

Employer Update

Attendance Requirements Raise ADA Issues

By Jeffrey S. Klein,
Nicholas J. Pappas,
and Valerie Z. Wicks

Employees discharged because of poor attendance sometimes claim that the employer violated the Americans with Disabilities Act (ADA) when the employee's absences resulted from a disability. In essence, the employee asserts that the employer should have accommodated the employee's absenteeism, as the employee was otherwise able to perform the job. The Ninth Circuit recently held, in *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. 2012), in precisely that factual context that even if an employee's absenteeism is the result of a disability, an employer may not be held liable under the ADA when attendance is an "essential function of the job."

To preserve the common-sense notion that reporting to work is an essential function of a job, employers should craft job descriptions and attendance policies that highlight the business justification for requiring regular attendance. Courts have demonstrated a willingness to look at employers' written job descriptions and the realities of particular workplaces to evaluate whether attendance is indeed an essential job function.

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Background

The ADA prohibits employers from discriminating against qualified individuals with disabilities. A "qualified" individual is one who can perform the "essential functions" of the job, with or without reasonable accommodation. 42 U.S.C. § 12111(8). To make out a claim under the ADA, a plaintiff must demonstrate: (1), that he was disabled within the meaning of the ADA, (2), he was qualified to perform the essential functions of the job (with or without a reasonable accommodation), and (3), his employer took an adverse employment action against him because of his disability. See *Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182, 186 (1st Cir. 2011).

Attendance Essential

In *Samper v. Providence St. Vincent Medical Center*, the Ninth Circuit held that attendance is an essential job function for a neo-natal intensive care unit (NICU) nurse, such that an employee who could not show up for work on a predictable basis was not qualified for the job, regardless of disability or attempts at accommodation. Plaintiff Samper was discharged from her position as a NICU nurse for exceeding the hospital's unplanned absence limit and a long history of "general problems with attendance." Upon termination, Samper filed suit, alleging that the hospital violated the ADA due to a failure to accommodate, among other claims. Samper, who suffers from

