No Excuses: "Retroactive Leniency" Is Not An ADA Reasonable Accommodation

3 THINGS TO KNOW ABOUT FAVORABLE COURT DECISION

Insights
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A federal appeals court upheld the termination of an employee who tried to blame her misconduct on her disability during the termination meeting itself. The court ruled that "retroactive leniency" was not a reasonable accommodation under the Americans with Disabilities Act (ADA), and therefore the employer had no obligation to apply the brakes to its ongoing disciplinary process despite the employee's pleas.

Here are three things you need to know about the 10th Circuit Court of Appeals' decision in *DeWitt v. Southwestern Bell Telephone Company.*

1. **Facts Demonstrated A Well-Documented Progressive Discipline Path**

   Janna DeWitt began working for Southwestern Bell as a customer service representative in its Wichita, Kansas call center in 1997. In this role, she answered calls from customers regarding residential telephone service.

   DeWitt informed her supervisors that she had Type I diabetes that required her to monitor her blood sugar levels several times a day. She told them that low blood sugar levels could cause her to develop lethargy, confusion, fatigue, and other similar physical symptoms. Her supervisors permitted her to take breaks to eat or drink something in order to raise her blood sugar levels as needed. Her company also allowed her to take medical leave several times in 2009 and 2010 for diabetes-related health issues.

   DeWitt's performance issues began in early 2010 when she mistakenly left phone service on a customer's account despite the fact that the customer had cancelled service. This error, known in the industry as a "cramming" violation, is specifically prohibited in Southwestern Bell's personnel policies and is included as a potentially terminable offense. The company suspended her for a day and issued her a Last Chance Agreement that indicated further violations could lead to termination.

   Two months later, her supervisors determined that DeWitt had hung up on at least two customers. Obviously, such conduct demonstrates poor customer service, and it is prohibited in

the company handbook. During an investigative meeting about the incidents, DeWitt told her managers that she did not remember dropping the calls because she had been experiencing dangerously low blood sugars at the time. Her managers played audio recordings of the dropped calls, and DeWitt asked, "Are you sure this is me?" The company suspended her employment once again while completing the investigation.

A week later, the company made the decision to terminate her employment given her violation of the company policies and the Last Chance Agreement. She filed a lawsuit alleging ADA violations, specifically claiming that the company did not reasonably accommodate her disability. She argued that Southwestern Bell should have excused the disconnected calls that she says were caused by her disability.

2. **Court Rejects Request For "Retroactive Leniency"**

A federal court dismissed her claim and she appealed to the 10th Circuit Court of Appeals, which hears cases arising from Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. On January 18, 2017, the court of appeals upheld the dismissal of the case and ruled in favor of the employer.

The court summed up its decision by stating: "Ms. DeWitt's accommodation claim fails because she did not request a reasonable accommodation to address concerns regarding the possibility of dropped calls; instead, she requested retroactive leniency for her misconduct. … Such retroactive lenience is not a 'reasonable accommodation' as defined by the ADA."

The court noted that employers are not obligated to overlook past misconduct as a reasonable accommodation, even if that misconduct resulted from a disability. To justify its rationale, the court cited to both the Equal Employment Opportunity Commission (EEOC) and other courts across the country.

The 10th Circuit pointed to the EEOC's Enforcement Guidance on Reasonable Accommodation which makes clear that the ADA is "always prospective" and that an employer is not required to excuse past misconduct even if it is the result of the individual's disability. The Guidance specifically says that "an employer never has to excuse a violation of uniformly applied conduct rule that is job-related and consistent with business necessity."\

The court also cited to decisions from the 2nd Circuit ("A requested accommodation that simply excuses past misconduct is unreasonable as a matter of law"), the 8th Circuit (asking for a "second chance" to do better is not a cause of action under the ADA), the 5th Circuit ("a plea for grace is not an accommodation as contemplated by the ADA"), and the 7th Circuit ("the ADA does not require" that an employer grant "another chance").

3. **Employers Should Tread Carefully**

   This is a welcome decision for employers operating in the 10th Circuit, and is a welcome reminder for those with employees in the other circuits which have ruled in this same manner. It clearly demonstrates that you do not have to put the brakes on an ongoing disciplinary process based on past performance deficiencies or misconduct simply because the employee requests an accommodation in the midst of the process.

   However, this case should not provide you an excuse to ignore an employee who requests reasonable accommodation during a disciplinary process. This case demonstrates that most courts will view the ADA prospectively – meaning that you do not have to excuse past behavior as an accommodation – but also means that you may have an obligation to engage in an interactive process with an employee to discuss *future* accommodation requests.

   For example, this case suggests that an employee who is called into a disciplinary meeting for recent tardiness cannot excuse her prior incidents of lateness based on a medical condition. However, if during that disciplinary meeting the employee explains that she has been late because she is seeking medical treatment or otherwise impaired from getting to work on time because of her disability, the employer may be obligated to engage in an interactive process to determine if it can provide a reasonable accommodation to avoid future violations of the company rule.

If you have any questions about this case or how it may affect your business, please visit our website at www.fisherphillips.com or contact your Fisher Phillips attorney.

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