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Locke Lord QuickStudy: The First Circuit Sends an ADA Warning ?to Employers

Locke Lord LLP

WRITTEN BY

Richard D. Glovsky

On September 15, the United States Court of Appeals for the First Circuit issued a startling and ?ominous opinion construing the Americans with Disabilities Act (ADA) in a manner which ?employers should take heed. In a 38-page opinion in the case of *Benson v. Wal-Mart Stores East, ?L.P.*, the Court addressed a seemingly insignificant controversy by adding twists to the ?commonly understood proof aspects of the ADA that should send shivers down employers' ?spines.?

Margaret Benson worked for Wal-Mart as a People Greeter, i.e. an employee who welcomed ?customers, provided "front-end security," ensured "customer safety in the greeting area," ??"respond[ed] to electronic surveillance alarms," and provided direction to customers. Apparently, ?Ms. Benson suffered a job related injury for which she received workers' compensation benefits ?and which, she asserted, resulted in her frequent absences from work for treatment and as a result ?of adverse reactions to prescribed medications.?

Wal-Mart terminated her employment due to excessive absences. In most circumstances, ?unexcused absences or tardiness from work prove sufficient for an employer to terminate an ?employee. For example, the Appeals Court cited *Colon-Fontanez v. Municipality of San Juan*, ??660 F.3d, 17, 33 (1st Cir. 2011) for the proposition that "regular attendance 'is an essential ?function of any job' and *EEOC v. Ford Motor Co*., 783 F.3d 753, 761 (6th Cir. 2016) for the ?proposition that the 'general rule – that regularly attending work on-site is essential to most jobs, ?especially the interactive ones – aligns with the text of the ADA.'?

Moreover, the Court recognized that to proceed with a case a plaintiff must first establish a ?*prima case* of disability discrimination by satisfying several criteria, including that she is ??"qualified, with or without reasonable accommodation, to perform the essential functions of her ?job. . ." ?

However, while reciting well-settled concepts of ADA parameters, the Court of Appeals ?reversed the District Court's entry of summary judgment for Wal-Mart. So, while one would ?think that attendance is an "essential" to the job of People Greeter, the Court reasoned that ?whether a function is essential turns on factors such as (a) whether or not "the written ?requirements or description of the job" include such a requirement and (b) "the consequences of ?not requiring the function." So while the Court, on the one hand, acknowledged it is "not tasked ?with second guessing an employer's legitimate business judgment about what is required of its ?employees," it indicated, on the other hand, that trial courts should inquire "whether the ?employer actually enforces this requirement of its employees or merely pays lip service" to it. In ?other words, the Court was advising lower courts to examine the exact terms of job descriptions ?and the consequences of absences to ascertain whether attendance is an essential function of a ?job and whether an employee is seeking a reasonable accommodation

for tardiness.?

The Court recognized that “[t]he ADA requires an employer ‘to make a reasonable ?accommodation…, unless [the employer] can demonstrate that the accommodation would impose ?an undue hardship on [its] operation of the business,” Moreover, it viewed Benson’s explanations ?for her tardiness as a request for a “modified work schedule” and it indicated that Wal-Mart’s ??“own Attendance policy” backfired on it as it “explicitly” considered “any missed time due to a ??‘reasonable accommodation’ to be permitted . . .”?

Adding more food for thought to the diet of employers in Massachusetts, New Hampshire, ?Maine, Rhode Island and Puerto Rico, the Court turned to Benson’s retaliation claims and ?reversed the District Court’s summary judgment on that count as well. In that regard, it relied ?heavily on the proximity in time for Benson’s internal complaint of harassment and request for a ?modified schedule and the timing of the termination of her employment. It opined: “On its own, ?the temporal proximity between the January email [complaining of harassment] and ?accommodation request and Benson’s February 18 termination is sufficient to make out a *prima ?facie* case, but the inference is even stronger alongside [her HR Manager’s] complete inaction in ?response to Benson’s harassment claim.?

So what are the lessons of *Benson v. Wal-Mart Stores, L. P.* when it comes to the ADA? ?

1. ?Make sure job descriptions align with company requirements and personnel decisions.?
2. ?Consider the consequences of what the company deems an “essential function” of an employee’s job. ?
3. ?Review, and amend if appropriate, policies for consistencies and alignment with personnel actions.?
4. ?Do not forget that proximity between a complaint and an employment action can create a treacherous slope.?
5. ?Remember to be vigilant about receiving and responding to complaints of ?discrimination and/or ?harassment.

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