

CALIFORNIA

EMPLOYMENT LAW LETTER



HRHero.com
A division of BLR®

DISABILITY DISCRIMINATION

Patience pays off: Employer put up with performance, attendance issues long enough

by Joel Van Parys
Carothers DiSante & Freudenberger LLP

For 11 years, Yvonne Hernandez took an average of 457 hours of protected leave per year from her job at AT&T. In the years when she wasn't eligible for protected leave, AT&T granted her unpaid leave. In addition to her attendance issues, she was frequently tardy and became a poor performer. AT&T warned her several times that she would be suspended if her attendance and performance didn't improve. Nevertheless, she continued to perform poorly and have attendance issues, and she was given a dismissal warning.

Before her dismissal became effective, Hernandez went out on leave again. AT&T finally gave her an option: Provide information about whether she would be able to do her job, with or without a reasonable accommodation, or return to work. She did neither and was terminated.

Hernandez sued AT&T, claiming, among other things, that it discriminated against her because of her disability and failed to engage in the interactive process with her. The trial court dismissed her claims, and she appealed. This case

exemplifies how an employer's patience in providing reasonable accommodations pays off.

Multiple leaves and performance problems

Yvonne Hernandez began working for AT&T in October 1998 as a service representative at its Pasadena call center. Her job involved selling products and handling customer requests, inquiries, and complaints. She suffers from mental health issues, upper and lower back trouble, and carpal tunnel syndrome.

Hernandez took various forms of leave throughout her employment. Between 2000 and 2010, she was granted approximately 3,657 hours of leave under the Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). AT&T also provided her company-initiated leave, which is unpaid leave to cover periods of absence due to disability for employees who aren't eligible for disability benefits.

In addition to her leave issues, Hernandez had performance problems. In June 2009, she was counseled for being excessively tardy to work. AT&T suspended her for one day for tardiness in October 2009. In March 2010, the company counseled her about her failure to meet service representative performance standards. She was

again suspended in May 2010 for her poor performance and attendance.

Hernandez had additional unprotected absences on September 9, 20 through 25, and 27 through 29. As a result of those absences, she was again suspended on September 30 and was given a dismissal warning for failing to meet AT&T's attendance standards. At that time, her supervisor asked her to identify a reasonable accommodation that might help her do her job and reminded her that a reduced work schedule might be available. However, she couldn't identify any reasonable accommodations that might help her.

Hernandez had unprotected absences again on October 11, 12, 23, and 26. On November 4, AT&T suspended her for two days and gave her a dismissal warning. In November, she began experiencing stress, anxiety, panic attacks, and dry mouth. Her doctor took her off work on November 10.

AT&T granted Hernandez unprotected leave from December 7, 2010, through January 13, 2011, and extended her leave on a monthly basis into April 2011. In a leave extension letter dated April 18, 2011, the company informed Hernandez that if her doctor continued to deem her disabled and she remained unable to perform the essential functions of her job, her unprotected leave wouldn't be extended beyond May 9, 2011. The letter further explained



CALIFORNIA NEWS IN BRIEF

DIR reports on antifraud efforts. The California Department of Industrial Relations (DIR) announced on January 18, 2017, that it has stayed (halted) more than 200,000 liens worth a combined value of more than \$1 billion. The announcement was part of DIR's report on its antifraud efforts in California's workers' compensation system. The liens are associated with 75 medical providers facing criminal fraud charges.

DIR's efforts to eliminate medical provider fraud and illegitimate liens were bolstered by two laws that became effective on January 1: Senate Bill (SB) 1160, which requires DIR to automatically stay liens owned by providers who have been indicted or charged with crimes until the disposition of criminal proceedings, and Assembly Bill (AB) 1244, which requires the administrative director of the Division of Workers' Compensation (DWC) to suspend any medical provider, physician, or practitioner convicted of fraud from participating in the workers' comp system.

Cal/OSHA launches safety campaign for tree-trimming. The California Division of Occupational Safety and Health (Cal/OSHA) announced in January that it has launched a safety campaign in response to four recent workplace fatalities involving tree-trimming. As part of the Tree Work Safety Emphasis

Program, Cal/OSHA inspectors throughout the state who observe unsafe tree-trimming or tree-removal operations will investigate possible violations. Inspectors will also respond to reports of unsafe operations. The major causes of tree-trimming injuries and fatalities include falls, electrical shock, being struck by a tree branch, chainsaw laceration, palm tree skirt collapses, and ladder accidents.

State releases audit unit's annual report. The DWC has posted the 2016 DWC Audit and Enforcement Unit annual report on its website at www.dir.ca.gov/dwc/AuditReport2015/AuditReport.pdf. The annual report provides information on how claims administrators audited by the DWC performed and includes the administrative director's ranking report for audits conducted in calendar year 2015.

The 2016 Audit and Enforcement Unit annual report details the results of audits conducted in 2015 and provides the name and location of each insurer, self-insured employer, and third-party administrator audited during that time. By law, the audit findings must include the number of files audited, the number and type of violations cited, and the amount of any undisputed compensation found due and unpaid to the injured worker. ♣

that if she was unable to perform the essential functions of her job with or without a reasonable accommodation, she might be eligible for job-search assistance.

In the letter, AT&T urged Hernandez to discuss the issue with her doctor and instructed her to complete and return a work capacities checklist (WCCL) to help the company understand her ability to work. Alternatively, she could report to work. The letter concluded by warning Hernandez that if she failed to report to work or return the WCCL, her employment would be terminated on May 10, 2011.

Hernandez failed to submit the WCCL and didn't return to work on May 10. Instead, she forwarded AT&T a letter from her doctor stating that she was temporarily totally disabled and on medical leave until approximately June 9, at which time she would be reevaluated. AT&T fired her on May 10, 2011.

Hernandez cannot maintain a disability discrimination claim

Hernandez sued AT&T for disability discrimination, including failure to engage in a good-faith interactive process and failure to provide a reasonable accommodation. In reviewing AT&T's motion to dismiss her claims, the trial court examined Hernandez's long record of absences and use of protected leave. The court found that she couldn't make a claim for discrimination because she couldn't regularly and reliably show up for work and do her job. The trial court further found that AT&T consistently interacted with her and offered her accommodations, and her failure to respond to the company's leave extension letter caused her termination.

On appeal, the court ruled that Hernandez couldn't establish a claim for disability discrimination because she didn't have regular and reliable attendance, which was an essential function of her job. AT&T's written attendance policy describes regular and reliable attendance as an essential function of every position and a condition of employment.

The court examined the number of absences Hernandez had throughout the years and the fact that she wasn't able to return to work in May 2011 and concluded that a person who isn't at work simply cannot perform her job functions. In other words, the court ruled that there could be no disability discrimination claim because Hernandez wasn't able to be at work.

Turning to the claim that AT&T failed to engage in the interactive process, the court explained that the company regularly interacted with Hernandez and provided her numerous accommodations, including unprotected leave. The court noted that just before Hernandez left work in September 2010, AT&T asked her whether any reasonable accommodation would enable her to do her job. In fact, the court explained, Hernandez ended the

interactive process by improperly responding to AT&T's final communication.

Hernandez failed to submit the WCCL, didn't return to work, and never responded to AT&T's final letter. For those reasons, the court of appeal found there was no evidence that AT&T failed to provide a reasonable accommodation, and it affirmed the trial court's dismissal of her claims. *Hernandez v. Pacific Bell Telephone Company* (California Court of Appeal, 2nd Appellate District, 1/24/17, unpublished case).

Bottom line

This case provides at least two important lessons for California employers. First, AT&T's policy specifically states that regular and reliable attendance is an essential function of every position. That allowed the company to argue that Hernandez's absenteeism meant that she couldn't perform one of the essential elements of her job. Although it seems self-evident, you should ensure that your company includes such an attendance requirement as part of its policies.

Second, AT&T provided Hernandez considerable amounts of protected and unprotected leave and made a very reasonable effort to accommodate her, including offering to help with her job search, encouraging her to discuss the issue with her doctor, and offering the option of a reduced work schedule. Additionally, in its last communication with her, the company again sought information that would allow her to remain an employee and tried to determine if there was a job that might fit her current disabilities. The letter clearly noted that she would be terminated if she didn't provide the required information or show up at work when her current leave expired. California employers should take note of AT&T's careful and reasonable approach, which included many opportunities and instances of accommodation before it moved forward with the termination.

The author can be reached at Carothers DiSante & Freudenberg LLP in Sacramento, jvanparys@cdflaborlaw.com. ♣

4th Annual



SAFETY SUMMIT

Powered by



Austin, Texas

Learning Workshops: April 3, 2017
Main Conference: April 4-5, 2017

<http://store.hrhero.com/safety-summit-17>