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Americans with Disabilities Act: Excusing Absences as a Reasonable Accommodation (Part 2)

What the ADA Does and Does Not Require When Responding to Periodic Absences

November 2010

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In Part 1, we discussed what the Americans with Disabilities Act (ADA) does and does not require when employees take large "blocks" of leave due to illness or injury. In Part 2, we examine what the ADA does and does not require when employees periodically take off for short increments of time—"a day here, a day there," so to speak. This issue typically implicates an employer's attendance or absence management program.

Whether you are interested in understanding better your obligations when managing absences for employees who take time off due to their own illness or injury, see a situation developing in your workplace that you know is going to result in absences for medical reasons, or want to defend an existing or emerging claim that you have been too "intolerant" of employee absences, we hope you find these Special Reports helpful.

Introduction to the "Excessive Absences" Analysis

Sitting in the Rose Garden on July 26, 1990**,** President George H.W. Bush signed the Americans with Disabilities Act, declaring it "the emancipation proclamation" for individuals with disabilities. The ADA "will offer accessible [work] environments and reasonable accommodations to empower persons with disabilities to utilize their full potential in strengthening the work force," Senator Robert Dole proclaimed on the Senate floor. "Our message to people with disabilities is that your time has come," he added.

While the ADA ensures an accessible workplace and reasonable accommodations for an individual with a disability seeking to participate in the workforce on the same basis as other employees, does the law give an individual with a disability the right to a job that he or she does not have to come to regularly? Does the ADA protect an individual who violates his or her employer's attendance policy or is absent excessively when those absences are related to the disability?

Interestingly, the legal analysis governing "periodic" or "excessive absences" (we use these terms interchangeably in this Special Report) is very different—and much more favorable to employers—than that governing "blocks of leave," which we discussed in Part 1 of the Special Report. In cases involving "blocks of leave," courts have analyzed whether the requested leave would enable the employee to return to work soon enough to be considered a reasonable accommodation. In the vast majority of "periodic absence" cases, however, courts have accepted as axiomatic that an employee who does not have regular and predictable attendance is not meeting an essential function of his or her job, and an employer is not required to remove an essential function as a reasonable accommodation.

Twenty years after the ADA was signed into law, the rules governing an employer's obligation to excuse absences—both periodic and "blocks of leave"—continues to evolve. The law concerning "periodic" or "excessive absences"—the subject of this Special Report—creates additional arguments for employers responding to employee absenteeism.

I. The Governing Law

A. <u>The Americans with Disabilities Act</u>

The ADA prohibits discrimination against an individual who can perform the essential functions of his or her job, either with or without a reasonable accommodation. Such an individual is a considered a "qualified individual with a disability." The prohibited discrimination includes "not making reasonable

accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the accommodation would impose an undue hardship on the employer. An "undue hardship" is "an action requiring significant difficulty or expense," when considering various factors, such as the nature and cost of the accommodation, the employer's financial resources, the size of its workforce, and the impact of the accommodation on its operations. The ADA's statutory examples of reasonable accommodations do not include any reference to excusing absences.

B. A Special Note on the Family and Medical Leave Act

Before proceeding further in analyzing ADA "periodic absence rights," it is important to note that employers must also consider their obligations under the federal and state family and medical leave laws. Unlike in "blocks of leave" cases, the federal Family and Medical Leave Act (FMLA) and comparable state laws are often a major obstacle to enforcing attendance policies. In most "blocks of leave" cases, employees already have exhausted the leave provided by these laws, and the question is how much more leave does the ADA require as a reasonable accommodation. That is not the case in most "periodic absence" cases.

The FMLA provides up to 12 weeks of unpaid leave per year, and eligible employees may take such leave intermittently if medically necessary. That means that if it were medically necessary for a full-time eligible employee to take FMLA leave in one day increments, the employee could take off 60 days per year—more than one day per week on average. Some states provide even more time. If it were medically necessary for the employee to take off for smaller increments of time, he or she could be absent numerous times per week, on average, and still have the job security provided by the FMLA.

To the extent an individual is eligible for and has not exhausted his or her FMLA leave, the ADA analysis does not come into play. For employers, the distinction between rights afforded by the FMLA and the ADA is critical. The first step in evaluating any attendance situation is determining which statute applies, keeping in mind that the FMLA protects the job security of an employee who is unable to perform the essential functions of his or her position, while the ADA requires that the employee be able to perform the essential functions of the position with or without reasonable accommodation.

Despite this difference, comparing the ADA and the federal Family and Medical Leave Act, the EEOC has stated that an "otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship" on the employer. This establishes that the EEOC views leave under the FMLA as the minimum or floor for reasonable accommodations, but gives no guidance as to the ceiling.[1]

II. Supreme Court on Reasonable Accommodations

In 2002, the United States Supreme Court issued its only decision concerning an employer's reasonable accommodation obligation under the ADA and the burdens of proof when litigating such a case. In *US Airways, Inc. v. Barnett*, the Court ruled in a 5-4 decision that granting a preference to a disabled employee over more senior employees in filling a job vacancy was unreasonable absent "special circumstances." U.S. Airways v. Barnett, 535 U.S. 391 (2002). According to the Court's decision, the plaintiff has the burden of proving that a requested accommodation is "reasonable in the run of cases" by showing that the accommodation is "reasonable on its face" or, if it is not, that "special circumstances" make the accommodation reasonable in the specific situation. If the plaintiff meets this burden, the employer can still prevail if it proves that the proposed accommodation poses an undue hardship on its operation.

Considering that the Merriam-Webster dictionary defines "excessive" as "exceeding what is usual, proper, necessary or normal" and states that "excessive implies an amount or degree too great to be reasonable or acceptable," it would seem that requesting an employer to tolerate "excessive" absences cannot be "reasonable on its face." However, there is no universal standard for the "usual, proper, necessary or normal" amount of absences. Once that analysis strays from the absences allowed by an employer's policy, courts would be in the unexplored universe of attendance norms, sitting as a super-personnel department for employers in determining at what point absences become "excessive."

III. Court Decisions

Like the extent of the employer's reasonable accommodation obligation with regard to "blocks of leave" which we discussed in Part 1, the extent of an employer's obligation to accommodate periodic absences has also been left to the courts. The typical pattern in cases addressing this issue is: (1) the plaintiff has been terminated for excessive absenteeism; and (2) he or she claims the absences were due to a disability and the employer failed to reasonably accommodate that disability by not excusing the absences. The underlying absence policies in these cases can vary widely, from point systems with defined disciplinary steps to ad hoc decisions about when absences become excessive and warrant termination.

Assuming the plaintiff is an individual with a disability—which will be much easier for a plaintiff to establish under the Americans with Disabilities Act Amendments Act—courts must consider two issues: (1) is the plaintiff a "qualified" individual with a disability, which raises the issue of whether attendance is an essential job function; and (2) is excusing absences a reasonable accommodation.[2]

A. Attendance Typically Considered an Essential Job Function

With regard to the first issue of attendance as an essential job function, with few exceptions, courts have found that it is. As the Seventh Circuit has noted, "[c]ommon sense dictates that regular attendance is usually an essential function in most every employment setting; if one is not present, he is usually unable to perform his job." Jovanovic v. In-Sink-Erator Division of Emerson, 201 F.3d 894, 899 (7th Cir. 2000). However, the court continued, "we need not go so far as to say that regular attendance is an essential function of every job in rendering our decision today, nor do we hold that an individual with erratic attendance can never be a qualified individual with a disability under the ADA." Note the judicial hedge by the use of "usually"; perhaps rooted in the principle that each situation under the ADA requires an individualized assessment, courts have gone out of their way to note that they are not making an absolute rule after having pronounced a near-absolute rule.

B. Attendance Not Necessary for Certain Positions

1. *Working from Home*

Some courts have indicated that particular jobs may not necessarily require attendance. In one case, the court noted that, for some jobs, an employee can effectively perform all work related duties at home, suggesting that working from home might be an appropriate accommodation in certain cases. The EEOC makes this same suggestion in its "fact sheet" on "Work at Home/Telework as a Reasonable Accommodation."

2. *Executives*

In the very first ADA case brought by the EEOC, the plaintiff, an executive director with cancer who was receiving palliative care and was absent about 25 percent of his last year of employment for medical reasons, claimed that coming to work was not an essential function of his position. The court denied the employer's motion for summary judgment, noting that the need to come to work may be different for executives:

> To be sure, attendance is necessary to any job, but the degree of such, especially in an upper management position such as [plaintiff's], where a number of tasks are effectively delegated to other employees requires close scrutiny…. [A]n executive such as [plaintiff] more than likely handled a number of his business matters through customer contact, and this usually is done by phone or in person at the customer's site. Whether a phone call is made from the office, a car phone, or a home is immaterial. Whether a contract is negotiated in the office or out of the office is immaterial. What is material is that the job gets done.

EEOC v. AIC Security Investigation, Ltd., 820 F.Supp. 1060, 1064 (N.D. Ill. 1993), *aff'd in part, rev'd in part*, 55 F.3d 1276 (7th Cir. 1995).

3. *Good Performance Not Enough*

From to time, a plaintiff with excessive absences has argued that he or she has good performance at work and thus is a qualified individual with a disability. Courts have said that good performance is not enough, that an employee "must be willing and able to demonstrate these skills by coming to work on a regular basis." Tyndall v. National Education Centers, Inc., 31 F.3d 209 (4th Cir. 1994).

C. A Closer Look at the "Usual" Cases: "When is Enough, Enough?"

In the "usual" case, after a perfunctory nod to the principle that attendance is an essential function of the job, judicial analysis typically moves to the heart of the matter: when may an employer terminate an employee with a disability for excessive absences, even if some or all of those absences are related to the disability? Or, as the Seventh Circuit has defined the issue, "When is enough, enough?" EEOC v. Yellow Freight System, Inc., 253 F.3d 943, 948 (7th Cir. 2001).

To analyze whether the employer has had "enough," courts use a variety of adjectives to describe the attendance an employer should be able to expect and the type that an employer need not accommodate. For the employer's expectations, courts use adjectives such as "regular" or "reasonably regular," "reliable,""predictable," "consistent," and "dependable." "Perfect attendance" is generally not, however, a necessary element of all jobs. To describe the types of employee absences that would be an undue hardship for an employer to accommodate, courts use adjectives such as "unpredictable," "unreliable," "erratic," "sporadic," "random," "spotty," "unscheduled," and "irregular."

When analyzing the extent of an employer's obligation to accommodate absences, courts focus on whether the requested accommodation would remove an essential function from the job, which is not required by the ADA, or be an undue hardship, or both.[3] The plaintiff has the burden of proof to

establish that he or she is a qualified individual with a disability, *i.e.*, can perform all essential job functions, and the employer has the burden of proof to establish "undue hardship."

Courts have held that an employer need not accommodate a plaintiff's request to, in essence, "work when able."

- Where plaintiff with visual disturbances "simply wanted to miss work whenever she felt she needed to and apparently for so long as she felt she needed to," the Seventh Circuit held that this request was not reasonable.

- Where plaintiff had asthma and Barrett's syndrome, the court noted that "the only imaginable accommodation would be an open-ended schedule that would allow [plaintiff] to come and go as he pleased" and rejected "such a schedule as an unreasonable accommodation under the circumstances of this case."

- Where plaintiff with chronic fatigue syndrome sought "simply to be allowed to work only when her illness permits," court held that "this is more than the Rehabilitation Act requires" and that plaintiff is "simply not suited for this position."

- Where plaintiff with fibromyalgia sought a more flexible work schedule and that her attendance rate be computed without counting sick days relating to a shoulder injury, court held this is a request for permission to work only when her illness permits and undermines the policy of regular attendance that is essential to her job.

- Where plaintiff could not get to work on time due to her obsessive compulsive disorder and sought to be able to clock in whenever she arrived at work, Eleventh Circuit held that such an accommodation was unreasonable.

- Court rejected plaintiff's request for an "[o]pen-ended, unlimited amount of 'sick days, if needed, without being penalized,'" and, in evaluating employer's interactive dialogue efforts, stated that it "refuse[s] to force employers to the negotiating table in the face of demands of this nature."

Beyond the request to "work when able," plaintiffs have argued that employers should have accommodated their absences with other measures. A sampling of decisions in those cases include the following:

- Court rejected plaintiff's suggestion that defendant-hospital retain and compensate extra employees on plaintiff's scheduled work days to be available in case he fails to report to work. Court said this does not address how employer could accommodate plaintiff, was merely a way for the employer to deal with plaintiff's absence, and removed an essential function of plaintiff's job, *i.e.*, regular attendance.

- Employer need not provide plaintiff's suggested accommodation of being allowed to make up time missed when absent because it does not address the unpredictability of his absences and removes an essential function of his position.

- Employer not required to grant plaintiff's request to increase the number of times she can be absent without discipline; this is not a request for a reasonable accommodation, but a request to remove an essential function of her position.

- Court held that the accommodations plaintiff sought for his bi-weekly arthritis treatment would be an undue hardship for the employer to provide. Plaintiff asked the employer to either schedule a regular day off or delay the start of his shift on those dates, and if he has a flare-up due to his condition, allow him to swap days off with other employees, delay his shift start time, or defer more physically demanding and less time sensitive job duties until the next day. Court held that the accommodations do not address the unpredictable nature of plaintiff's absences and would burden the agency with making last minute arrangements for plaintiff's work to be done by someone else.

- Court held that employee's request for "unfettered ability to leave work at any time" because there was possible exposure to an irritant was not reasonable, and that employer's offer to let employee "exit the area" was an offer of a reasonable accommodation.

- Court held plaintiff's request was not for a reasonable accommodation where she asked that her predecessor in her position relieve her from time to time; that she be allowed to use vacation days as sick days as in the past; and that the employer "just accommodate her until she found the medication necessary to correct her problem." Court held that plaintiff's predecessor had her own work to perform and employer did not have substitutes readily available to fill in for plaintiff.

- Where plaintiff with depression sought ability to take sudden unanticipated absences, court held that such a request is not for an accommodation because it would not have assisted her to perform her job but, rather, was a request for a personal benefit.

- Summary judgment denied to employer when employee with narcolepsy sought waver of attendance points for three absences due to her narcolepsy as an accommodation.

- Summary judgment denied to employer where plaintiff's request for flexible schedule due to severe arthritis was not per se unreasonable and employer did not produce any evidence to establish that the flexible schedule would be an undue hardship.

IV. EEOC Regulations and Guidance

While the EEOC has sued employers with "inflexible leave" policies,[4] it has not pursued inflexible absence policies with the same vigor. As with "blocks of leave," the EEOC has said that employers must be somewhat flexible in the administration of their absence programs but, like the courts, has also recognized that it is challenging for an employer to accommodate unpredictable absences.

As far back as its 1992 Training Manual, which was used to train EEOC staff to prepare for the implementation of the ADA, the EEOC has said that flexible attendance policies may be a form of reasonable accommodation but also observed that not all absences are equal:

> [I]n assessing the effect that an employee's absences have on the employer's operations and on the employee's ability to do his/her job, investigators should distinguish between scheduled and unscheduled absences. Scheduled absences are generally less disruptive than unscheduled absences.

ADA Training Manual, EEOC, Training Conference 1992, published by Organization Resource Counselors, Inc. 1992.

More recently, in its 2008 Enforcement Guidance, *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities*, the EEOC posed a question and provided a comprehensive response about the extent of an employer's obligation to accommodate a disabled employee's absences. The response, including its examples, provides somewhat of a roadmap for investigating and evaluating an absence issue involving an individual with a disability.

> **20. Does the ADA require that employers exempt an employee with a disability from time and attendance requirements?**
>
> Although the ADA may require an employer to modify its time and attendance requirements as a reasonable accommodation (absent undue hardship), employers need not completely exempt an employee from time and attendance requirements, grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee's disability necessitates), or accept irregular, unreliable attendance. Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice. The chronic, frequent, and unpredictable nature of such absences may put a strain on the employer's operations for a variety of reasons, such as the following:
>
> an inability to ensure a sufficient number of employees to accomplish the work required;
>
> a failure to meet work goals or to serve customers/clients adequately;
>
> a need to shift work to other employees, thus preventing them from doing their own work or imposing significant additional burdens on them;
>
> incurring significant additional costs when other employees work overtime or when temporary workers must be hired.
>
> Under these or similar circumstances, an employee who is chronically, frequently, and unpredictably absent may not be able to perform one or more essential functions of the job, or the employer may be able to

demonstrate that any accommodation would impose an undue hardship, thus rendering the employee unqualified.

Following this answer, the EEOC included a series of examples to illustrate its interpretation of an employer's obligations. The examples include:

- After exhausting FMLA leave, an assembly line employee with asthma needs more unforeseeable time off. The EEOC opines that due to the lack of notice of the absences, the strain they place on the assembly line, and the lack of time to obtain a replacement, accommodating the employee's absences would be an undue hardship and "[a]ssuming no position is available for reassignment, the employer does not have to retain the employee."

- An office worker with epilepsy, ineligible for FMLA leave, has two seizures at work within three months and, each time, takes the rest of the day off but returns the next day. The employee's doctor predicts the employee will have approximately six seizures annually. The EEOC noted that, though unpredictable, the leave was "only one day …every few months" and said that providing the leave as needed would not be an undue hardship.

- After exhausting FMLA leave, an event coordinator requests more intermittent leave as a reasonable accommodation. The leave dates are unpredictable but are expected to last one to three days. After the employer agrees to provide the accommodation, the employee takes 14 leave days over the next two months. The employee's doctor predicts the employee will need similar amounts of leave for at least the next six months. Because event planning requires staff to meet strict deadlines and the employee's sudden absences create significant problems, the employer cannot plan work around the employee's absences and makes additional leave an undue hardship.

- A housekeeper with multiple sclerosis who is not eligible for FMLA leave requests intermittent leave as a reasonable accommodation. The employee has already taken five days of leave for his disability prior to his request. The employee's doctor predicts that the employee will continue to need leave for at least several months and that each leave would be from one to three days. The employer grants the employee's request and explains that it will reassess the accommodation in six months or sooner if the employee's use of leave begins to have a negative impact on its operations. During the next six months, the employee takes 12 days of medical leave. Because "the employer has managed to adjust to the situation without burdening other employees or falling behind in the workload, the employee has made up work where he could, and the employee has always notified his supervisor immediately when he realizes he needs to take leave," there is no undue hardship to the employer.

In the same Guidance, the EEOC posed and answered a question about an employer's obligation to reasonably accommodate absences before the employer knew the need for the absence was somehow related to a medical condition.

> **22. Does an employer have to grant a reasonable accommodation to an employee with a disability who waited until after attendance problems developed to request it?**
>
> An employer may impose disciplinary action, consistent with its policies as applied to other employees, for attendance problems that occurred prior to a request for reasonable accommodation. However, if the employee's infraction does not merit termination but some lesser disciplinary action (e.g., a warning), and the employee then requests reasonable accommodation, the employer must consider the request and determine if it can provide a reasonable accommodation without causing undue hardship.

Here also, the EEOC gave examples to illustrate its perspective:

- An employee with diabetes is given a written warning for excessive absenteeism, and then tells his employer that his absences were related to his diabetes, and asks that the discipline be withdrawn and he be provided leave when necessary. The employee's doctor predicts that the employee's diabetes will be well controlled within the one to two months and that there might still be a need for leave during this transitional period, but expects the employee would be out of work no more than three or four days. *The EEOC stated that the employer does not have to withdraw the written warning, but it must grant the requested accommodation unless it would pose an undue hardship*.

- A bank manager was given a verbal warning for arriving an hour late regularly, prompting her to ask that she be allowed to arrive at 9 a.m. instead of 8 a.m. because of the side effects of medication she takes for her disability. Arriving at 9 a.m. would not affect the ability of the manager or others to do their jobs but the bank denies the request because it would not set a good punctuality example for other employees. *The EEOC opined that the denial of the bank manager's request violated the ADA.*

Read together, the EEOC's regulations and guidance suggest that, when administering an attendance policy, an employer may need to accommodate someone with a disability, unless it is an undue hardship. This approach suffers from the same conceptual conundrum we discussed in Part 1: The purpose of a reasonable accommodation is to enable the individual to be a qualified individual with a disability, someone who, by definition, can—in the present tense—perform the essential functions of the position. An employer's excusing absences does not necessarily enable an employee to perform any of the job's functions, essential or otherwise.

V. Conclusion

The caselaw and EEOC guidance dealing with periodic absences is much more uniform and favorable to employers than the caselaw relating to "blocks of leave." Since both issues deal with an employee who is not coming to work, it is unclear why the "attendance as an essential function" analysis should differ. While one might argue that "blocks of leave" may be more predictable than absences,

many courts have held that an employer need not tolerate even predictable excessive absences, so "predictability" does not seem to be the distinguishing characteristic.

Courts in "blocks of leave" cases seem to focus more on the future: will the leave enable the employee to do the essential functions in the not too distant future? On the other hand, courts in "periodic absence" cases, without saying so explicitly, tend to focus on the present: regular attendance is an essential function and the issue is whether the plaintiff has it or not. There is no logical reason why, when interpreting the same reasonable accommodation issue, the focus in "blocks of leave" cases should involve looking in the crystal ball to predict the employee's future while the focus in "periodic leave" is in real time.

What is clear from the "periodic absence" cases is that employers can benefit from regularly communicating in as many vehicles as possible its expectations concerning regular attendance. These expectations should include both positive statements —here is what is expected—as well as an explanation of the consequences when an employee does not report to work regularly, to the extent possible and appropriate. In any legal challenge, these communications will assist in making the primary focus of the case whether regular attendance is an essential function, rather than sliding by that issue and moving immediately to undue hardship analysis.

The cases also suggest that an employer can benefit from having and enforcing a defined absence policy. Without such a policy, a plaintiff can challenge whether the absences were indeed excessive, as well as whether the policy was administered uniformly to all employees. With such a policy, the employer defines its attendance expectations and what it considers to be excessive absence.

As with "blocks of leave," employers should track the law of the applicable U.S. Court of Appeals for guidance on periodic absences. Some courts, like the U.S. Court of Appeals for the Seventh and Eighth Circuits, have issued numerous decisions on this issue. Others, like the U.S. Court of Appeals for the Second Circuit, have not issued any decisions offering definitive guidance.

If challenged, employers should be prepared to argue that while they support and respect Sen. Dole's comment to the disability community that their "time has come," employees—both with and without disabilities—must still come to work regularly.

[1] The EEOC "fact sheet" on the comparison of the ADA and FMLA suggests an employer may rely on FMLA leave to argue that additional leave is an undue hardship. The EEOC stated succinctly: "To evaluate whether additional leave [beyond that required by the FMLA] would impose an undue hardship, the employer may consider the impact on its operations caused by the employee's initial 12-week absence, along with the undue hardship factors specified in the ADA." 29 C.F.R. § 1630.2(p).

[2] As with the "blocks of leave" analysis, courts deciding "periodic absences" cases tend to ignore the Supreme Court's U.S. Airways decision. Eight years after U.S. Airways, courts evaluating an employee's request for more excused absences, or a reprieve from attendance points, decide the issues without so much as a citation to U.S. Airways, or a reference to its analytical framework. Nonetheless, employers defending ADA reasonable accommodation cases should revisit U.S. Airways and consider arguing that a request for more leave, or more absences, is not "reasonable in the run of cases."

[3] Some courts have even suggested that if an employer has administered its policy without discrimination, there is no need to reasonably accommodate variations from that policy, although most seem to apply the "essential function/undue hardship" analysis.

[4] The EEOC has sued another employer on this theory since publication of Part 1 of this Special Report. *See* Jackson Lewis, EEOC Continues Its Attack on "Inflexible" Leave Policies, http://www.disabilityleavelaw.com/2010/08/articles/ada/eeoc-continues-its-attack-on-inflexible-leave-policies/.

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