

# ADA and FMLA Claims Fail for Call Center Employee Who Dropped Calls

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In a published opinion, the Tenth Circuit Court of Appeals recently ruled that the ***Americans with Disabilities Act (ADA)*** and the Family and Medical Leave Act (FMLA) do not require employers to excuse an employee's misconduct even though the conduct was related to the employee's disability. As a result, the Tenth Circuit affirmed summary judgment in the employer's favor on the employee's disability discrimination claim and FMLA retaliation claim. *DeWitt v. Southwestern Bell Telephone Company*, No. 14-3192, Tenth Circuit Court of Appeals (January 18, 2017).

## Background

In 2009, a customer service representative working for Southwestern Bell Telephone Company started taking leave intermittently under the Family and Medical Leave Act (FMLA) for health issues related to her Type I diabetes. The representative alleged that she took FMLA leave only when she did not have any available vacation days because Southwestern Bell "frowned upon" the use of FMLA leave. According to one former manager, because the use of leave "negatively impacted the sale quota of the sales manager" the company "targeted" employees who use leave for discharge. The manager further stated that the representative was on the "target list" of employees who "should be fired if possible for other reasons."

After the employee mistakenly left a customer's phone service connected after cancellation—a terminable offense—Southwestern Bell suspended her and later placed her on a "Last Chance Agreement." According to the agreement, "even one incident of failing to maintain satisfactory performance" in all of the components of her job, "may lead to further disciplinary action up to and including dismissal."

Approximately one month later, the representative allegedly suffered a drop in blood sugar while at work and hung up on two customers. Later that day, her First Line Supervisor and a Southwestern Bell manager met with her regarding the dropped calls. The employee claimed that she did not remember taking the two calls and told her supervisors of her "dangerously low blood sugar levels." Two weeks later, Southwestern Bell terminated her employment for dropping the two calls in violations of Southwestern Bell's Code of Business Conduct and her Last Chance Agreement.

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The customer service representative filed suit claiming that Southwestern Bell (1) discriminated against her in violation of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) by firing her because of her disability, (2) failed to accommodate her disability in violation of the ADAAA, and (3) retaliated against her for taking FMLA leave. The district court granted summary judgment in favor of Southwestern Bell, and the employee appealed.

## **The Tenth Circuit's Decision**

### ***(1) ADAAA Discrimination Claim***

The Tenth Circuit concluded that the representative's ADAAA termination claim failed because she had failed to identify any evidence from which a reasonable jury could rationally find that her disability—and not the dropped calls—motivated her discharge. In arriving at this conclusion, the court examined the reasons considered in the decision to terminate employment. According to the court, the employee's supervisor had considered multiple factors in deciding to fire her: (1) hanging up on a customer is a two-step process, requiring "discrete decisions," (2) that the employee had "operated successfully the rest of the day and never reported that she was not feeling well," (3) that the employee had interacted with a co-worker on an instant messenger program just before she dropped the first call, and (4) that the employee had not taken a break from accepting calls.

The employee argued that this rationale was nevertheless pretext for discrimination, pointing out "evidence of her own belief that symptoms related to her diabetes caused her to disconnect the phone calls." However, the Tenth Circuit ruled that the employee "supports her pretext complaint with '[m]ere conjecture.'" According to the court, the employee's "opinion on this matter has no bearing on whether [her supervisor] honestly believed that [the employee] dropped the customer calls intentionally." The court concluded that the employee "did not point to evidence that would call into question the employer's legitimate reason for terminating her employment" and concluded that her "ADAAA termination claim must fail."

### ***(2) Failure to Accommodate***

The employee next argued that Southwestern Bell failed to accommodate her disability when it did not excuse her for disconnecting calls. According to the employee, Southwestern Bell could have overlooked the two disconnected phone calls while she was on a Last Chance Agreement. The Tenth Circuit found that the "ADAAA does not require employers to reasonably accommodate an employee's disability by overlooking past misconduct—irrespective of whether the misconduct resulted from the employee's disability." The employee had not requested a "reasonable accommodation to address concerns regarding the possibility of dropped calls," the court found, and instead was requesting "retroactive leniency for her misconduct"—which is not a reasonable accommodation under the ADAAA. "[W]e are confident that the ADAAA does not require employers to accommodate disabled employees by overlooking a past violation of a workplace rule, regardless of whether that violation was caused by the employee's disability," the court concluded. Thus, the Tenth Circuit ruled that the employee's ADAAA accommodation claim fails.

### ***(3) FMLA Retaliation***

Finally, the employee argued that Southwestern Bell fired her for taking FMLA leave. The Tenth Circuit found that Southwestern Bell's reason for firing the employee—disconnecting the two customer calls—was a legitimate non-retaliatory reason for the termination. The court noted that while one of the employee's managers made statements appearing to target the employee, that manager

was not a decision-maker with regard to the employee's discharge. Thus, the court concluded that the employee failed to demonstrate that Southwestern Bell's stated reason for its disciplinary action—the disconnected calls—was pretextual.

Based on this reasoning, the Tenth Circuit affirmed the district court's grant of summary judgment in favor of the company on all claims.

## Key Takeaways

The decision provides guidance for cases arising in the Tenth Circuit involving situations concerning so-called disability-related misconduct, making clear that after-the-fact accommodation requests for leniency are not reasonable and that—so long as the work rule at issue is consistent with “business necessity”—disabled employees can generally be held to the same conduct standards as other employees. Of course, employers must have solid grounds that enforcement of the work rule pertains to an important, not trivial, job function and must also still be sure that any action they take is consistent with how other, non-disabled, employees have been treated in similar circumstances.

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National Law Review, Volume VII, Number 66

Source URL: <https://natlawreview.com/article/ada-and-fmla-claims-fail-call-center-employee-who-dropped-calls>