

REGULAR AND DEPENDABLE ATTENDANCE IS AN ESSENTIAL JOB FUNCTION FOR A NURSE

Dealing with an employee's poor attendance is one of the bigger headaches for management, especially in health care where a crucial employee's unplanned absence could mean the difference between life and death for a patient. But the FMLA and the ADA add layers of complexity and uncertainty for employers in striking a balance between employee rights and the rights of the patients. The FMLA is comparatively straight forward. The real challenge arises under the ADA when an employer has to decide to what extent poor attendance must be accommodated. Here is the tough question that confronted a hospital in Oregon not long ago when it had to determine if completely exempting a nurse from its attendance policy was a reasonable accommodation:

Question: Is regular and dependable attendance an essential job function for a nurse?

Answer: Yes, it is!

This legal answer was recently provided by the often employee-friendly 9th Circuit Court of Appeals and is welcome good news for all employers, especially health care employers. The Court, in answering that question, framed the issue nicely:

"Just how essential is showing up for work on a predictable basis?"

"In this case of a Neo-natal Intensive Care Unit nurse, we conclude that attendance really is essential."

In reaching its conclusion, the Court relied heavily on past opinions of the 7th Circuit, which is often employer-friendly. That in itself is significant and may signal a welcome trend. The facts of this case seem to occur all too often in health care. Here is how the Court dealt with those facts:

A NURSE REQUESTS TO BE EXEMPT FROM HOSPITAL'S ATTENDANCE POLICY

The nurse had worked in the NICU for 11 years and, after having years of attendance problems, was finally diagnosed with fibromyalgia. She requested an accommodation to be completely relieved from having to comply with the Hospital's attendance policy. That policy called for discipline after having more than five unplanned absences in a rolling 12-month period. (The attendance policy, by the way, didn't count FMLA, jury duty, bereavement and other approved leaves.) For several years, the Hospital bent over backwards trying to accommodate the nurse by allowing her to call in when she was "having a bad day" and moving her shifts to avoid having to work two days in a row. Yet when she was told her part-time job was being eliminated and that she would need to find another position in the Hospital, she made inappropriate comments to patients and then accumulated seven unplanned absences. For that, she was fired. She sued under the ADA and lost at the District Court and on appeal.

THE COURT SAYS THAT'S NOT REASONABLE

Here are some examples of what the 9th Circuit had to say about her claim that the Hospital had failed to reasonably accommodate her:

- "It is a rather common sense idea...that if one is not able to be at work, one cannot be a qualified individual."
- "Sometimes it [regular attendance] is required simply because the employee must work as a part of a team."
- "[The employee's] job unites the trinity of requirements that make regular on-site presence necessary for regular performance: teamwork, face-to-face interaction with patients and their families, and working with medical equipment."
- "[The employee's] regular predictable presence to perform specialized life-saving work in a hospital context was even *more* essential than in cases like a dock worker where workers are basically fungible with one another so that it did not matter who was doing the job on a particular day."

- "Medical needs and emergencies - many life-threatening - do not mind the clock, let alone staff-nurse convenience. The 24-hour hospital unit setting thus affords a particularly compelling context in which to defer to rational staffing judgments by hospital employers based on genuine necessities of hospital business."
- "An accommodation that would allow the employee to simply miss work whenever she felt she needed to and apparently for as long as she felt she needed to as a matter of law is not reasonable."
- "The Hospital was under no obligation to give the employee a free pass for every unplanned absence."
- "An employer need not provide accommodations that compromise performance quality - to require a hospital to do so could, quite literally, be fatal."

THE GOOD FAITH INTERACTIVE PROCESS IS STILL PRUDENT

The health care employer still needs to be careful. Not all nurses are as crucial as an NICU nurse. This hospital in this case did offer many accommodations through the years. The hospital's job descriptions specifically required strict adherence to the attendance policy and listed "attendance" and "punctuality" as essential job functions. The bottom line is that it is always a good idea to engage in a **good faith interactive process** to find a reasonable accommodation if one exists. In this case, the employee's insistence on a complete exemption from compliance with the hospital's attendance policy was unreasonable and her insistence on it caused a breakdown in the process and ultimately sank her case.

Reference: *Samper v. Providence St. Vincent Medical Center*, (No. 10-35811, 9th Cir., April 11, 2012)

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