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EMPLOYMENT LAW

Vague Reference to Injury Enough to Trigger ADA/FMLA Issues

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Special to the Legal

The baseball adage that "a tie always goes to the runner" has a legal equivalent in a court looking at a summary judgment record in a light most favorable to the nonmoving party—which is almost always the former employee in employment litigation. This standard seems particularly apt in the recent decision of *Munoz v. Nutrisystem*, No. 13-4416, 2014 U.S. Dist. LEXIS 104465 (E.D. Pa. July 30, 2014), where a former employee's vague references to the reason for a leave were sufficient (at least in part) to support claims under both the Americans with Disabilities Act and the Family and Medical Leave Act.

EMPLOYEE VIOLATES ATTENDANCE POLICY

Edith Munoz was hired as a retention representative by Nutrisystem Inc. in December 2010. During her hiring interview, she advised the HR representative that she suffered from sleep apnea and how her ongoing treatment for this condition might require her to attend "some appointments coming up." Under Nutrisystem's points-based attendance policy, "scheduled absences" would not receive an attendance "point" so long as the employee provided 48 hours' notice and received management approval. A late arrival or early departure merited a "half-point" and an extended medical absence would receive just one point if accompanied by a doctor's note.

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In her first seven months of employment, Munoz accrued seven points, which put her at the "final warning" stage—one point away from termination. Two of the points, however, were arguably related to her sleep apnea (or the treatment she was receiving).

On Aug. 7, 2011, Munoz was in a car accident, which injured her back and neck. She was out of work for eight weeks, which included several extensions of her leave and she had a number of excused absences related to her injuries through mid-December.

VAGUE REFERENCE TO NECK INJURY

On Dec. 26, 2011, a Friday, still teetering on the brink of termination with seven attendance points, Munoz left work early complaining of flu-like symptoms. The following Monday (Dec. 29), Munoz called out saying that she still did not feel well, but would bring in a note. On Dec. 30, Munoz again called off, explaining that she had "an infection and my neck was out." She returned to work Jan. 2. Notably, Munoz became eligible for FMLA on Dec. 28, her one-year

anniversary of employment.

Nutrisystem began drawing up termination papers for Munoz on Dec. 30 as her early departure, combined with her flu absence, put her over the eight-point termination threshold. There was a dispute as to whether Munoz provided a physician's note upon her return. Moreover, while Munoz claimed that she saw her sleep apnea physician during this period, the medical records did not support this assertion. She was terminated upon her return to the workplace Jan. 2, 2012.

DISCRIMINATION ALLEGED

Munoz brought suit claiming that she was discriminated against on the basis of her alleged disability, had been denied a reasonable accommodation, had been retaliated against for requesting an accommodation and for taking FMLA leave. She also claimed that her FMLA rights had been interfered with. Munoz's core argument was that Nutrisystem should have "allowed her more flexibility in missing periodic work days for her disability-related health problems."

Munoz had no evidence that Nutrisystem fired her for a reason other than her exceeding the points permissible under the company's attendance policy—nor did she have evidence that she was treated differently than non-disabled employees. Summary judgment was granted on the ADA/Pennsylvania Human Relations Act discrimination claims.

FAILURE TO ACCOMMODATE CLAIM SURVIVES

Summary judgment was denied, however, on the failure-to-accommodate claim. First, the court found that Nutrisystem was aware of both Munoz's sleep disorder and the injuries she suffered in the car accident. Most importantly, since Munoz had requested "periodic days off" due to her injuries, and she attributed at least some of her late-December absences to residual neck pain from the accident, the court found that a jury could find "that a reasonable accommodation was available and would have allowed Munoz to perform her job."

Summary judgment was granted with respect to all retaliation claims, under the ADA/PHRA and FMLA, on the grounds that there was no evidence of a causal connection between the request for leave/accommodation and the termination. However, Munoz's FMLA interference claim will proceed to trial. While the court found that "it may be difficult for Munoz to convince a jury not only that [her neck spasms were] a serious health condition, but also that it was the reason for her absence," there was a genuine issue of fact on this count (even though the court observed that "it is far from clear ... that the neck problem was the real reason for Munoz's absence").

Moreover, the court found that Munoz's email alluding to her neck as a reason for being "out" could "possibly" lead a jury to conclude that Nutrisystem was on notice of an FMLA-qualifying leave. In that light, a jury could also find that the company should have inquired further, after which it might have found that FMLA leave was needed.

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'TIE' GOES TO THE EMPLOYEE

The case uses the words "might," "could" and "possibly" quite a bit. But it emphasizes to counsel and clients that every absence should be looked at carefully in relation to disability or FMLA claims. Furthermore, if there is ever a question about whether an absence is related to a known disability, the "tie" should always go to the employee. •