Subpar Performance by Probationary Employee Permits Dismissal after Medical Leave

Court rules poor-performing worker not entitled to reasonable accommodation. By Maureen Rubin, J.D.

SAN FRANCISCO, CALIFORNIA, UNITED STATES, November 9, 2021 /EINPresswire.com/ -- A supermarket warehouse employee who claimed employment discrimination lost his appeal when the court ruled he was not entitled to more time to improve his “subpar” performance after he returned to work following medical leave.

> “Probationary employees are considered employees under federal and California laws and are protected from discrimination the same as employees who have passed their probationary period.”
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> *Richard Koss, Bay Area Employment Lawyer*

In an opinion by Orange County Superior Court Judge James L. Crandall issued on September 27, the court affirmed a motion for summary judgment entered in favor of Albertsons by Los Angeles Superior Court Judge Richard Burdge. Crandall, sitting on assignment in Division One, denied the claim of Cristian Delgado Barrera that was filed under the California Fair Employment and Housing Act (FEHA). Crandall’s opinion has not been certified for publication.

Plaintiff Barrera was hired as an order selector during the night shift at an Albertsons distribution center on March 12, 2018. He sprained his ankle eight weeks into his 12-week probationary employment trial period. During his orientation, he received company information that stated employees could be fired for any reason during their 90-day-probationary period. After his injury, Barrera was given medical leave, despite a “subpar” performance evaluation.

Albertsons uses a sophisticated algorithm to evaluate employee performance. Its formula compares the amount of time an employee takes to perform a task to the amount of time the algorithm believes it should take. Progress is measured weekly, and regular improvement is expected. All order selectors must perform at 100 percent of the required pace by week six of their probation.

Barrera did not meet the improvement and performance prerequisites. Evidence showed that

his numbers “consistently fell below Albertsons’ expectation.” By week six, he was performing at only 65 percent of his requirement. In addition, his supervisor noted that despite additional training in week five, he showed “no real improvement” and was also late returning from lunch and breaks.


Richard Koss, San Francisco Employment Attorney

Plaintiff’s ankle injury occurred in probation week eight. He claimed it was the result of a “workplace accident” caused by a foreman who backed a forklift into his foot. Barrera did not immediately report the accident as required. He took time off, then told Albertsons about the incident two days later. He was then told to fill out the required paperwork and be examined at a clinic that handled worker’s compensation. A doctor confirmed the ankle sprain, issued treatment advice, and sent Albertsons an electronic note that excused him from work for five days.

Both Albertsons and Barrera agreed that it would not have been possible for Barrera to perform his work responsibilities while he needed to wear an ankle boot and use a cane. His position required bending, lifting and stacking required items without mechanical assistance. He was given nine days of medical leave and told that Albertsons had no other positions available that could accommodate his injuries. Later, his leave was extended for an additional month because he needed to continue wearing a boot and using a cane.

At the conclusion of his leave, Barrera failed to report for work or contact Albertsons. On June 4, the day after his medical leave ended, he came to work late. He was fired on June 5, 2018, due to his “low production numbers.”

On November 14, Barrera sued Albertsons alleging: “(1) disability discrimination; (2) failure to accommodate a physical disability; (3) failure to engage in the interactive process; (4) wrongful discharge for exercise of FEHA rights and retaliation; and (5) wrongful termination in violation of public policy.”

Albertsons moved for summary judgment on July 2, and Barrera conceded three of his causes of action but retained two objections to summary judgment because of Albertsons’ failure to accommodate his physical disability and their failure to engage in the interactive process. The trial court only granted the motion regarding failure to accommodate a physical disability. He was unable to provide any documentation about Albertsons’ alleged failure to engage in the interactive process, so that count was also properly dismissed. Plaintiff’s attempt to bar the inclusion of a declaration submitted by his supervisor was also found to be an “improper

evidentiary objection" because Barrera failed to seek a proper order to compel discovery.

After his review of the facts, Crandall's opinion explained the standard of review for summary judgment and the dismissal of the remaining cause of action for failure to accommodate a disability under FEHA. To prevail, plaintiffs must have a disability, be qualified to perform essential functions of the job with or without reasonable accommodation, and prove the employer "failed to reasonably accommodate the disability." He wrote that the burden of proof is on the plaintiff to present evidence that establishes a "triable issue of fact." Thus, Barrera had to offer "substantial evidence" that Albertsons' reasons for firing him were "untrue, pretextual" or made with "discriminatory animus."

California employment law attorney Richard Koss explains that proving the employer's reason or motive for termination is often a major burden of the employee in a discrimination case. "Some evidence," Koss says, "could be good performance reviews, commendations from customers of the employer, or commendations or awards from the employer." Other evidence, Koss says, could be what he calls "me-too" evidence, such as evidence that the employer has recently fired many disabled people or older workers or workers of a specific race. Koss also says the timing of the termination could go toward demonstrating the employer's real reason behind a termination, such as if the employee was fired right after informing the employer that the worker has cancer.

Barrera did not argue that Albertsons failed to accommodate his injury during his medical leave. His argument focused on what happened after he returned to work when he believes "further accommodation," in the form of extended time to improve his performance, should have been allotted.
Crandall disagreed with the precedent Barrera cited to support his argument. He concluded that Albertsons "was not required to offer an additional accommodation" that was "likely to be futile because, even with the accommodation… the employee could not efficiently perform the essential functions of the job." The trial court found no triable issue of material fact. The motion for summary judgment was affirmed, and Albertson's was allowed to recover costs.

Although the employee in this case had an uphill climb and was eventually unsuccessful, attorney Koss says he can definitely envision circumstances where an employer would be required to give a poor-performing probationary employee additional time to improve job performance after returning to work from medical leave. If the alleged poor performance was at least partly because of the employee's disability, then Koss believes an accommodation would be required. "Probationary employees are considered employees under federal and California laws and are protected from discrimination the same as employees who have passed their probationary period."

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