

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2017

PHILADELPHIA, THURSDAY, OCTOBER 12, 2017

VOL 256 • NO. 72

An **ALM** Publication

EMPLOYMENT LAW

Timing of Termination Leads to Viable FMLA and ADA Claims

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Special to the Legal

Neither the Family and Medical Leave Act (FMLA) nor the Americans with Disabilities Act (ADA) are so-called “job protection” statutes. Employers can and should discipline employees, up to and including termination, despite an employee having a disability or needing FMLA leave. The timing of such decisions when an employee has implicated either statute, however, should be considered very carefully, as discussed in the recent decision, *Saller v. QVC*, No. 15-2279, 2017 U.S. Dist. LEXIS 160961 (E.D. Pa. Sept. 29).

Jennifer Saller was an assistant buyer for QVC from July 2011 until her termination in March 2014. In July 2012, she was placed on a performance improvement plan after a series of incidents where she exhibited unprofessional behavior in interacting with co-workers. The PIP was withdrawn a month later.

In the fall of 2012, Saller was diagnosed with arthritis in both hands.



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Although she requested, and was granted, time off for surgery on her left hand in late 2012, QVC did not provide her with FMLA paperwork. Saller returned to work after a four-day leave of absence.

In early 2013, Saller's performance was rated a two out of five. She was classified as a “low performer-plus.” In April 2013, Saller requested that a meeting about a product for which she was responsible be moved to accommodate an appointment (which appears to have been for rehabilitation on her hand). Her supervisor

refused to reschedule the meeting and noted (in writing) that, while Saller arrived at work early in the morning, she had been leaving early on a regular basis. That same day, Saller received a coaching plan in which among other things specific reference was made to “concerns about the effect of [her] time out of the office . . .” The next day, Saller's supervisor sent a grid to human resources recording Saller's time out of the office in order to provide (in her words) “a clear picture of a deviance of standard work hours as well as how little time Saller spent in the office to recoup for the days where she left or came in late.”

In late December, Saller again took a short leave for hand surgery and again QVC did not provide FMLA paperwork. Saller returned to the workplace without incident.

In early January, the HR representative assigned to Saller's department completed a “Talent Profile Summary Data” rating Saller's performance for 2013 as a three out of five (a “solid performer”). Saller's supervisor however, rated Saller as a two, a “low performer with potential.”

In mid-February, Saller again requested time off for hand surgery to be performed in April. FMLA was, again, not discussed by QVC. A few weeks later, her supervisor prepared a formal memo detailing unprofessional behavior on the part of Saller. During

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this period, QVC began to discuss Saller's termination and her employment was ended in mid-March. She subsequently brought suit claiming FMLA interference and retaliation as well as ADA claims of retaliation and failure to accommodate.

Summary judgment was awarded to QVC on Saller's claim that the company had failed to designate her various leaves as qualifying under the FMLA. The court found that QVC granted all of Saller's leave requests and there was no evidence that she would have requested or been entitled to any benefits under the FMLA that she did not receive.

Saller also claimed that QVC had interfered with her FMLA rights by not adjusting her workload and performance goals—essentially that her workload should have been adjusted as she was working fewer hours due to her FMLA leave. The court rejected this claim as well, finding that there was no “decision or regulation

holding that the FMLA mandates an adjustment in an employee's workload where said employee takes FMLA-qualifying leave—intermittent or otherwise.”

Saller's claim that she was denied a reasonable accommodation under the ADA was also dismissed. Like Saller's FMLA-interference claim, the court found that because QVC considered and approved each request for leave or schedule modification—combined with the fact that Saller was able to perform the duties of her position throughout her employment, her failure-to-accommodate claim failed.

Summary judgment was denied to QVC on Saller's FMLA-retaliation claim and her termination-based ADA claim. With respect to the FMLA claim, the court found that Saller's request for a leave for future surgery, followed shortly by discussions of her termination, were sufficient to create an inference of discrimination. The close timing of the leave request and termination consideration was also evidence to support a prima facie case of disability discrimination, particularly in light of the comments made by Saller's former supervisor about the amount of time Saller was absent from work.

The court also found that the discrepancy between the talent profile rating (three) and her ultimate performance rating (two) created a genuine issue of fact as to whether the reason for Saller's termination (poor work performance) was pretextual. Notably, the court recognized that Saller's FMLA retaliation and ADA claims were dependent upon a factfinder finding there to have been “a large scale conspiracy by QVC

employees of all departments to lie about incidences of insubordination and unprofessionalism and conjure up reasons to find the plaintiff's performance deficient.” While noting that the court may not find the evidence to be “convincing,” it was, nevertheless, sufficient to defeat summary judgment.

While the court found that QVC's failure to treat Saller's absences as covered by the FMLA did not create a cause of action, the fact that her leaves appear to have been handled largely by her manager may have created a circumstance where her manager felt able to comment on her frustration at Saller's absences. This documented frustration, in turn, was part of the court's determination that a jury could find Saller's termination discriminatory. It is unclear why QVC did not classify Saller's absences as covered by the FMLA—but had it done so, her manager may have more clearly recognized that criticizing her leave was, at best, a dangerous proposition from a discrimination standpoint. •