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DISABILITIES

Down for the count: Court rejects cancer victim's ADA and FMLA claims

by Lance Rich

Ever wonder why in the Rocky movies, the referee never calls the fight, even though one or both of the boxers are so beaten up that they can hardly go on? There comes a point when despite the first aid received, a fighter simply has endured too much to perform effectively. In the following case, a courageous warehouse supervisor (also named Rocky) battled cancer while trying to maintain his job. However, at what point is an employer justified in stepping in and letting a chronically sick employee know that he is no longer capable of performing his job? Read on to find out.

Rocky's fight

Doyle "Rocky" Brown was a warehouse supervisor for Mueller Supply Company, which manufactures metal building products. In April 2005, he advised his supervisor, Brent McGill, that he had cancer and would need surgery. Mueller wasn't subject to the requirements of the Family and Medical Leave Act (FMLA) because it employed too few people. Nevertheless, it approved Rocky's request for FMLA leave and informed him that he had a right under the FMLA to take up to 12 weeks of unpaid leave in a 12-month period. He returned to work in May 2005 following his surgery.

Rocky took intermittent FMLA leave in 2006 and again in 2007. On January 24, 2007, he presented a doctor's note indicating that he was being treated for colon cancer, bronchitis, and fatigue and wouldn't be able to return to work until February 8. On February 7, Mueller sent him a letter explaining that he had exhausted his 12 weeks of FMLA leave. That same day, Rocky obtained another doctor's note indicating he would need three more weeks of leave. The following day, Mueller terminated his employment, citing poor work performance and excessive absences. Rocky offered to come to work against doctor's orders, but Mueller refused.

Rocky later filed suit against Mueller in federal district court in New Mexico. He raised various claims under the Americans with Disabilities Act (ADA) and the FMLA. The district court denied his claims without a trial, and Rocky died before filing an appeal. Gabriella Valdez, the personal representative of his estate, appealed to the U.S. Tenth Circuit Court of Appeals, whose rulings apply to Utah as well as New Mexico.

'You can do it, Rock!' (or can you?)

In one of the *Rocky* movies, Rocky's trainer, played by Burgess Meredith, shouts, "You can do it, Rock!" as encouragement to his fighter to continue battling. In analyzing the ADA claim in this case, the Tenth Circuit had to consider whether Rocky the warehouse supervisor could continue performing the essential functions of his job with a reasonable accommodation.

The court had to determine whether Mueller violated the ADA by failing to provide a reasonable accommodation for Rocky's disability. To establish a basic claim, a disabled employee must show:

- (1) he is qualified, with or without a reasonable accommodation, to perform the essential functions of the job held or desired; and
- (2) he was discriminated against because of his disability.

Under the first prong, if a person can't perform the essential functions of his job, the court must determine whether a reasonable accommodation by the employer would enable him to do so. Valdez argued that Rocky could have performed the essential functions of his job had he (1) been allowed to work from home, (2) been given additional leave time, (3) been temporarily assigned to a new position, or (4) had his duties reassigned to another employee. The court rejected each of those arguments.

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Rocky finds no path to victory

With respect to the “working from home” argument, the court noted that Rocky had conceded that his job required physical attendance at the workplace. Although he could have used technology to perform many of his job duties, working from home would have limited his ability to perform several important aspects of his job. For example, he couldn’t conduct inventory counts, interact with customers, or effectively supervise his staff from home. While Valdez argued that Mueller could have delegated some of those tasks to other workers, the court stated that the ADA’s reasonable accommodation requirement doesn’t require employers to reallocate essential employee duties.

The court also rejected the argument that Mueller could have reasonably accommodated Rocky with additional leave time. The court stated that additional leave time can be a reasonable accommodation when (1) the expected duration of impairment is known and (2) the employee has a good prognosis for recovery. However, when it’s uncertain if or when an employee will be able to return to work, a leave of absence is not a reasonable accommodation. The court found that in light of Rocky’s colon cancer diagnosis, frequent absences, and inability to return to work (based on his doctor’s earlier note), it was uncertain if or when he would sufficiently recover to return to work.

Next, the court rejected the argument that Mueller could have reasonably accommodated Rocky by using a temporary worker or an existing employee as a substitute for him. The court stated that requiring an employer to reallocate job duties to change the essential functions of a job isn’t a reasonable accommodation. It also rejected the argument that Rocky could have been temporarily reassigned, mainly because he failed to identify an appropriate job vacancy.

A futile fight

The court then turned to Valdez’s claim that Mueller violated the ADA by failing to engage in an interactive process to determine whether a reasonable accommodation could enable Rocky to perform the essential functions of his job. Under the ADA’s implementing regulations, once a qualified employee informs his employer of a disability, the employer must engage him in an interactive process to determine whether a reasonable accommodation exists.

However, the court explained that the interactive process is only a means to an end and that to recover under the ADA, an employee must show that a reasonable accommodation was possible. The court concluded that, in this case, Mueller wasn’t required to engage in a futile interactive process when no reasonable accommodation was possible.

Calling the fight on the FMLA claims

Valdez also asserted several arguments that Mueller had violated the FMLA. Specifically, she claimed it interfered with Rocky’s right to FMLA leave, failed to give him proper notice under the FMLA, and retaliated against him for taking FMLA leave. The court rejected each of those arguments. To establish an FMLA interference claim, Valdez was required to show:

- (1) Rocky was entitled to FMLA leave;
- (2) Mueller’s adverse action interfered with his right to take FMLA leave; and
- (3) Mueller’s action was related to Rocky’s exercise or attempted exercise of his FMLA rights.

The court decided that even assuming Rocky had been entitled to FMLA leave, Valdez failed to satisfy the second element of the test because there was nothing in the record to suggest that he hadn’t exhausted his 12 weeks of leave. Valdez tried to argue that there was an inconsistency between Mueller’s official timekeeping records and McGill’s personal records. The court noted that McGill had testified that his records were informal and he wasn’t always consistent in updating them. While McGill’s personal records showed fewer absences than Mueller’s official records, they still showed that Rocky had exceeded his 12 weeks of leave.

Valdez also argued that Mueller interfered with Rocky’s FMLA rights by failing to give him notice of the amount of time he had taken off within one or two business days of the requested time. However, the court noted that Valdez conceded notice isn’t strictly due within one or two days. Ultimately, the court rejected her argument because Rocky had failed to raise it in the district court.

Finally, the court rejected Valdez’s FMLA retaliation claim. The court explained that a retaliation claim may be filed when an employee:

- (1) successfully took FMLA leave;
- (2) was restored to his previous employment status; and
- (3) was adversely affected by an employment action postdating his return to work.

Because Rocky was denied reinstatement following leave, the court determined that his claim was properly classified as an interference claim rather than a retaliation claim. The court further concluded that even if he could file a retaliation claim, it would fail for the same reason as his interference claim. In short, because he had exhausted his 12 weeks of FMLA leave, he wasn’t engaged in a protected activity when Mueller fired him. *Valdez v. McGill*, 2012 WL 432635 (10th Cir., February 13, 2012).

What to expect in a Rocky sequel

Just as the original *Rocky* movie storyline has been replayed in multiple sequels, employers are likely to see

some version of this story at some point in the future. Employers may face a tough situation in which a chronically sick employee who has exhausted his FMLA leave may not be able to return to work. As this case shows, the ADA doesn't require employers to retain employees who can no longer perform the essential functions of their job even with a reasonable accommodation. However, employers should exercise caution and examine whether there is a reasonable accommodation before deciding to terminate those employees.

Depending on the nature of an employee's work, there may be circumstances in which a terminally ill

worker can be accommodated by reassignment to a vacant position or other available means. If in doubt, it's good practice to consult an experienced employment attorney to analyze the facts and provide a safe path to compliance. Otherwise, an employer may let its guard down only to be surprised by a knockout punch in the form of litigation from a staggering employee who was down but not out.

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