

2010 WL 10903676 (N.J.Super.A.D.) (Appellate Brief)
Superior Court of New Jersey, Appellate Division

Jennifer MARAZZO, Plaintiff-Appellant,
v.
MERCER COUNTY BOARD OF SOCIAL-SERVICES, Defendant-Respondent.

No. A-5885-08T1.

February 2, 2010.

On Appeal From: Superior Court of New Jersey-Civil Division-Mercer County Docket No.: MER-L-1691-03
Sat Below: Hon. Andrew Smithson, J.S.C.

Brief on Behalf of the Defendant-Respondent

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***1 PRELIMINARY STATEMENT**

This case arises from the plaintiff Jennifer Marazzo's claim that her employer, Mercer County Board of Social Services, (herein after referred to as the "Board") failed to reasonably accommodate her disability by not allowing her to arrive to work fifteen to

thirty minutes later everyday than other employees. Ms. Marazzo takes antidepressants and anxiety medication that cause her to be slower and groggy in the morning. Ms. Marazzo worked as a social worker in the Adult Protective Service unit investigating **elder abuse**.

This case hinges on weighing the equities between the Board's responsibility to provide an accommodation for Ms. Marazzo's position as an Adult Protective Service worker and whether Ms. Marazzo's request was reasonable in that she could not overcome circumstances in her control to arrive to work in a timely fashion. Ms. Marazzo admitted that she can determine at what time she takes her medicine, however she claimed that her routine which assists her in dealing with her mental illness and the effects of the medication, namely her undefined exercise schedule at the gym and her counseling appointments, would be compromised if she took her medication one half an hour earlier each evening to arrive to work in a timely fashion. She further indicated that she lived approximately ten minutes from the Agency and had an alarm clock with the time being in her control. Ms. Marazzo, despite having received two disciplinary complaints unrelated to her tardiness and absenteeism, claimed that the medication did not limit her ability to work generally after 8:45 a.m. to 9:00 p.m., but interferes with her ability to get to work prior to 8:30 a.m. Ms. *2 Marazzo is not an individual that is "substantially limited," and thus is not entitled to her requested accommodation.

Ms. Marazzo indicated that she is of the belief that she could have made up the time she missed in the morning by staying later in the day or working through her breaks or by not taking her breaks. The Board denied her request for that accommodation because one of essential job function in Ms. Marazzo's position, as a social worker in an Adult Protective Service unit is regular attendance and daily coverage for case assignments. Ms. Marazzo contended in her deposition that she was very able to do her job and that she did not have a problem doing her job, despite her latest unit supervisor's frank statements in his deposition about her poor performance, lackluster reviews from her former unit supervisor citing time management problems, and pending disciplinary charges for not properly tending to cases. Ms. Marazzo further contended that she could piece meal make up the time together on Tuesday nights, despite her poor time management skills, when the building was open to service clients other than those for Adult Protective Service. Ms. Marazzo's supervisor testified that he had an issue with Ms. Marazzo's request because of case coverage during the morning and the need to have a supervisor stay later to supervise Ms. Marazzo during the time she needed to "make-up" the time she missed, as the building closes at 5:00 p.m.

STATEMENT OF FACTS

1. The plaintiff Jennifer Marazzo (hereinafter referred to as "plaintiff") was employed by the Mercer County Board of Social Services (hereinafter referred to as "Board") as an Adult Protective Service investigator social worker having returned from an extensive medical leave and psychiatric hospitalization (PA92).

2. The plaintiff was a participant in a union contract that specified hours, time, breaks, and lunch times, which included operation between 8:30 a.m. and 4:30 p.m. and did not allow for breaks to be used to substitute for compensatory time, and the Board's building is shut down completely, all employees having vacated the premises by 5:00 p.m (PA129).

*4 3. It is undisputed that the plaintiff was accumulating steps in a disciplinary action for her tardiness, although this tardiness was not every day, as there were varying times and reasons why Ms. Marazzo arrived late (PA107-115).

4. It is undisputed that the plaintiff was cited in her last reviews as having poor time management, unsatisfactory dependability, and often missing deadlines (PA131-138).

5. Ms. Marazzo takes a regime of anti-depressants and anxiety medication that causes her to be slower and groggy in the morning. (PA93)

6. Ms. Marazzo worked in a unit where her presence was required for coverage and case assignments of investigating **elder abuse** per a Board administrator, as meeting with resources to assist the **elderly** are typically not available in the later evening. (PA 166, p. 56, line 9 through p. 57, line 13).

7. Ms. Marazzo indicated that she is of the belief that she could have made up the time she missed in the morning by staying later in the day or working through her breaks (PA95).

8. The Board denied her request for that accommodation because one of essential job function in Ms. Marazzo's position, as a social worker in an Adult Protective Service unit is regular attendance (PA184, p 35 line 1 through p. 36 line15).

9. Ms. Marazzo contended in her deposition that she was very able to do her job and that she did not have a problem doing her job, despite her latest unit supervisor's frank statements in his deposition about her poor performance, lackluster reviews from her former unit supervisor citing time management problems, and pending *5 disciplinary charges for not properly tending to cases (PA 65 p. 46 line 20 through PA66 p.47 line 13).

10. Ms. Marazzo's unit supervisor testified that he had an issue with Ms. Marazzo's request because of case coverage during the morning and the need to have a supervisor stay later to supervise Ms. Marazzo during the time she needed to "makeup" the time she missed, as the building closes at 5:00 p.m (PA 187 p. 48 line 1 through PA 188 p. 49 line 21).

11. Ms. Marazzo testified that there was never any "formal" meeting about her issues coming into work at 8:30 a.m., as there were only informal meetings (PA64 p. 40 line 2 through 3).

12. Ms. Marazzo failed to document or to give a specific timelines as to when she exercised or when her appointments were scheduled that controlled her taking her medication later so that it interfered with her attendance at her job.

13. It was not until the summary judgment motion that she disclosed that it was her evening medication regime and not her morning medication regime that caused her to be late in the mornings (PA93 paragraph 8).

14. Ms. Marazzo, despite having received two disciplinary complaints unrelated to her tardiness and absenteeism, claimed that the medication did not limit her ability to arrive at work generally after 8:45 a.m. to 9:00 p.m., but interferes with her ability to get to work prior to 8:30 a.m. Ms. Marazzo is not an individual that is "substantially limited." (PA94 paragraph 9).

*6 15. Ms. Marazzo admitted that there was no specific time her medication had to be taken other than in the a.m. or the p.m. (PA65 page 43 line 17 through page 46 line 6).

16. The court granted summary judgment as it determined that there was nothing in the record to suggest that the plaintiff could not adjust her schedule so that her medication would not interfere with her employment.

CIVIL ACTION

PROCEDURAL HISTORY

On or around July 30, 2007, in the Law Division of Mercer County, the plaintiff-employee filed a complaint alleging that her employer the Mercer County Board of *3 Social Services had failed to reasonably accommodate her pursuant to the New Jersey Law Against Discrimination (PA18-PA21), and moved for summary judgment on or around June 1, 2007 (PA23-PA29). The plaintiff filed a letter brief in opposition on or about June 23, 2009 (PA77-PA90), to which defendant filed an additional letter brief in response on or around July 6, 2009 (PA74-PA76).

The motion was orally argued on July 24, 2009, before the Honorable Andrew J. Smithson, J.S.C.; Judge Smithson granted summary judgment to defendant (PA314). The plaintiff appealed (PA315).

ARGUMENT

I. Standard of Review

The New Jersey Supreme Court in *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 523 (1995) instructed that “[t]o send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose.” *Id.* At 540-541. Thus the summary judgment procedure is designed to prevent such harassment of deserving movants and eliminate from crowded court calendar cases in which a trial would serve no useful purpose and those in which the threat of trial is used to coerce a settlement. *Id.* At 541.

II. In Granting Summary Judgment The Trial Court Found That The Plaintiff Was Not A Qualified Applicant Under The New Jersey Law Against Discrimination In That Her Request For Accommodations Was Not Reasonable Considering That Her Medication Regime Was In Her Control.

“[T]he import of the [LAD] is that the handicapped should enjoy equal access to employment, subject only to limits that ... cannot [be] overcome.” *Jansen v. Food Circus Supermarkets, Inc.*, *supra*, 110 N.J. 363, 374 (1998) It is without dispute that the *7 LAD “must be applied sensibly with due consideration to the interests of the employer, employee, and the public.” *Id.*

In this case the plaintiff claims that she could not overcome waking up an additional fifteen to thirty minutes earlier, or in the alternative, to take her medication fifteen to thirty minutes earlier the evening before a workday in order to arrive to work on time. In fact, the plaintiff believed that after the clock struck 9 a.m., she was able and competent to do her job with no difficulty. In fact, Plaintiff Marazzo indicated, “I was very able to do my job. I did not have a problem doing my job.” It is reasonable to conclude that the plaintiff's problem, according to the plaintiff, was getting to work, not working. Ms. Marazzo contended in her deposition that she was very able to do her job and that she did not have a problem doing her job, despite her latest unit supervisor's frank statements in his deposition about her poor performance, lackluster reviews from her former unit supervisor citing time management problems, and pending disciplinary charges for not properly tending to cases (PA 65 p. 46 line 20 through PA66 p. 47 line 13).

The courts have “consistently held that regular and reliable attendance is a necessary element of most jobs,” and that by its nature “a reasonable accommodation would allow her to perform the essential functions of her position” rather than excuse an inability to perform the job's essential functions. *Rask v. Fresenius Med. Care N. A.*, 509 F.3d 466, 469-470 (8th Cir. 2007), *cert. filed*, 76 USLW 3583 (Apr 15, 2008).

*8 If the accommodation is job-related, *e.g.*, the accommodation specifically assists the employee in performing the duties of a particular job, the accommodation will be considered reasonable. “On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide.” *Id.* at 471 (quoting 29 C.F.R. § 1630.9 (emphasis added)). Ms. Marazzo admitted that there was no specific time her medication had to be taken other than in the a.m. or the p.m. (PA65 page 43 line 17 through page 46 line 6). Ms. Marazzo failed to document or to give a specific timelines as to when she exercised or when her appointments were scheduled that controlled her taking her medication later so that it interfered with her attendance at her job. It was not until the summary judgment motion that she opined that it was her evening medication regime and not her morning medication regime that caused her to be late in the mornings (PA93 paragraph 8).

III. Excessive Absenteeism Need Not Be Accommodated Under The New Jersey Law Against Discrimination Where Regular Attendance Is An Essential Job Function.

“The ADA does not require the employer to eliminate an essential function of the plaintiff's job.” *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1229 (11th Cir. 2005). Where an employee requests not just a change in work hours, but the right to be

late on an unpredictable basis, the analysis typically does not proceed beyond whether *9 attendance is an essential function of the job. An employee who cannot appear for work on a regular and predictable basis because of his disability will rarely be found to be “qualified.” *Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir. 2000). Punctual attendance can indeed be an essential function of a job and cannot be reasonably accommodated with schedule modifications. In *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000), plaintiff's depression medication caused her to be late in the morning. The Court concluded that punctual arrival was an essential function of the position, in order to serve customers when the store was opened for business. By the same token, punctual arrival was an essential function of a later shift, because other employees would be forced to cover or perhaps work overtime waiting for plaintiff to arrive when she was not punctual. Accordingly, the Court concluded that the employer had no duty to accommodate the employee's tardiness by exempting her from punctual attendance requirements. The key issue is whether the employee's normal work schedule is an essential function of his job. When the employer requires starting work at a particular time, working a particular shift, or working long hours as a prerequisite to employment, attendance is an essential function and refusal to provide the accommodation will likely be upheld - indeed, the employee would not be “qualified” under the ADA. See *Jacques v. Clean-Up Group, Inc.*, 96 F. 3d 506 (1st Cir. 1996). It is only when the work schedule is not an essential function of the position, the issue then becomes whether the proposed accommodation would impose an undue hardship upon the employer.

*10 Ms. Marazzo's unit supervisor testified that he had an issue with Ms. Marazzo's request to arrive late every morning because of case coverage during the morning and the need to have a supervisor stay later to supervise Ms. Marazzo during the time she needed to “make-up” the time she missed, as the building closes at 5:00 p.m (PA 187 p. 48 line 1 through PA 188 p. 49 line 21). In the alternative, Ms. Marazzo's legal team extensive argued that the plaintiff could have been accommodated on Tuesday evenings when the building is opened or merely worked through her break time.

The plaintiff was a participant in a union contract that specified hours, time, breaks, and lunch times, which included operation between 8:30 a.m. and 4:30 p.m. Employee are entitled to a rest break of fifteen (15) minutes per 7:4 *Meal and Rest Breaks* from the Employee Handbook (PA129). Break time, however, is non-cumulative and break time “shall” not be combined or used by employees to adjust their work schedule (e.g. taking a meal break from 3:30p.m. to 4:30 p.m.). *Id.* In the alternative employees are not allowed, nor would it be advisable to have employees arrive at 9:30 a.m. and work with out a break for the rest of the day. Employees are not entitled to compensation for break time not taken. Break time is non-cumulative. *Id.* Furthermore, the Board's building is shut down completely, all employees having vacated the premises by 5:00 p.m (PA129). The plaintiff suggests that this break time be used cumulatively in the morning to excuse her lateness, thus trampling on her duties required of her in the morning and thus imposing on her the requirement that she work without a break for the rest of the day.

*11 Under the NJLAD, as at least two courts have held that an employer is not required to accommodate an employee's chronic and excessive absenteeism, even where the absences are related to a handicap recognized by the NJLAD. *Svarnas v. AT&T Communications*, 326 N.J. Super. 59 (App. Div. 1999). *Leonard v. Metropolitan Life Ins. Co.*, 318 N.J. Super 337 (app. Div. 1999). “Even an employee whose job performance is more than adequate when she is working will not be considered qualified for the job unless the employee is also willing and able to come to work on a regular basis.” *Svarnas*, 326 N.J. Super. 59.

Ms. Marazzo testified that there was never any “formal” meeting about her issues coming into work later than at 8:30 a.m., as there were only informal meetings (PA64 p. 40 line 2 through 3) yet through her transcript she conveniently vague about her attendance at various meetings with her unit supervisor.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this court affirm the summary judgment by the trial court judge.

Dated: February 1, 2010

MERCER COUNTY BD. OF SOCIAL

SERVICES LEGAL DEPARTMENT

By: Kristine Walsh, Esq.

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