5th Circuit Court of Appeals precedent *Hypes v. First Commerce Corporation*, the district court judge reaffirmed the principle that regular attendance is an essential function of a job, such that someone who is excessively tardy and absent from work is not qualified to perform the job.

The court granted Lowe's motion for summary judgment on the ADA claims because Tamara could not establish a *prima facie* case of disability discrimination or failure to accommodate.

Specifically, Tamara's inability to appear for work and to complete assigned tasks within a reasonable period of time meant that she was not qualified to perform her job.

No evidence of retaliation

As to Tamara's remaining claim of FMLA retaliation, the court determined that the only evidence of retaliation presented by Tamara was she was terminated soon after she told Lowe's about her medical issues. Lowe's placed Tamara on multiple performance improvement plans and fired her four months after she requested and obtained intermittent FMLA leave.

Again relying on established 5th Circuit authority, the court reaffirmed the principle that "temporal proximity between protected activity and the alleged adverse employment action, by itself, is insufficient to create a genuine issue of material fact" on the *prima facie* element of causation. The court noted that there must be a combination of temporal proximity along with other "significant evidence of pretext" in order to avoid summary judgment.

Lessons for employers

The decision in *Wolf v. Lowe's* is an important reminder that employers can prioritize consistently holding employees accountable for violations of work rules—even when the employees have invoked their rights under the ADA, FMLA or another law.

It was undoubtedly significant to the court's decision that Lowe's had been regularly holding Tamara accountable for her absenteeism, tardiness and other performance issues for several years before she ever disclosed her disabilities. Lowe's successfully continued the performance management process after Tamara notified Lowe's of her disabilities and of her need for FMLA leave by tracking her nonprotected absences and tardiness, as well as addressing her performance deficiencies.

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