

The Bennett Law Firm

Client Update

Trusted Advisor to Management for Over 50 Years
Labor Relations ~ Employment Law ~ Business Litigation
Portland, ME (207) 773.4775 / Boston, MA (617)973.1550



Federal Court Upholds Termination for Absenteeism Caused By Multiple Sclerosis

The Facts

On May 8, 2013, the United States Court of Appeals for the Seventh Circuit upheld an employer's termination of a disabled employee for excessive absenteeism. In *Basden v. Professional Transportation, Inc.*, No. 11-2880 (7th Cir. 2013), the employer maintained a no fault attendance policy based on a cumulative incident system. A certain number of absences triggered a documented verbal warning, followed by a written warning, then a suspension and ultimately termination of employment.

In January 2008, the employee became dizzy and fell in her home. She was treated in the emergency room and referred to a neurologist after a CT scan showed abnormalities that suggested that she might have multiple sclerosis. Absences for the same medical issue resulted in the employer's issuing her a verbal warning in March 2008, a written warning in April 2008, and a three day suspension in May 2008. Upon her receipt of the suspension, Basden requested a thirty day leave of absence. She informed her employer that she needed the leave because of complications due to MS, though the medical providers had yet to confirm this diagnosis. The employer denied the leave because Basden had only worked for the employer for eleven months. Company policy, consistent with the FMLA, required that an employee work for at least twelve months before becoming eligible for a leave of absence.

Basden failed to return to work following her suspension and the employer terminated her employment. The medical providers subsequently confirmed the MS diagnosis and prescribed medication for the MS in July 2008. Basden filed a lawsuit claiming that the employer violated the Americans With Disabilities Act when management failed to accommodate her need for a leave of absence. She further claimed, in part, that the leave of absence would have given her the opportunity to gain sufficient control over the MS so that she could return to work and comply with the employer's attendance expectations.

The Law

The Court held that the employee had the burden to present evidence that, if believed as true, would establish that at the time of her termination, she was able to perform the essential functions of the job with or without a reasonable accommodation. A person whose disability prevents her from coming to work regularly cannot perform the essential functions of her job and therefore cannot be a qualified individual under the ADA. The focus of the court was whether the employee established that at the time of her termination, the requested leave of absence would have allowed her to return to work on a consistent basis without “erratic or unreliable attendance.” The court ruled that the employee failed to meet her burden of proof because at the time of her employment termination, “she had no final diagnosis, no prescribed treatment and no anticipated date by which she could have been expected to attend work regularly even if she had been granted leave.”

Caveat and Recommended Action

Had the employee’s medical provider diagnosed her MS prior to the termination of employment and also opined with reasonable certainty that the employee would be able to meet the attendance expectations of the employer following the thirty day leave of absence, the outcome of this case likely would have been different. In addition, had the employee worked long enough to qualify for FMLA, the employer would have been required to provide up to twelve weeks of leave and then would have been obligated to determine whether additional leave would be an effective reasonable accommodation. This case highlights that disability discrimination claims are decided on case by case basis and an absenteeism caused by a disability requires careful evaluation prior to an employer’s taking any adverse action against an employee. The Bennett Law Firm has a great track record of guiding employers through this process to minimize the chance of litigation and to maximize the likelihood of a defense verdict in the event of litigation. Please contact Peter Bennett (pbennett@thebennettlawfirm.com) or Rick Finberg (rfinberg@thebennettlawfirm.com) with any questions.