
**Federal Court Report**

**Termination for Absenteeism Might Have Been Pretext for Discrimination**

12/21/2021

By Howie Waldman - Allen, Norton & Blue, P.A.
*A member of* [*Worklaw® Network*](http://www.worklaw.com)

While an employer's reason for firing an employee, such as absenteeism, may appear to be a legitimate, nondiscriminatory reason, it may amount to a pretext for discrimination or retaliation if it conflicts with an employer's internal policy, the 1st U.S. Circuit Court of Appeals held.

The plaintiff, who was employed as a people greeter at Walmart, experienced a work-related injury that resulted in a disability. Following her return to work from the injury, the plaintiff missed several days of work and arrived late to work or left work early on several occasions due to medical appointments to treat her work-related injury. Ultimately, Walmart fired the plaintiff due to her excessive unexcused absences.

The plaintiff filed a lawsuit against Walmart alleging that the company terminated her employment because of her disability and in retaliation for engaging in protected activities. The district court disagreed, concluding that the plaintiff's attendance was an essential function of her job and there was no reasonable accommodation that would have allowed for her to attend work. Additionally, the district court found that the plaintiff's protected activities were not sufficiently connected to her termination.

The 1st Circuit reversed the district court's decision on both the plaintiff's disability discrimination claim and retaliation claim. As to the discrimination claim, the appeals court agreed with the district court that the plaintiff's attendance was an essential function of her people greeter position.

However, the appeals court determined that the plaintiff could perform the essential function of attending work with the reasonable accommodation of Walmart authorizing some of her absences or tardiness. In finding that this was a reasonable accommodation, the appeals court focused on Walmart's attendance policy, which stated that absences or tardiness related to workers' compensation are allowed and any work time that an employee misses due to a reasonable accommodation is also allowed.

Further, as to the retaliation claim, the 1st Circuit found that the plaintiff's complaint of discrimination and her request for a reasonable accommodation, which occurred less than one month before the plaintiff's termination, were sufficiently connected to her termination due to the close proximity between the protected activities and the discharge.

Lastly, as to both the discrimination claim and retaliation claim, the 1st Circuit held that although Walmart's reason for the plaintiff's termination—specifically, excessive unexcused absences—was a legitimate, nondiscriminatory reason, such reason could be a pretext for discrimination or retaliation. The appeals court relied upon an ambiguity in Walmart's attendance policy that made it unclear whether the plaintiff's absences could be excused under the policy.

*Benson v. Wal-Mart Stores East LP*, 1st Cir., No. 20-1495 (Sept. 15, 2021).

**Professional Pointer:** When drafting employment policies and job descriptions, it is important for an employer to include all relevant information that informs the employees of the employer's expectations for the job to be performed by the employee.

*Howie Waldman is an attorney with* [*Allen, Norton & Blue, P.A.*](https://worklaw.com/firms/allen-norton-blue-pa)*, the Worklaw® Network member firm in Winter Park, Fla.*