

Second Circuit Dismisses ADA and FMLA Claims

Poor Attendance, Not Alcoholism, Cause for Termination

Where regular attendance is an essential job function of a position, the Americans with Disabilities Act and the Family and Medical Leave Act would not shield from termination an employee chronically absent from work, a federal appeals court in New York has held. *VandenBroek v. PSEG Power CT LLC*, No. 09-1109, ___ F.3d ___ (2d Cir.).

Affirming summary judgment in favor of the employer in a disability discrimination and wrongful termination case brought under the ADA and the FMLA, the U.S. Court of Appeals for the Second Circuit held a boiler utility operator at a power plant, who was an alcoholic, was not “otherwise qualified” for the job because he was repeatedly absent from work. Although regular attendance is an essential job function for most positions, the Court noted that it was particularly important to this employee’s job because “reliable employee attendance was . . . essential to ensuring against a power outage or even an explosion.” Finding the employee failed to prove he was terminated for taking protected leave under the FMLA, the Court further ruled he was terminated for violating the employer’s “no call/no show” policy. The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

The Suit

In 2007, Bruce VandenBroek sued his former employer, claiming he was terminated because of his alcoholism and for taking medical leave to treat his alcoholism. Agreeing with the employer that VandenBroek was terminated, instead, for violating the employer’s “no call/no show” policy, the district court granted the employer’s motion for summary judgment and dismissed VandenBroek’s claims.

VandenBroek appealed, arguing that under *Teahan v. Metro-North Commuter Railroad Co.*, 951 F.2d 511 (2d Cir. 1991), when an employer fires an employee for conduct caused by a disability, the employer fires the employee because of his disability. The employer argued that VandenBroek’s reliance on *Teahan*, a case decided under the Rehabilitation Act of 1974, was

misplaced because the ADA, unlike the Rehabilitation Act, specifically permits employers to hold employees with alcoholism to the same performance standards as non-alcoholic employees, even if the employee's alcoholism causes the unsatisfactory performance.

Attendance is “Essential Function”

Noting that it need not decide whether this case presented one of the “subtle distinctions” between the ADA and the Rehabilitation Act that required a departure from the general practice of “treat[ing] claims under the two statutes identically,” the appellate court found VandenBroek had failed “to adduce sufficient evidence to make out a prima facie case under the ADA.”

Specifically, the Court found VandenBroek was not “otherwise qualified” for the job because he could not perform the essential functions of his position, one of which was regular attendance. Regular attendance was particularly important due to the safety concerns inherent in the position. Employees had to be present at the plant to monitor the boiler and respond to any alarm to avoid potential power outages or explosions. VandenBroek failed to produce evidence showing the employer could rely on him to appear for his shifts. Accordingly, the Court held that VandenBroek's disability discrimination claim failed.

Employee Violated Policy

The Court also found VandenBroek failed to show the employer terminated him for taking FMLA-protected medical leave. Rather, the evidence showed he was terminated because he repeatedly violated the employer's “no call/no show” policy. Accordingly, the Court affirmed the dismissal of VandenBroek's FMLA claim.

This case provides helpful, though cautionary, guidance regarding disciplinary issues where alcoholism is alleged as the cause of attendance problems. While the result in this case is good for employers, the Court seemingly left for another day the issue of whether the result in *VandenBroek* holds where the facts are not so clear that reliable attendance is an essential job function of the employee's job. Therefore, an employer considering terminating an employee for attendance problems related to alcoholism, or other disabilities, should be prepared to demonstrate the specific reasons regular and reliable attendance are essential to job

performance. Employers should consult with employment counsel to determine whether and how their policies may be affected by *VandenBroek*.