Accommodating employee disability: Advice for employers from recent court cases

Employers must reasonably accommodate disabled workers so they can perform the essential functions of their jobs. But at what point does absenteeism make it impossible for the worker to perform the job?

In fact, regular attendance is an essential function of many jobs. Absenteeism so chronic that it's clear the employee can't be counted on to show up regularly may be good reason to terminate.

Simply put, you don't have to accommodate excessive absences because doing so is unreasonable.

Recent case: Michael worked for the New York City Department of Parks and Recreation as a maintenance worker from April 2013 until January 2014. During that time, he missed 87 days of work. He claimed the reason was that he suffered from a bulging disk in his neck that caused severe migraine headaches that prevented him from getting out of bed in the morning to go to work. He was terminated.

Michael sued, alleging failure to accommodate his disability.

The city argued that it would have been a hardship to keep Michael employed if it had to accommodate his frequent absences. It told the court that the nature of Michael's job required him on the premises to perform maintenance tasks. It called attendance an essential function of the job of maintenance worker.

The court agreed with the city. It said disabled workers may be entitled to time off for disability-related reasons, but that absences can't be so frequent that they create an undue hardship. In this case, Michael had been absent 45% of the time. The court tossed out his lawsuit. (*Lazzari v. New York City Department of Parks and Recreation*, 2nd Cir., 2018)

Advice: Be sure your job description lists attendance as an essential function.

Special oversight OK for disabled employees who telecommute

Do you allow telecommuting as an option for some employees and as a possible reasonable accommodation for disabled workers? That's fine. It's OK to set slightly different conditions for the two kinds of telecommuters, such as requiring tighter monitoring for disabled workers.

Recent case: Goldy worked as a computer programmer for the SUNY state university system. After she developed a disability, she requested the option of telecommuting as a reasonable accommodation. SUNY agreed. Other workers were also allowed to telecommute.

Goldy sued after SUNY required her to use a specific piece of software so her work at home could be monitored. She alleged that other telecommuters weren't monitored. She claimed the reason had to be either sex discrimination, or that her boss thought she might tend to domestic chores instead of working—or that her boss was targeting disabled workers with more onerous working conditions.

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The court dismissed her case, but only because she never provided any specifics about why the monitoring was more than an annoyance or had otherwise affected her ability to telecommute. Had she shown that the monitoring affected her pay or a promotion, she might have had a case. (*Stern v. State University, et al.*, ED NY, 2018)

Advice: Courts don't want to micro-manage employers and generally give them the benefit of the doubt whenever possible. Make it easy. Document your decisions when you make them, noting good business reasons to back them up.

ADA: Permanent part-time work not reasonable

Employers aren't required to create new positions as reasonable accommodations for disabled workers, or farm out so much work to co-workers that the job becomes part-time. The ADA only requires reasonable accommodations, not an absolute right to a job within one's abilities.

Recent case: Ronald was an inside sales representative, selling United Parcel Service's services to small businesses. He took a series of FMLA leaves when he developed chronic arm and neck pain and needed several operations. Then he took a short-term disability leave per the company's benefits plan. He followed up with an application for long-term disability leave.

UPS reminded him that it has a reasonable accommodations process in place and invited him to use it. Ronald agreed that he wanted to return to work.

His doctors told UPS that Ronald could work no more than four hours per day, and could lift no more than five pounds. It also said that his medications might impair his ability to make decisions.

Ronald asked for a part-time schedule and an ergonomic work station, but couldn't point to an accommodation that might help his cognitive difficulties. UPS looked for open part-time positions for Ronald, but couldn't find any that didn't require sharp cognition.

UPS denied his request for accommodations, and Ronald then sued, alleging failure to accommodate.

The court dismissed his lawsuit, reasoning that the ADA's reasonable accommodation rules do not require an employer to create a whole new, part-time position with entirely different essential functions. (*Gonzalez v. United Parcel Service*, WD TX, 2018)

Advice: UPS did everything right in this case. It initiated the i

nteractive accommodations process and looked for relevant open positions within the employee's limitations. Only when it then determined there were none did it discharge him.

Disability: Beware docking attendance points

Policies designed to encourage regular attendance often use a point system to determine when employees who miss work will receive discipline. Points plans are easy to administer and seem like a fair way to combat attendance problems.

But that simplicity may create legal problems. For example, FMLA-covered employers with a point-based attendance policy must make absolutely sure that they don't count FMLA leave against workers when assigning points.

Points plans can also run afoul of the ADA. According to the EEOC, they may violate the ADA if a disabled worker

needs leave as a reasonable accommodation and that time off is counted against the worker under the policy.

The EEOC has been aggressively pursuing lawsuits in such cases.

Recent case: On Sept. 25, the EEOC sued Austal USA, a global builder of military and commercial ships. The lawsuit alleges the company unlawfully applied its points-based attendance policy to terminate a worker who needed intermittent leave to deal with diabetes.

An Alabama warehouse worker with diabetes sometimes had to come in late or leave work early to control his symptoms. On occasion, he missed work entirely for periodic medical appointments.

When he exceeded the maximum number of points allowed under Austal's attendance policy, he was fired. He complained to the EEOC, which concluded that the company should have considered each absence through the lens of reasonably accommodating the man's disability. The EEOC contends no points should have been assessed for diabetes-related absences.

Advice: Here's how to handle a disabled employee's attendance. Before assessing points under your attendance policy, determine if the FMLA applies or if the worker has other leave he might take. If not, take the extra step of determining if additional time off might be a reasonable accommodation under the ADA.

Risky assumptions: 9th Circuit adds clarity to ADA's 'regarded as disabled' definition

When the ADA was amended in 2008, Congress changed the definition tied to discrimination based on an employer's presumption that a worker is disabled. This section of the ADA had previously required that in order to support a "regarded as disabled" claim, the discriminating employer had to both believe the worker was disabled and that the disability substantially impaired a major life activity.

Now the 9th Circuit has clarified what Congress meant when it said the employer can be liable for disability discrimination if it discriminated "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."

Recent case: Herman worked as a delivery driver for a company that sells bottled water in five-gallon containers. He had to lift the bottles from the truck and carry them into the customers' homes and businesses. The position description specified that it required lifting and carrying a minimum of 50 pounds, as well as other physical tasks.

Herman hurt his shoulder at work, but didn't report the injury right away. He simply kept working. Later, he asked to transfer to a part-time warehouse position. According to the employer, Herman made the request so he could focus on his independent side job doing landscaping. He found a part-time warehouse employee who was willing to switch jobs and the company approved the change.

That's when Herman told the company about his shoulder injury. Within days, the company informed Herman that the part-time position was no longer available and that he had to resign.

He did, and then sued, arguing that as soon as he told the company about the injury, the transfer vanished and so did his job. That, he argued, was proof that it regarded his shoulder injury as a disability. And under the ADA, regarding a worker as disabled and then discriminating against him because of that disability carries the same penalty as discriminating against someone with a disability.

The trial court said a worker has to show that the discriminating employer didn't just believe that the worker was disabled, but that the disability substantially impaired a major life activity like working, walking or lifting. It

dismissed the lawsuit, saying Herman had not proven that's what his employer believed—perhaps because the employer understood Herman was doing landscaping work on the side. Herman appealed.

The 9th Circuit Court of Appeals reversed the lower court and reinstated the lawsuit. It said that the ADA Amendments Act of 2008 clearly changed the "regarded as disabled" definition. All a worker has to show is that his employer regarded him as having a disability; he doesn't have to show that the employer also believed the disability substantially impaired a major life activity. (*Nunies v. HIE Holdings*, 9th Cir., 2018)

Final note: The court also said that a worker who continues to work despite a disability can still win a disability discrimination case. Herman testified that he kept lifting the bottles despite experiencing a stabbing pain. Working through the pain doesn't mean the pain isn't disabling.

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