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Labor & Employment Alert

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First Circuit decision on termination of employment for attendance issues

By Shelagh C.N. Michaud and Jessica S. Jewell

The First Circuit determined that an employer can terminate an employee for pre-existing performance issues despite protected status.



What's the impact?

- Employers should create and implement clear attendance and time-off policies and ensure that these time-away policies are consistently applied to similarly situated employees.
- Businesses can minimize exposure by properly documenting performance and/or attendance issues and addressing them proactively.

In *Serrano-Colon v. United States Department of Homeland Security*, the First Circuit Court of Appeals affirmed the dismissal of discrimination and retaliation claims brought by a former TSA agent, Almaris Serrano-Colon (Serrano or Plaintiff) whose employment Homeland Security terminated because of a history of erratic attendance and her failure to correct her attendance despite receiving multiple warnings. Serrano alleged that she was fired because of her sex, pregnancy status—and specifically that she had a high-risk pregnancy, disability, and parental

status. Serrano argued that being fired while experiencing a high-risk pregnancy was alone sufficient to establish discriminatory animus on the part of the TSA. The United States District Court of Puerto Rico and the First Circuit disagreed and in dismissing all counts, affirmed that employers may terminate employment based on pre-existing performance issues—including attendance issues—which persist even where the employee is pregnant, suffers from a medical condition, and/or is temporarily disabled.

Plaintiff's pregnancy, absenteeism, and discrimination claims

In 2007, Serrano, a single mother of two children, began working as a TSA agent at Mercedita/Ponce International Airport in Puerto Rico. Throughout her 8-year employment, she worked different schedules based on personal or medical needs (i.e., requesting a reasonable accommodation) as well as TSA policy (reduced schedules offered to all TSA agents). She was also granted multiple leaves of absences (paid and unpaid) throughout her employment. Despite the changes throughout the years, the one constant was that Serrano was reliably unreliable—calling out of work immediately prior to or after her scheduled days off, “thus effectively extending her ‘weekend,’” consistently failing to provide advance notice for absences, and frequently arriving late to work without notice or approval. The TSA issued her multiple warnings over several years and informed her that continued attendance issues could result in termination of employment.

In early 2015, Serrano informed her supervisor that she was pregnant. During her pregnancy, Serrano was assigned light duty work and continued her pattern of unscheduled absences and tardies. In line with previous discipline, the TSA issued Serrano yet another warning for her absenteeism and tardiness. She then requested 20 hours of sick leave and then later a reduced work schedule for personal/medical reasons, which included experiencing symptoms of a miscarriage and having a high-risk pregnancy. Both requests were denied based at least in part on Serrano’s demonstrated history of performance issues and also on business needs. After her attendance issues persisted, Serrano’s employment was terminated, during her pregnancy, in August 2015.

Before her termination, Serrano filed multiple charges of discrimination with the EEOC—one in 2011, which resulted in a settlement, and another in June 2015. After her discharge, Serrano filed a lawsuit alleging discrimination based on disability, gender, and parental status and retaliation for termination after filing EEOC complaints under Title VII, the Rehabilitation Act, the Administrative Procedure Act (APA), the Fifth Amendment, and the Puerto Rico Civil Code. She alleged that she was denied reasonable accommodations (i.e., reduced schedule, advance of sick leave, and leave time) for her medical condition, was prevented from taking FMLA leave, and had absences incorrectly marked as unexcused.

The TSA moved for summary judgment on all counts. The district court dismissed all claims. On appeal, the First Circuit affirmed the dismissal.

Discrimination, pretext, and retaliation claims fail under scrutiny

In evaluating Serrano's Title VII discrimination claim, the First Circuit presumed that Serrano could prove her *prima facie* case and jumped to determining whether TSA had proffered a legitimate, nondiscriminatory reason for the adverse employment action. The First Circuit found that TSA had satisfied its burden by showing Serrano's "chronic absenteeism, lateness, and failure to follow TSA's leave procedures," and noted that TSA had given Serrano numerous written warnings.

Next, the First Circuit considered whether Serrano had established pretext. She argued that that TSA "deliberately stimulated" her absences when TSA had failed to provide her with accommodations in the form of a reduced schedule and/or time off to avoid the absences. The court found this argument unavailing and without adequate substantiation to support the argument. It further opined:

Quite the opposite, the evidence supports TSA's position that her requests for a modified schedule were denied because the agency was short-staffed and needed Serrano to be present at her job. Moreover, the undisputed facts show that Serrano's attendance issues existed even while she was enjoying the four-on-three-off schedule that she says would have sufficed as a reasonable accommodation. Serrano does not explain how TSA "stimulated" her troubling attendance record by denying her accommodation requests when her absenteeism persisted notwithstanding her modified schedule. Serrano otherwise offers mere conclusory assertions that her absences were used as a pretext for her removal. That conjecture is not enough to support a finding of pretext.

Similarly, the court declined to adopt Serrano's contention that TSA harbored a discriminatory animus against her which she alleged was based on one stray comment by a co-worker about her being pregnant and simply because her employment was terminated during her high-risk pregnancy. The court noted that

[t]his argument, however, ignores entirely Serrano's problematic attendance record. TSA has presented evidence of Serrano's frequent absenteeism, repeated failure to notify her supervisors of her absences in advance, and noncompliance with TSA's requests for adequate documentation to support her absences. . . . That Serrano's removal coincided with her high-risk pregnancy would not permit a finder of fact to overlook her lengthy history of erratic attendance that preceded the termination decision.

In dismissing Serrano's retaliation claim, the court acknowledged that Serrano engaged in protected conduct when she filed her charge with the EEOC, but, citing the same evidence as for dismissal of her discrimination claims, noted that TSA had shown legitimate, non-retaliatory

reasons for its employment decision which had “nothing to do with any impulse to retaliate against her for protected conduct” and that Serrano had failed to show sufficient evidence of pretext.

Finally, on her claims of disability discrimination and retaliation under the Rehabilitation Act, the court found that Serrano had only proffered her own “say so” that an accommodation would have allowed her to perform her job. Noting that Serrano was often late or absent even when provided an accommodation, the court found that this evidence was not sufficient. The court confirmed that “attendance is an essential function of any job” and found that even with Serrano’s positive performance reviews for her work on the job, she had failed to perform an essential function of her position and to show that an accommodation would have permitted her to perform the essential function.

What can employers do to address attendance issues?

Employers should create and publish to their employees clear attendance and time off policies which instruct employees on the need for consistent attendance and also how to properly take time off—both when needed in advance and in emergency situations. These policies must comply with all applicable laws and may vary based on work location, but need to be consistently applied to similarly situated employees.

Employers should also properly document performance issues, including attendance issues, and establish solid performance evaluation programs. Maintaining a record of performance counseling and discipline forms the foundation for a defensible termination, but only where the coaching and discipline are part of consistent and nondiscriminatory, non-retaliatory practices. Had the TSA not created the record on Serrano’s employment issues, this decision might have come out a different way.

Finally, employers should proactively address attendance issues. When employees assert that these issues are the result of medical conditions or disabilities, or to care for an ill family member, employers should ensure that they are going through the applicable processes and evaluate whether a reasonable accommodation, such as a schedule change, reduction in hours, or taking leave, will allow the employee to do their job and will not create an undue burden for the employer. Employers should also address attendance issues as they arise and not wait for performance review time to bring them up.

Nixon Peabody has employment law attorneys through New England and the country who can help advise employers on implementing and modifying attendance and leave policies and on addressing different state and local requirements which may create the need for a variation based on work location.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Shelagh Michaud

401.454.1133

smichaud@nixonpeabody.com

Jessica Schachter Jewell

401.454.1046

jsjewell@nixonpeabody.com