LOUIS LONG,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
CALVERT COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee.	Opinion No. 18-20

OPINION

INTRODUCTION

Appellant, a Calvert County Board of Education ("local board") employee, challenges his termination from employment. The local board filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. The Appellant did not respond to the local board's motion.

FACTUAL BACKGROUND

Appellant was an equipment operator for Calvert County Public Schools ("CCPS"). He requested extended leave under the Family and Medical Leave Act ("FMLA").[1] By letter dated February 14, 2017, Laveeta M. Hutchins, Director of Human Services, pre-approved the leave request provided that the Appellant submit the required FMLA paperwork by March 1, 2017. (Motion, Ex. 2). The leave period was from February 14, 2017 through May 10, 2017, or 60 work days, whichever occurred first. *Id*. The letter advised Appellant that, prior to returning to work, he needed to submit to Human Resources medical documentation from his physician indicating his release to return to work, including any restrictions. *Id*.

CCPS publishes an FMLA Sign Off document that provides a synopsis of how FMLA applies to CCPS employees. (Motion, Ex. 3). The FMLA Sign Off document states that "prior to returning to work, [the employee] must provide to the Human Resources Department a fitness-for-duty certificate from [the] employee's health care provider, to include any restrictions if applicable." *Id*. Appellant signed the FMLA Sign Off document on February 20, 2017, acknowledging that he understood and agreed to the information contained therein. *Id*.

On February 20, 2017, Appellant submitted the requisite FMLA form requesting 60 continuous days of leave for the care of his own serious health condition. (Motion, Ex. 4). Human Resources approved the request on February 23, 2017. *Id*.

By letter dated February 27, 2017, Leslie Holt-Vega, Certified Associate Counselor Alcohol and Drug ("CAC-AD") from Hope House, advised that Appellant was admitted to Hope House Treatment Program on February 20, 2017, with estimated treatment duration from 14 to

[1] Under FMLA, an eligible employee is guaranteed job protection while using up to 12 weeks of unpaid leave that may be used concurrent with any accumulated paid leave. *See* 29 U.S.C. 2612 *et seq*.

21 days.[2] (Motion, Ex. 5). Appellant received treatment there and by letter dated March 10, 2017, Rita Robertazzi, Nurse Practitioner ("NP") from Hope House, medically cleared the Appellant to return to work on March 23, 2017. (Motion, Ex. 6). Appellant did not return to work on March 23. On March 30, 2017, however, Mukesh Mather, M.D., advised CCPS that Appellant was unable to work from March 28 to March 31, 2017. *Id*. Dr. Mather's note provided no diagnosis or other medical information. Appellant did not return to work on March 31.

Thereafter, by note dated April 6, 2017, Suzanne Pelz, Licensed Clinical Professional Counselor ("LCPC") from Pathways, advised that Appellant had been under the care of a doctor since March 24, and was unable to return to work until April 27, 2017.[3] (Motion, Ex. 8). Appellant did not return to work on April 27, 2017. *Id*.

In a May 9, 2017 note, Ms. Pelz supplemented her initial excuse slip stating that Appellant was under her care from March 21 through May 17, and that he could return to work without restrictions on May 17, 2017.[4] (Motion, Ex. 9).

Meanwhile, Appellant's 60 day approved FMLA leave expired on May 10, 2017. As of that date, Appellant had not returned to work nor had he requested an extension of his medical leave from Human Resources. By letter dated May 12, 2017, the local superintendent, Dr. Curry, advised Appellant that his "employment with [CCPS] will be immediately terminated for willful neglect of duty and job abandonment" because he failed to contact the school system and provide the required documentation from his physician to release him to return to work when the FMLA leave expired. (Motion, Ex. 11).

Thereafter, in two letters, both dated May 15, 2017, Ms. Holt-Vega confirmed that Appellant had been admitted to the Hope House Detoxification Program on May 12, 2017 and was projected to remain there until May 25. (Motion, Ex. 12). One of the letters, addressed to the Frederick County District Court, requested a postponement of a hearing concerning Appellant's absence from work due to his "inability to be present for the hearing." The letter also stated that the Appellant "continues to be evaluated to determine his needs to best facilitate full recovery." *Id*. In the other letter, addressed "To Whom It May Concern," Ms. Holt-Vega stated that the Appellant would be "referred to a step-down level of care" and that he would continue "to be evaluated to determine his needs to best facilitate the goal of sustained abstinence." *Id*. On May 30, 2017, Michael G. Hayes, M.D., Medical Director of Addiction Recovery, Inc. (Hope House) cleared the Appellant to return to work without any restrictions as of May 31, 2017. (Motion, Ex. 13).

The following chart illustrates the information the Appellant submitted to the school system:

Date Note Submitted	**Absence/Cleared to Return to Work**	**Provider**
2/27/17	2/20/17 – 14-21 days	Holt-Vega/Hope House
3/10/17	Cleared to Return to Work 3/23/17	Robertazzi/Hope House
3/30/17	3/28/17 – 3/31/17	Mather
4/6/17	3/24/17 – 4/27/17	Pelz/Pathways

[2] Hope House is a drug and alcohol treatment center.
[3] Pathways is a drug and alcohol treatment center.
[4] On August 23, 2107, Ms. Pelz amended the time frames stating that Appellant was under her care from April 6 to May 9, 2017, and that "[a]ny other dates were submitted in error." (Motion, Ex. 10).

5/9/17	3/21/17 – 5/17/17	Pelz/Pathways
5/15/17	5/12/17 – 5/25/17	Holt-Vega/Hope House
5/30/17	Cleared to Return to Work 5/31/17	Hayes/Hope House
8/23/17 amended note	4/6/17 – 5/9/17	Pelz/Pathways

On May 18, 2017, Calvert Association Educational Support Staff ("CAESS") Superintendent Meeting, CAESS UniServ Director, Mike Spahr, asked the local superintendent if the Appellant could resign rather than be terminated. Dr. Curry advised that a resignation would be accepted if promptly submitted. (Motion, Ex. 20).

On May 30, 2017, CCPS conducted an Interactive Accommodations Meeting with the Appellant, Ms. Holt-Vega, and Human Resources administrators Laveeta Hutchins, Kevin Howard, and Connie Palowski. (Motion, Ex. 14). Appellant agreed to discuss both his medical condition and his FMLA leave during the meeting. *Id*. During the meeting, they discussed that the FMLA leave expired May 10, 2017 and that the Appellant had not followed proper procedure for job protection under the law because he failed to return to work on May 11 and failed to submit a fitness-for-duty certificate from his health care provider indicating that he could work beginning May 11. Nor did he contact human resources to make any other leave arrangements. *Id*. Neither party has set forth any additional details about the meeting.

The Appellant never submitted resignation papers as Mr. Spahr stated he would. Therefore, on June 5, 2017, the local Superintendent met with the Appellant to discuss his employment with the school system. By letter dated June 15, the Superintendent summarized their meeting and reiterated that the Appellant had failed to follow proper procedure for return to work. (Motion, Ex. 15). He stated that "[t]his letter is to inform you that . . . I have decided to terminate your employment with Calvert County Public Schools effective this date, on the basis of willful neglect of duty and job abandonment. *Id*. He also advised the Appellant of his appeal rights. *Id*.

On July 7, 2017, Appellant appealed the termination alleging that it was a violation of the American with Disabilities Act (ADA) and the FMLA. (Motion, Exs. 16, 17). He claimed that the lack of timely documentation and his absences were symptoms of his disease (alcoholism) rather than willful neglect of duties and job abandonment. *Id*. In his appeal materials, Appellant included an additional medical excuse slip from Pathways covering absences from March 4 through May 11, 2017. (Motion, Ex. 18). In response, the Superintendent argued that Appellant failed to return to work or contact the Human Resources Department, failed to present medical notes in a timely manner, and failed to provide additional medical documentation until after he was informed of his dismissal.

Hearing Examiner, Gregory Szoka, Esq., reviewed the record of the case.[5] On October 26, 2017, Mr. Szoka issued written Findings of Fact, Conclusions of Law, and Recommendations finding no violation of the ADA or the FMLA. (Motion, Ex. 1). He recommended that the local board affirm the termination. *Id*. In a decision issued November 9, 2017, the local board adopted the hearing examiner's decision and upheld the termination. (Motion, Ex. 22).

This appeal followed.

[5] Appellant waived his right to an in-person hearing so Mr. Szoka decided the case on the record before him.

STANDARD OF REVIEW

A non-certificated employee is entitled to administrative review of a termination pursuant to § 4-205(c) of the Education Article. *See Homesley v. Prince George's County Bd. of Educ.*, MSBE Op. No. 14-56 (2014). The standard of review that the State Board applies to such a termination is that the local board's decision is considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

The Appellant argues that the local board's decision upholding the termination is illegal because it violates the ADA.[6] The ADA prohibits discrimination based on an individual's disability. 42 U.S.C. 12101 *et seq*. Appellant maintains that the ADA prohibited the local board from terminating him for job abandonment when he did not submit a return to work slip at the end of his FMLA leave because he was seeking treatment for alcoholism.

To establish a *prima facie* claim of unlawful termination based on disability discrimination under the ADA, Appellant must produce evidence that (1) he is an individual with a disability; (2) that he is a "qualified individual" for the employment in question, and; (3) that the local board terminated him because of his disability. *See, Jacobs v. North Carolina Admin. Office of the Courts*, 780 F.3d. 562, 572 (4th Cir. 2015).

The local board maintains that the Appellant failed to satisfy the second prong of the *prima facie* case because he is not a qualified individual for the job. To be a "qualified individual" the employee must be able to perform the "essential" (as opposed to marginal or incidental) functions of the position either with or without reasonable accommodation. *Tyndall v. Nat'l Educ. Centers, Inc. of California*, 31 F.3d 209, 212-213 (4th Cir. 1994). The decision whether an individual is "qualified" is made at the time of the adverse employment action. *EEOC v. Stowe-Pharr Mills, Inc*., 216 F.3d 373, 379 (4th Cir. 2000). The Appellant bears the burden of demonstrating that he could perform the essential functions of his job with or without reasonable accommodation. *Tyndall,* 31 F.3d at 213.

Here, the adverse employment action took place on June 15, 2017, the date of the final letter from the local superintendent to the Appellant terminating his employment. Thus, the question is whether or not the Appellant could have performed the essential functions of his job with or without reasonable accommodation on June 15.

There is no dispute that the Appellant's FMLA leave expired on May 10, 2017, and that he did not report for work on May 11 or speak with anyone at work about extending his medical leave. To be a "qualified individual" with a disability under the ADA, an employee must be willing and able to demonstrate the skills necessary to perform the job in question by coming to work on a regular basis. *Id.* at 213. "Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee 'who does not come to work

[6] In his appeal before the local board, Appellant also challenged the termination based on an alleged FMLA violation. The Appellant has dropped the FMLA claim from the State Board appeal.

cannot perform any of his job functions, essential or otherwise.' Therefore, a regular and reliable level of attendance is a necessary element of most jobs." *Id.* (citations omitted). Because the Appellant did not report for work, he was unable to perform the essential functions of his job without a reasonable accommodation.

The next question is whether the Appellant could have performed the essential functions of his job with a reasonable accommodation. Here the accommodation would be allowing additional leave beyond the 12 weeks already granted in order for the Appellant to seek treatment for his alcoholism. The ADA recognizes that, in some circumstances, a temporary leave of absence may be a reasonable accommodation. *See* 29 CFR 1630.2(o) ("[O]ther accommodations could include permitting the use of accrued leave or providing additional unpaid leave for necessary treatment. . . . "). We must determine, therefore, whether granting the Appellant additional leave is a reasonable accommodation that would have allowed him to return to work and perform the essential functions of his job.

Although leave from work may be considered a reasonable accommodation in some circumstances, it "does not require an employer to grant a disabled employee an indefinite leave of absence to treat the disabling condition." *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995). In addition, medical leave is considered a reasonable accommodation only when it is "finite and will be reasonably likely to enable the employee to return to work." *Kitchen v. Summers Continuous Care Ctr*., LLC, 552 F.Supp.2d 589, 596. (S.D.W.Va.2008). The Appellant has the burden of demonstrating that an accommodation is reasonable. *Wells v. BAE Sys. Norfolk Ship Repair*, 483 F.Supp.2d 497, 509 (E.D.Va.2007).

In determining the reasonableness of the additional leave, we must keep in mind that the Appellant had already been absent from work on excused medical leave for 12 weeks for treatment of his condition. During that time, he submitted medical return to work notices stating that he was cleared to return to work on certain days, only to fail to return on the days noted without timely notifying the school system. There were also gaps in time between when Appellant was cleared to return to work and when he would submit the next return to work notice. This left the school system in the situation of not knowing if the Appellant was going to show up for work. Although the Appellant maintains that the gaps in submitting notices and lack of contact was due to his restricted access while he was admitted for care, he was observed in the school system's payroll office during the month of April. (*See* Motion, Ex. 20). Appellant could have met with someone from Human Resources that day also, but he did not. In addition, it was only after the Appellant's leave had already expired and he received notice that he would be terminated that he submitted two more return to work notices. The first, dated May 15, 2017, from Ms. Holt-Vega at Hope House, stated that he was projected to return to work on May 25. (Motion, Ex. 12). That date came and went without the Appellant returning to work. Then there was another gap of several days before the school system received the next notice, dated May 30, 2017, from Dr. Hayes at Hope House, stating a return to work date of May 31. (Motion Ex. 13). At that point, however, Human Resources was expecting the Appellant's resignation, which never came.

Given the record in this case, it is our view that there is insufficient evidence to demonstrate that granting additional leave beyond the 12 weeks already granted was a reasonable accommodation that would have allowed Appellant to perform the essential functions of his job -- reporting for work. In light of the Appellant's ongoing pattern of not returning to work on the

dates listed on the return to work notes, the final return to work notes from Ms. Holtz-Vega and Dr. Hayes, without more, hold little value with regard to a date that the Appellant would actually return to work. Especially, the notes from Ms. Holt-Vega who indicated that the Appellant was continuing to be evaluated.

Appellant needed to submit evidence regarding his medical condition and prognosis to show that the additional leave was truly likely to enable him to return to work. *See Severson v. Heartland Woodcraft, Inc*., 872 F.3d 476 (7th Cir. 2017) ("An employee who needs long-term medical leave cannot work and thus is not a qualified individual under the ADA . . . A multi-month leave of absence is beyond the scope of a reasonable accommodation under the ADA."); *Fuller v. Frank*, 916 F.2d 558, 562 (9th Cir. 1990)(Employer was not required to give alcoholic employee another leave of absence when alcohol treatment had repeatedly failed in the past); *Schmidt v. Safeway, Inc*, 864 F.Supp. 991, 997 (D. Ore. 1994) (employer is not required "to provide repeated leaves of absences (or perhaps even a single leave of absence) for an alcoholic employee with a poor prognosis for recovery."). The Appellant has failed to meet his burden of showing that the additional leave is a reasonable accommodation. Thus, the Appellant has not demonstrated that he is a qualified individual who can perform the essential functions of his job and, he has failed to establish a prima facie case of discrimination based on his disability under the ADA.

CONCLUSION

For the reasons stated above, we affirm the local board's decision that there was no ADA violation and uphold the Appellant's termination.

Signatures on File:

_____
Andrew R. Smarick
President

_____
Chester E. Finn, Jr.
Vice-President

_____
Michele Jenkins Guyton

_____
Jean C. Halle

_____
Justin M. Hartings

_____
Stephanie R. Iszard

_____
Rose Maria Li

_____
Joan Mele-McCarthy

_____
Michael Phillips

_____
David Steiner

_____
Warner I. Sumpter

June 20, 2018