United States Court of Appeals
For the Eighth Circuit

No. 19-2483

Tori Evans

Plaintiff - Appellant

v.

Cooperative Response Center, Inc.

Defendant - Appellee

Appeal from United States District Court
for the District of Minnesota

Submitted: October 22, 2020
Filed: May 4, 2021

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

LOKEN, Circuit Judge.

Cooperative Response Center (CRC) services electric utilities and monitors security and medical alarms throughout the country. CRC hired Tori Evans in 2004. She became the sole office assistant at CRC's Austin, Minnesota office in 2012. CRC terminated Evans in March 2017 for violating its "no-fault" attendance policy. In February 2018, Evans commenced this action, alleging her termination violated her rights under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*,

and the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, because she suffers from reactive arthritis, a chronic autoimmune disease. After discovery, the district court[1] granted CRC summary judgment, dismissing all claims. Evans appeals, arguing there are triable issues of fact as to whether CRC violated the ADA by discriminating and retaliating against her because she is disabled and by failing to accommodate her disability, and violated the FMLA by denying leave to which she was entitled and by discriminating against her for exercising FMLA rights. Reviewing the award of summary judgment *de novo* and the facts in the light most favorable to Evans, we affirm. See Dalton v. ManorCare of West Des Moines IA, LLC, 782 F.3d 955, 957 (8th Cir. 2015) (standard of review).

I. ADA Claims.

CRC's employee conduct policy stresses the importance of regular attendance, deeming it an "essential job function for all CRC employees." Repeated absences, failing to notify a supervisor of an absence, and unauthorized absences without approved leave are grounds for termination. CRC's attendance policy provides that unexcused absences that are not FMLA-eligible or otherwise part of an approved leave of absence generate "points" that progressively lead to verbal warnings, then written warnings, then termination if an employee receives ten points in a rolling twelve month period.

In December 2015, Evans began suffering from diarrhea, mouth sores, and severe anemia. She consulted her physician, Dr. Gregory Angstman. After these symptoms caused Evans's hospitalization in April 2016, Dr. Angstman certified to CRC she was suffering from a serious health condition. In June, Dr. Angstman diagnosed Evans with reactive arthritis, an autoimmune disease whose symptoms

[1]The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

include gastrointestinal illness, oral lesions, and joint pains. Dr. Angstman advised CRC that Evans would likely need a half day off once or twice per month to attend medical appointments and a full day off once or twice per month to deal with recurring arthritic flare-ups. A CRC human resources employee (Jennifer Groebner) informed Evans the company had approved up to two full days and two half days of intermittent FMLA leave per month but noted that "absences above and beyond the FMLA approved frequency" would be eligible for points.

In the succeeding months, Evans took intermittent FMLA leave on numerous occasions, but there were eleven days she received a point after being denied FMLA leave, point-bearing absences that led to her termination in March 2017. In a December annual performance review, Evans's supervisor Kerry Wylie noted that Evans needed to improve her attendance, a "key" part of her role, because her frequent absences burdened co-workers and caused a delay in functions that could not await her return. When Evans was absent, Wylie and accounting department staff performed duties that could be covered in her absence. Wylie testified that she could generally manage covering for Evans but the absences burdened co-workers.

After the performance review, Evans did not incur another unexcused absence until March 2017, taking approved FMLA leave on four occasions. On March 22, Evans texted Wylie that she would be absent the next two days because she had no voice and was developing a slight fever. CRC assessed a point because lost voice was not among her listed FMLA symptoms.[2] Evans returned to work on March 24 but left after emailing Wylie that her fever had returned. She informed Wylie's supervisor, Brad Fjelsta, and human resources staff that she was leaving but did not say she was seeking FMLA leave or suffering from a reactive arthritis flare-up. CRC assessed a half point for this absence, putting Evans at ten within the twelve-month

[2]CRC drafted a final written warning that went undelivered because Wylie was out of the office until March 27.

period. On Monday, March 27, Wylie and Groebner advised Evans CRC was terminating her employment for excessive absences in violation of the company's attendance, employee conduct, and work rules policies.

A. ADA Discrimination. Evans first asserts that her termination violated the ADA's prohibition against discharging an employee on account of her disability. See 42 U.S.C. § 12112(a). To prove a claim of disability discrimination, an employee may rely on either direct or indirect evidence. Lipp v. Cargill Meat Sols. Corp., 911 F.3d 537, 543 (8th Cir. 2018). Evans stakes her ADA claims on the latter, arguing she presented sufficient evidence of discrimination under the familiar burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) -- a plaintiff establishes a prima facie case by demonstrating: "(1) that [she] was disabled within the meaning of the ADA; (2) that [she] was qualified to perform the essential functions of the job with or without a reasonable accommodation; and (3) a causal connection between an adverse employment action and the disability." Lipp, 911 F.3d at 544 (cleaned up). If she makes that showing, "the burden of production then shifts to the employer to show a legitimate, nondiscriminatory reason for the adverse action. The burden then returns to the plaintiff to show that the employer's proffered reason was a pretext for discrimination." Id. (quotation omitted).

Many of Evans's duties as the sole office assistant required her physical presence at the office. These responsibilities included answering phones, welcoming visitors, coordinating travel itineraries, and helping the accounting department with check deposits and monthly billing. The district court concluded that Evans was "unable to perform the essential functions of her position" -- the second element of the prima facie case -- "[b]ecause [she] could not come to work on a regular and reliable basis." Alternatively, the district court held that Evans could not show that "CRC's legitimate, nondiscriminatory reasons for firing her" were pretextual. We need only consider the first ground to affirm. See Alexander v. Northland Inn, 321 F.3d 723, 726 (8th Cir. 2003).

We have "consistently stated that regular and reliable attendance is a necessary element of most jobs." Lipp, 911 F.3d at 544 (quotation omitted). "[A]n employee who is unable to come to work on a regular basis is unable to satisfy any of the functions of the job in question, much less the essential ones." Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847, 850 (8th Cir. 2002) (cleaned up). We must consider an employer's judgment that regular and reliable attendance is an essential function of an employee's job, looking to relevant evidence such as written job descriptions and policies regarding attendance and workplace conduct. See Lipp, 911 F.3d at 544, quoting 42 U.S.C. § 12111(8) and 29 C.F.R. § 1630.2(n)(3).

In Lipp, we affirmed the grant of summary judgment dismissing the plaintiff's ADA disability claims because of strong evidence she could not perform her job due to persistent absences. See id. at 545. Here, CRC's "no-fault" attendance policy stated that: "Regular attendance/punctuality for scheduled work hours is an *essential job function* for all CRC employees." (Emphasis added). CRC's job description for the office assistant position, filled only by Evans at the Austin location, listed tasks such as answering phones and greeting visitors that she could only perform when physically at the office. See id. Dating back to 2014, CRC warned Evans several times that her unexcused absences were "unacceptable," impaired CRC's service to its customers, and, as supervisor Wylie testified, placed an "additional burden . . . on fellow employees." See Higgins v. Union Pac. R.R., 931 F.3d 664, 670 (8th Cir. 2019). Evans admitted that her absences burdened co-workers by detracting from the time they could spend on their own duties. Her attendance was an essential function of the office assistant job. CRC was not obligated to "reassign existing workers to assist [Evans] in [her] essential duties." Dropinski v. Douglas Cnty., 298 F.3d 704, 710 (8th Cir. 2002); accord Alexander, 321 F.3d at 728.

Evans contends that CRC did not follow its policies because it failed to give a final written warning in March 2017 and inconsistently assessed unexcused absence points. The failure to provide a final written warning was excusable, given supervisor

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