

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

**The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer:
The Interplay Between the ADA, the FMLA, Workers' Compensation,
and Employers' Leave and Attendance Policies**

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I. INTRODUCTION

A. The Problem of the Absent Employee

Absenteeism is a continuing problem for many employers. It is further complicated by the Americans with Disabilities Act, the Family and Medical Leave Act, and workers' compensation laws. This paper addresses the problem of an employee who claims a psychiatric disability after receiving discipline or performance improvement directives. The employee then claims that the psychiatric disability (such as depression or anxiety) associated with that discipline has caused him to be absent and unable to work. Prior to the advent of the Americans with Disabilities Act (and its state cousins) and the Family and Medical Leave Act, the solution to this problem was simple: treat the employee as one would any absent employee, taking appropriate disciplinary action under an attendance policy. In many cases, even today, that is still the appropriate outcome. However, the employer's response is now complicated by the ADA and FMLA, in combination with state workers' compensation statutes.

B. Needed: New Solutions

Unquestionably, employers are currently striving for smaller, more efficient workforces. Many employers stress a "team approach" emphasizing quality and employee accountability. Accompanying these structural changes in the workplace is a changing concept of the employee. Recent years have witnessed the

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

emergence of innovations such as flex-time, job sharing, employee leasing, and telecommuting. New ways of working and, indeed, attitudes about work have appeared. The increasing diversity of the workforce, in particular the growing numbers of women at all levels, likewise adds a dynamic of change. And, as this paper seeks to demonstrate, the Americans with Disabilities Act and the Family and Medical Leave Act also create many new realities for employers. Employers must be given a clear idea of how to properly navigate the confusing issues involved in disciplining an employee who claims psychiatric disability as a result of earlier disciplinary action.

The magnitude of the problem is best illustrated by the growing numbers and percentage of ADA charges filed. In fiscal year 1992, a total of 91 charges citing emotional/psychiatric impairment were filed, representing 9.1% of the total charges filed for that year.¹ By contrast, in fiscal year 1997 the total had grown to 2,789 charges representing 15.3% of the total.² The number of emotional/psychiatric impairment charges filed grew each year from 1992 to 1997, and in 1997 constituted the most common alleged impairment.³ Such charges outnumbered those involving alleged heart impairment, hearing impairment, vision impairment, or even back impairment.⁴ Between 1992 and 1998, a total of 1,649 ADA claims involving psychiatric impairment were resolved in favor of employees, yielding a total monetary award of approximately 29.5 million dollars.⁵ These trends are likely to continue.

¹ *Americans with Disabilities Act of 1990 (ADA) Charges FY 1992-1998* (visited May 26, 1999) <<http://www.eeoc.gov/stats/ada.html>>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Kim Curtis, *Invisible Disabilities Challenge Employers*, TENNESSEAN, May 23, 1999, at 2E.

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

A related and emerging issue involves the medical screening of job applicants by employers.⁶

Although the ADA permits medical testing of applicants offered a position where "job-related and consistent with medical necessity"⁷ and given uniformly to all such applicants, the law is unsettled on the point of testing for possible future medical problems as a means of employment screening.⁸ The resolution of this issue will obviously impact testing for psychiatric disability as well.

II. RELEVANT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990, EEOC REGULATIONS, AND EEOC ENFORCEMENT GUIDANCES

A. Americans with Disabilities Act

The discussion begins with a consideration of the Americans with Disabilities Act of 1990 itself. Under the ADA,⁹ a number of selected definitions deserve mention. Of central importance, the term "[q]ualified individual with disability" turns on the ability of the employee to perform essential functions of the job.¹⁰ Under this provision, the employer's judgment about essential functions must be considered.

Pursuant to the ADA, employers may "not discriminate against qualified individuals with disabilities with regard to ... discharge and other terms, conditions and privileges of employment."¹¹ In addition, employers may not utilize standards or criteria which have the effect of discrimination on the basis

⁶ See William C. Smith, *Hypothetically Handicapped*, A.B.A. J., June 1999, at 32.

⁷ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disability (Mar. 25, 1997) at 14.

⁸ See *supra* note 6 (citing *EEOC v. Rockwell Int'l Corp.*, No. 95 C 3824; *EEOC v. Cambridge Indus. Inc.*, No. 95 C 4413 (N.D. Ill.) as cases challenging the practice of medical screening).

⁹ 42 U.S.C. §§ 12101 *et seq.* (Title I).

¹⁰ See § 12111(8).

¹¹ § 12112(a).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

of disability.¹² Employers may not fail to make reasonable accommodations to the known limitations of an otherwise qualified individual with a disability, unless undue hardship can be demonstrated.¹³ Nor can employers deny benefits to a qualified individual because of the disability of a person with whom the qualified individual is known to have a relationship.¹⁴ "Reasonable accommodation" includes part-time or modified work schedules.¹⁵ The "undue hardship" limitation includes the following factors: [1] number of people employed; [2] type of operations (including composition, structure and functions of workforce); and [3] impact on overall operations.¹⁶

There are a number of possible inquiries by employers which are prohibited under the ADA. In the pre-employment context, employers may not ask the applicant if he or she has a disability or about the nature or severity of any disability.¹⁷ However, an employer may inquire into the ability of the applicant to perform job-related functions.¹⁸ In the post-hiring context, no employer may inquire about the existence of a disability or nature or severity of a disability, unless the inquiry is job-related and consistent with a business necessity.¹⁹ Contrariwise, an employer may ask about the ability to perform job-related functions.²⁰

¹² See § 12112(3)(A).

¹³ See § 12112(5)(A).

¹⁴ See § 12112(b)(4).

¹⁵ See § 12111(9).

¹⁶ See § 12111(10).

¹⁷ See § 12112(d)(2)(A).

¹⁸ See § 12112(d)(2)(B).

¹⁹ See § 12112(d)(4)(A).

²⁰ See § 12112(d)(4)(B).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

B. EEOC Regulations

The Equal Employment Opportunity Commission ("EEOC"), which is charged with enforcing Title I, has promulgated detailed regulations which are also pertinent here.²¹ A job function may be essential because of the limited number of employees available to do the job or by the fact that it is highly specialized and the employee was hired because of ability and experience. Other factors weighing in on the issue of whether a job function is essential include the employer's judgment, the job description, the time spent performing the function, and the effect of not performing it upon the employer.²²

Reasonable accommodation can include part-time and modified work schedules.²³ Reasonable accommodation can also include use of accrued paid leave or the provision of additional, unpaid leave for treatment.²⁴ Prohibited discrimination is any discrimination with respect to leaves of absence, sick leave, or any other leave.²⁵

Additionally, the EEOC Technical Assistance Manual contains a number of provisions relevant to this topic.²⁶ Section III discusses specific examples of reasonable accommodation. Subsection 3.10(3) covers modified work schedules as a reasonable accommodation, and includes flexibility in hours worked, a redefined workweek, and part-time work.²⁷ Subsection 3.10(4) treats flexible leave policies as a

²¹ See 29 C.F.R. Part 1630.

²² See § 1630.2(n)(and Appendix).

²³ See § 1630.2(o)(2)(ii).

²⁴ See Part 1630 Appendix, § 1630.2(o).

²⁵ See § 1630.4(e).

²⁶ EEOC Title I Technical Assistance Manual (1992) [hereinafter TAM].

²⁷ TAM 3.10(3).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

reasonable accommodation. It includes use of accrued leave, advanced leave, and leave without pay for those who need time off due to a disability.²⁸

Section V of the EEOC Technical Assistance Manual discusses nondiscrimination in the hiring process. Subsection 5.5, entitled "Pre-Employment Inquiries," distinguishes between permitted and prohibited questions.²⁹ On the permitted side, an employer may ask: "Are you able to be at work when scheduled?"³⁰ An employer faces liability though if it asks: "How many days were you absent due to illness last year?" or "Have you ever filed a workers compensation claim?"³¹

Section VII, entitled "Nondiscrimination in Other Employment Practices," includes a subsection on leave. Subsection 7.10 prohibits an employer from denying leave to an employee with a disability if other employees are permitted such leave.³² Although an employee need not allow additional leave, adjustments in the leave policy may be necessary as a reasonable accommodation. Significantly, an employer is not required to grant accommodation leave to an employee in a relationship with an individual with a disability so that the employee can care for that individual.³³

C. EEOC Enforcement Guidances

The EEOC also promulgates ADA Enforcement Guidance publications for use by the public. In its October 10, 1995, Guidance Related to Preemployment Disability, it attempted to clarify what questions

²⁸ TAM 3.10(4).

²⁹ TAM 5.5.

³⁰ *See id.*

³¹ *See id.*

³² TAM 7.10.

³³ *See id.*

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

could be asked and if medical examinations could be required.³⁴ Permitted inquiries include: "Can you satisfy certain attendance requirements for the position?" and "As to your prior attendance record, how many days did you miss work last year?"³⁵ Regarding possible abuses, "How many Mondays or Fridays were you absent last year on leave other than approved vacation?" is acceptable.³⁶ Prohibited inquiries include those likely to cause an applicant to reveal the existence of a disability, such as "How many days were you sick last year?"³⁷

1. What is a "Psychiatric Disability"?

In 1997, the EEOC released an Enforcement Guidance designed to clarify the EEOC's stance on the application of the ADA to psychiatric disabilities.³⁸ Reacting to the growing number of charges alleging employment discrimination based upon psychiatric disability, the EEOC set forth the definition of psychiatric disability and then showed how ADA analysis applies in this context.

The operative term for this discussion is actually "mental impairment."³⁹ Although mental impairment includes emotional and mental illness, not all conditions known to mental health professionals fit under the term. As examples, sexual behavior disorders, compulsive gambling, and pyromania do not qualify

³⁴ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Oct. 10, 1995).

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Mar. 25, 1997).

³⁹ 42 U.S.C. §12102(2).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

as disabilities or impairments under the ADA.⁴⁰ Likewise, traits or behaviors, such as stress or poor judgment, are not in themselves mental impairments.⁴¹ Major depression and anxiety disorder can qualify, however.

As with physical impairments, mental impairments must substantially limit one or more major life activities to constitute a disability within the meaning of the ADA. A substantial impairment is one which "limits a major life activity or significantly restricts the condition, manner, or duration under which an individual can perform a major life activity, as compared to the average person in the general population."⁴² To qualify as substantially limiting, an impairment must "last[] for more than several months."⁴³ Chronic, episodic conditions can be substantially limiting impairments if, in addition to the above requirement, they are active or have a "high likelihood of recurrence."⁴⁴

The recent Supreme Court decision in *Bragdon v. Abbott*⁴⁵ promises to greatly impact the number of ADA claims filed. There, the Court found that the plaintiff's asymptomatic HIV infection was an impairment which substantially limited a major life activity (reproduction), bringing the plaintiff within the protection of the ADA.⁴⁶ By holding that the ADA does not apply only to public, economic, or daily activities, the Court effectively broadened the definition of "major life activity." Claims of psychiatric disability predicated on novel forms of impairment are likely.

⁴⁰ 42 U.S.C. §12211(b); 29 C.F.R. § 1630.3(d).

⁴¹ See EEOC Compliance Manual §902.2(c)(4). These conditions may be symptomatic of a psychiatric disability, however.

⁴² 29 C.F.R. §1630.2(j).

⁴³ See *supra* note 38 at 7.

⁴⁴ *Id.* at 8.

⁴⁵ 118 S.Ct. 2196 (1998).

⁴⁶ See *id.*

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

2. Discipline in the Context of Psychiatric Disability

The 1997 EEOC Enforcement Guidance on psychiatric disabilities also directly addresses the disciplinary issue. Significantly, even though an employee with a disability violates a workplace conduct standard because of the disability, the employer may discipline that employee if the conduct standard is job-related for the position and is consistent with business necessity.⁴⁷ An employer can discipline an employee with a disability if the employer would similarly discipline an employee without a disability for the same breach of conduct. Stated differently, an employer need not withhold discipline or termination of an employee in such circumstances.⁴⁸ By way of example, an employer may reprimand an employee for stealing money from the employer, even if the employee claims the disability was the cause of his or her misconduct.⁴⁹ This is because the rule prohibiting employee theft is obviously job-related and consistent with business necessity.⁵⁰

Conversely, "rigid application of [employer] rules to [the] employee" violates the ADA where these requirements of job-relatedness and business necessity are not met.⁵¹ The EEOC Enforcement Guidance illustrates this rule with the example of an employee with a known psychiatric disability who works in a warehouse.⁵² The employee's job involves no customer contact and little interaction with coworkers. The employee begins to arrive at work looking disheveled and, moreover, becomes increasingly anti-social with coworkers. Although the employee's work does not suffer, he is disciplined for his appearance and demeanor,

⁴⁷ See *supra* note 38 at 27.

⁴⁸ See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Mar. 1, 1999) at 21-22.

⁴⁹ See *supra* note 38 at 27.

⁵⁰ See *id.*

⁵¹ *Id.* at 28.

⁵² See *id.* at 27-28.

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

which are in violation of the company handbook rules. The employee explains that his behavior has deteriorated because of his disability. The employer's disciplinary actions are a violation of the ADA because the rules breached are not job-related for the position nor are they consistent with business necessity under these circumstances. A different result would have obtained if the employee's psychiatric disability made him a direct threat to coworkers, however.⁵³ The EEOC Enforcement Guidance on psychiatric disabilities states "[a]n employer must make reasonable accommodation to enable an otherwise qualified individual with a disability to meet such a conduct standard in the future, barring undue hardship."⁵⁴ This is because employer accommodations are prospective in nature. By the same token, an employer need not excuse past breaches of conduct.⁵⁵ Where an employer has adequate notice of the employee's disability, including any mental disability, that fact necessarily shapes the employer's subsequent handling of disciplinary matters. Conversely, where an employer is informed of the disability by the employee only after termination for threatening a supervisor, for example, the employer need not offer reasonable accommodation for the future. This is because the discharge was in conformity with a uniformly-applied rule of conduct which is both job-related and consistent with business necessity.⁵⁶

⁵³ See 42 U.S.C. §12113(b) (1994). Where an individual is a "direct threat" because he or she poses "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation," an employer may terminate or refuse the hire that individual. 29 C.F.R. §1630.2(r).

⁵⁴ See *supra* note 38 at 28 (emphasis added).

⁵⁵ See *id.*

⁵⁶ See *id.* at 29-30.

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

III. COURT DECISIONS INTERPRETING THE ADA

The typical ADA issues litigated in connection with attendance-challenged employees are: [1] whether attendance is an essential function of the job; and [2] whether accommodating irregular attendance would be an undue hardship. Numerous cases exist where courts have grappled with these interrelated issues. The following are fairly representative.

In *Tyndall v. National Education Centers, Inc. of California*,⁵⁷ the court held that since a regular and reliable level of attendance is a necessary element of most jobs, an employee who cannot meet the attendance requirements of the job is not a "qualified" individual protected by the ADA.

The court in *Stradley v. LaFourche Communications, Inc.*⁵⁸ found that although regular attendance is an essential function of most jobs, it is a question of fact for the jury whether an accommodation can be made without imposing an undue hardship on the employer.

In *Dutton v. Johnson County Board of County Commissioners*,⁵⁹ the court accepted the jury's determination that the plaintiff was a qualified individual with a disability, but held that when his absenteeism exceeds his combined vacation and sick leave he should be treated in accordance with the policies that apply to all employees. However, unlike the rest of the employees, the court did not require that plaintiff give advance notice of vacation days when they were to be used for sickness.

⁵⁷ 31 F.3d 209 (4th Cir. 1994).

⁵⁸ 869 F. Supp. 442 (E.D. La. 1994).

⁵⁹ 868 F. Supp. 1260 (D. Kan. 1994).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

In denying the defendant employer's motion to dismiss, the court in *Hall v. Janet Wattles Center*⁶⁰ observed that in analyzing absenteeism from work, the relevant factors in deciding the intertwined essential function and reasonable accommodation questions are the pattern of absences and the characteristics of the job. However, the court found that the range of potentially reasonable accommodations was narrow.

In *Barfield v. Bell South Telecommunications, Inc.*,⁶¹ the court granted defendant's motion for summary judgment and held that regular attendance at work is an essential function of virtually all jobs. The court found it to be an undue hardship on the employer to give qualified individuals a "work when able" schedule.

In *Johnson v. Children's Hospital of Philadelphia*,⁶² the court likewise granted the defendant's motion for summary judgment, holding that substantial and unpredictable absences need not be accommodated. Absences caused by a disability do not eliminate the requirement that an employee demonstrate regular attendance in order to be considered "qualified" for the position.

The court in *Walders v. Garrett*,⁶³ in finding for the employer, noted that "plaintiff was part of a five-person team in an office operating under stringent statutory deadlines. Put another way, her job clearly required reasonable regular, predictable attendance."⁶⁴

⁶⁰ No. 94C50239, 1995 U.S. Dist. LEXIS 5801 (N.D. Ill. Apr. 14, 1995).

⁶¹ No. 4:93CV103(L)-(N), 1995 U.S. Dist. LEXIS 7590 (S.D. Miss. Apr. 21, 1995).

⁶² No. 94-5698, 1995 U.S. Dist. LEXIS 7743 (E.D. Pa. June 5, 1995).

⁶³ 765 F. Supp. 303 (E.D. Va. 1991).

⁶⁴ *Id.* at 310.

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

In *Guice-Mills v. Derwinski*,⁶⁵ the Second Circuit found that beginning work at 7:30 or 8:00 was an essential requirement for the position of head nurse and, therefore, upheld the trial court's determination that requiring the hospital to modify the plaintiff's schedule to allow her to arrive at work at 10:00 would be an undue burden.

The district court in *Carr v. Barr*⁶⁶ concluded that the plaintiff was not otherwise qualified because of her inability to meet her employer's requirement for predictable attendance. The court stated: "chronic long-term absenteeism is not a condition that can be accommodated without imposing 'undue hardship.'"⁶⁷

In *Santiago v. Temple University*,⁶⁸ the court stated that where "[p]laintiff has demonstrated an apparent inability to attend work with any degree of predictability," the plaintiff cannot be accommodated. The court in *Matzo v. Postmaster General*⁶⁹ found the plaintiff-employee not "otherwise qualified" where she missed several months of work.

In *Wilbly v. Bolger*,⁷⁰ the court rejected the plaintiff's claim that his employer failed to accommodate his need for treatment where the plaintiff failed to live up to the employer's requirement that his absences for treatment be scheduled and supported by adequate documentation.⁷¹ The court further noted that

⁶⁵ 967 F.2d 794 (2nd Cir. 1992).

⁶⁶ 1991 U.S. Dist. LEXIS 9022, 59 Empl. Prac. Dec. (CCH) ¶ 41, 651 (D.D.C. 1992).

⁶⁷ *Id.* at 651.

⁶⁸ 739 F. Supp. 974, 979 (E.D. Pa. 1990).

⁶⁹ 685 F. Supp. 260 (D.D.C. 1987).

⁷⁰ 642 F. Supp. 481 (W.D. Tenn. 1986).

⁷¹ *Id.* at 485.

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

placing the employee in a part-time position would not be a reasonable accommodation because "even a part-time employee would still have a fixed schedule."⁷²

The plaintiff's unscheduled absences in *Lemere v. Burnley*⁷³ kept her from following a regular work schedule under which she could perform the essential functions of her position. Therefore, the court found that she did not meet the definition of a qualified employee with a disability.

Finally, at least three courts have addressed the attendance issue in cases where the alleged disability was psychiatric or emotional. See *Matzo v. Postmaster Gen.*, 685 F. Supp. 260, 263 (D.D.C. 1987), *aff'd* 861 F.2d 1290 (D.C. Cir. 1988) (holding under the federal Rehabilitation Act that a manic-depressive employee who was absent three months was not "otherwise qualified" for the job due to the absenteeism); *Cannon v. Principal Health Care*, 4 AD 873 (E.D. La. 1995) (termination of employee was proper where the employee took a medical leave of absence and exhausted her long-term benefits; the employee's absences prevented her from fulfilling the essential functions of her job); and *Walders v. Garrett*, 765 F. Supp. 303 (E.D. Va. 1991) (an employer is not required to accommodate an employee with chronic fatigue syndrome by granting excess leave; to do so would unduly burden the employer). For its part, the EEOC maintains attendance is not an essential function as defined by the ADA because it is not a fundamental job duty.⁷⁴ In the EEOC's view, the regulations plainly state that essential functions are duties to be performed.⁷⁵ Attendance relates only to job performance. While an essential function cannot be modified by a reasonable

⁷² *Id.*

⁷³ 683 F. Supp. 275 (D.D.C. 1988).

⁷⁴ See *supra* note 48 at n61. The EEOC EG takes issue with cases which characterize attendance as an essential function, citing *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994), and *Jackson v. Department of Veterans Admin.*, 22 F.3d 277, 278-79 (11th Cir. 1994).

⁷⁵ *Id.* (citing 29 C.F.R. § 1630.2(n)(1)).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

accommodation, attendance is merely a job performance issue which can be accommodated by schedule changes and leave arrangements. Employers may lawfully deny employee requests for a schedule modification only where "the time during which an essential function is performed is integral to its successful completion"⁷⁶ and granting the request would create an undue hardship. Cases relied upon by the EEOC for this proposition include *Haschmann v. Time Warner Entertainment Co.*⁷⁷ and *Cehrs v. Northeast Ohio Alzheimer's Center*.⁷⁸

In *Haschmann*, the court acknowledged regular attendance is crucial to the proper functioning of a business. It remarked, however, that "it is not the absence itself but rather the excessive frequency of an employee's absences in relation to that employee's job responsibilities that may lead to a finding that an employee is unable to perform the duties of his job."⁷⁹ Attendance is not in itself something "to be performed" and, hence, is not an essential function.

Cehrs directly disputes the presumption that attendance is an essential job requirement. In that court's opinion, "[i]f ... uninterrupted attendance in all instances is a mandatory job requirement, then the policies and needs of both the individual employer and employee would never be considered."⁸⁰ Moreover, the court felt this presumption is contrary to the rule mandating that the determination of whether a disabled employee is otherwise qualified be individualized and fact-specific.⁸¹

Summarizing these authorities, it is possible to state a few general principles:

⁷⁶ *Id.*

⁷⁷ 151 F.3d 591 (7th Cir. 1998).

⁷⁸ 155 F.3d 775 (6th Cir. 1998).

⁷⁹ 151 F.3d at 602.

⁸⁰ 155 F.3d at 782.

⁸¹ *Id.*

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

- Regular, predictable attendance is an essential function of most jobs.
- However, whether it is an essential function in any given case may be a question of fact.
- The EEOC does not regard attendance per se as an essential function.
- It generally is an undue hardship to accommodate an employee's irregular, unpredictable attendance, even if the employee has a psychiatric or emotional disability.

IV. FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family and Medical Leave Act of 1993⁸² provides, *inter alia*, for leave entitlement "to care for a family member (child, spouse, or parent) with a serious health condition."⁸³ The FMLA also provides for leave "[b]ecause the employee's own serious health condition makes the employee unable to perform the functions of the employee's job."⁸⁴ A "serious health condition" is defined as inpatient care or continuing treatment by a healthcare provider, but in the latter case there must be a period of "incapacity" (i.e., inability to work or perform other regular daily activities).⁸⁵ However, "serious health condition" does not include the "common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. ... unless complications arise."⁸⁶

An employee is "unable to perform the functions of the position" when a "health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the

⁸² 29 U.S.C. §§ 2601 *et seq.*

⁸³ 29 C.F.R. § 825.100(a).

⁸⁴ *Id.* (emphasis added).

⁸⁵ *See* 29 C.F.R. § 825.114(a)(1)(2).

⁸⁶ 29 C.F.R. § 825.114(c).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

employee's position within the meaning of the Americans with Disabilities Act."⁸⁷ "An employee who must be absent to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment."⁸⁸

There are also provisions affecting or relating to an employer's existing leave policies.

In general, if the employer distributes an employee handbook or any other written guidance to employees concerning employee benefits or leave rights, it must amend it to include information concerning employee rights and obligations under the FMLA, together with a statement of the employer's policy regarding leave taken under the law.⁸⁹ If the employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, then whenever an employee requests leave under the law, the employer must provide written guidance to the employee concerning the employee's rights and obligations under the law.⁹⁰

The specific notice should include, as appropriate: [1] that the leave will be counted against their annual FMLA leave entitlement; [2] any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so; [3] the employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, and the conditions related to any substitution; [4] any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments; [5] any requirement for the employee to present a fitness-for-duty certificate to be restored to employment, in the case where the employee takes leave because of his or her own serious health condition; [6] the employee's status as a "key employee" and the potential consequence that restoration may be denied following leave, explaining the conditions required for such denial; [7] the employee's

⁸⁷ § 825.115.

⁸⁸ *Id.*

⁸⁹ *See* § 825.301(a)(1).

⁹⁰ *See* § 825.301(a)(2).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

right to restoration to the same or an equivalent job upon return from leave; and [8] the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid leave if the employee fails to return to work after taking leave.⁹¹

Other general FMLA provisions affect how employers must deal with absent employees who may qualify for FMLA leave. For instance, the entire period of leave may be unpaid, unless the employee has accrued paid leave (such as vacation or sick leave), in which case either the employee or the employer may choose to substitute the accrued paid leave for all or a portion of the leave being taken.⁹² The leave may be taken all at once or intermittently.⁹³ However, leave because of the birth of a child or placement of a child for adoption or foster care may not be taken intermittently unless the employer agrees.⁹⁴ The right to take leave because of the birth of a child or the placement of a child for adoption or foster care expires 12 months after the date of the birth or placement of the child.⁹⁵ If an employee requests intermittent leave because of planned medical treatment for the employee or the employee's child, spouse, or parent, then the employer may require the employee to transfer temporarily to an available alternative position, so long as the alternative position has equivalent pay and benefits and it better accommodates recurring periods of leave than does the employee's regular position.⁹⁶

⁹¹ See 29 C.F.R. § 825.301(b)(1)(i-viii).

⁹² See § 825.207(a).

⁹³ See § 825.203(a).

⁹⁴ See 29 C.F.R. § 825.203(b).

⁹⁵ See § 825.201.

⁹⁶ See § 825.204(a-c).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

Eligible employees must give at least 30 days advance notice of intent to take leave before the date the leave is to begin when leave is foreseeable that far in advance.⁹⁷ Otherwise, employees must give notice as soon as practicable. Where leave is to be taken for planned medical treatment, the employee "shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider."⁹⁸

Spouses employed by the same employer may be limited to an aggregate of 12 workweeks of leave under certain conditions.⁹⁹ Employers may require employees on leave to report periodically to the employer on the status and intention of the employee to return to work.¹⁰⁰ It is clear that employers cannot count FMLA leave against an employee under a no-fault attendance policy, require an employee to return to light duty position, or discipline an employee without first having given notice of discipline in advance.¹⁰¹

Employers may require a medical certification from a health care provider to support FMLA leave requests either to care for an employee's seriously ill family member, or for leave due to a serious health condition that makes the employee unable to perform the functions of the employee's job.¹⁰² Employees must provide such certification "in a timely manner." The regulations define "timely manner" as within 15 calendar days, unless it is not practicable to do so under the circumstances.¹⁰³ Employers must advise the employee if medical certification will be required when the employee requests leave so the employee can obtain it during

⁹⁷ See 29 U.S.C. § 2612(e)(2)(B).

⁹⁸ § 2612(e)(2)(A).

⁹⁹ See § 2612(f).

¹⁰⁰ See 29 C.F.R. § 825.309(a).

¹⁰¹ See 29 C.F.R. § 825.207.

¹⁰² See 29 U.S.C. § 2613(a).

¹⁰³ See 29 C.F.R. § 825.305.

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

visits to the health care provider.¹⁰⁴ The regulations provide an optional form for required medical certifications.¹⁰⁵ The form, which is to be completed by the health care provider, makes maximum use of easy checklist entries. The form may be reproduced by employers.

A certification for medical leave must include a statement that the employee "is needed to care for" a seriously-ill family member or, in the case of an employee's serious health condition, a statement that the employee is "unable to perform the functions of the position of the employee."¹⁰⁶ Some of this information may not be readily known to the health care provider. For example, the health care provider may know that the seriously ill family member needs care, but may not know whether the employee is needed to provide such care. Similarly, the health care provider may know that an employee is so seriously ill as to be unable to perform any work, but may not know in less serious circumstances without further information whether the employee is able to perform some of the "functions of the position of the employee."

The regulations implement the statutory requirements affecting such leave in the first instance by having the employee certify as to the care the employee will provide to the family member. In the case of an employee's serious health condition, the health care provider may review a description of the employee's essential job functions provided by the employer, or, if none is provided, may ascertain such functions from the employee when determining (and certifying) that either the employee is unable to perform the essential functions of the employee's position.¹⁰⁷ The requirement for intermittent leave or leave on a reduced schedule should be satisfied by the specified description of the treatment regimen provided.

¹⁰⁴ See 29 C.F.R. § 825.305(c).

¹⁰⁵ 29 C.F.R. § 825(Appendix B)(Optional Form WH-380).

¹⁰⁶ 29 C.F.R. § 825.306.

¹⁰⁷ See 29 C.F.R. § 825.115.

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

An employer may require the employee to obtain a second medical opinion, at the employer's expense.¹⁰⁸ The second health care provider may not be employed on a regular basis for the employer. If the opinions of the first and second health care provider differ, the employer may require a third opinion, again at the employer's expense, from a health care provider mutually agreed upon by the employer and employee.¹⁰⁹ The third opinion shall be final and binding.

An employer can require an employee to obtain subsequent recertifications to support continuing FMLA medical leave "on a reasonable basis."¹¹⁰ The applicable regulations permit the employer to request such recertification not more often than every 30 days unless [1] the employee requests an extension of leave; [2] changed circumstances occur regarding the illness or injury; and, [3] the employer receives information that casts doubt upon the continuing validity of the most recent certification.¹¹¹

If an employee fails to provide timely certification within 15 days (where practicable) of being asked to do so by the employer and the need for leave was foreseeable, the employer may deny the employee leave until the required certification is provided.¹¹² If the need for leave is not foreseeable, the employee must still attempt to provide the certification within 15 days of the employer's request, or as soon thereafter as practicable under the circumstances.¹¹³

An eligible employee who takes FMLA leave is entitled to be restored to the same position that the employee held when the leave started, or to an equivalent position with equivalent benefits, pay, and other

¹⁰⁸ See 29 U.S.C. § 2613(c)(1).

¹⁰⁹ See 29 U.S.C. § 2613(d)(1).

¹¹⁰ See 29 U.S.C. § 2613(e).

¹¹¹ See 29 C.F.R. § 825.308.

¹¹² See 29 C.F.R. § 825.311(a).

¹¹³ See 29 C.F.R. § 825.311(b).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

terms and conditions of employment.¹¹⁴ The legislative history characterizes this as an appropriately stringent standard for assigning employees who return from leave to jobs other than the position which they previously held.¹¹⁵ FMLA does not entitle a restored employee to any more rights, benefits, or employment beyond that to which the employee would have been entitled had the employee not taken FMLA leave.¹¹⁶

An employer may recover premiums it paid for maintaining group health plan coverage during any period of unpaid FMLA leave if the employee fails to return to work after the employee's FMLA leave entitlement has expired, unless the reason the employee does not return to work is due to [1] the continuation, recurrence, or onset of a serious health condition that would entitle the employee to FMLA leave (either affecting the employee or an immediate family member), or [2] "other circumstances beyond the control of the employee."¹¹⁷ If an employee fails to return to work at the end of the leave period because of a serious health condition, the employer may request that the employee furnish a medical certification from the health care provider of the employee or the employee's family member to support the employee's claim.¹¹⁸ If the employee fails to furnish the requested certification within 30 days of the employer's request, the employer may recover the health insurance premiums it paid during the period of unpaid leave. An employee who does not return to work for at least 30 calendar days is considered to have failed to "return" to work for this purpose.¹¹⁹

V. WORKERS' COMPENSATION LAWS

¹¹⁴ See 29 U.S.C. § 2614(a)(1).

¹¹⁵ See S. REP. NO. 103-3 (1993).

¹¹⁶ See 29 U.S.C. § 2614(a)(3).

¹¹⁷ See 29 C.F.R. § 825.113(a).

¹¹⁸ *Id.*

¹¹⁹ See 29 C.F.R. § 825.213(c).

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

State workers' compensation laws are intended, of course, to provide benefits for job-related injuries. Although these statutes often purport to provide the "exclusive" remedy for injured employees, in fact they do not automatically preclude ADA or FMLA protection. Coverage under all three statutory schemes is possible provided the employee meets the requirements of each. Nonetheless, whether a psychological disability qualifies as a job-related injury is a separate determination to be made by reference to the state's workers' compensation laws. Of importance under the laws of some states is whether or not the psychological disability is the result of a work-related physical injury. In some states, e.g., Kentucky, workers' compensation benefits are not available for psychological disabilities which are not the result of, or at least accompany, work-related physical injuries. This would be significant in the case of a psychological disability resulting from disciplinary action (assuming that all modern employers refrain from corporal punishment as a form of discipline).

Whenever an employee proceeds under state workers' compensation laws, the employer must determine whether any leave and accommodation issues raised also implicate the ADA or FMLA. From the standpoint of an employer, it is advisable to consider the effects the actions taken in the workers' compensation context may have for purposes of the ADA and FMLA. Otherwise, employers may find themselves bound by statements made in a workers' compensation proceeding. In general, employers should strive to shield themselves from potential problems brought about by a failure to consider the ADA or FMLA in conjunction with the workers' compensation claim. For this reason, employers and their counsel should be familiar with the EEOC Enforcement Guidance: Workers' Compensation and the ADA (September 3, 1996).

VI. ISSUES

The materials discussed above serve to highlight the more significant provisions of the ADA and FMLA. The issues can be summarized as follows:

1. Is the absent employee disabled within the meaning of the ADA?
2. Is the absent employee qualified for his position, based on his attendance situation?

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

3. Is attendance an essential function of the employee's position?
4. Is the employee suffering from a "serious medical condition" under the FMLA?
5. Should the Company designate the employee's leave from work (in the interim) as FMLA leave?
6. Should the Company notify its workers' compensation carrier?
7. Should the Company apply its attendance policy to the absent employee without regard to any possible disability or right to FMLA leave or workers' compensation benefits?

With respect to the problem of an employee who claims a disability resulting from disciplinary action by an employer, no reported cases have been found. However, applying the foregoing decisions and principles, the following may be inferred:

1. The psychiatric/emotional problem would be a disability if it substantially limited one or more major life activities, including the major life activity of working. Assuming that it does, then the following conclusions apply.

2. If regular, reliable attendance were an essential function of the employee's position, and the employee could not satisfy this requirement, he would not be a qualified individual with a disability under the ADA (except in the eyes of the EEOC).

3. If regular, reliable attendance were not an essential function of the employee's position, then, upon request of the employee, the employer would be required to provide a reasonable accommodation, which could include modifying of job duties, modifying the attendance policy, or transferring the employee to a vacant position. EEOC Enforcement Guidance: Workers' Compensation and the ADA, ¶¶ 20-22. If possible, the employer in this situation should offer a reasonable accommodation other than modification of the attendance policy. The courts have held that as long as the employer offers a reasonable accommodation, it has complied with the ADA, even if the employer does not offer the accommodation requested by the employee. However, the EEOC's position is that the employer may not unilaterally transfer an employee with a

The Absent Employee with a Psychiatric Disability Claimed as a Result of Disciplinary or Performance Improvement Action Taken by the Employer

"disability-related occupational injury" to a different position without first trying to accommodate the employee in the position held at the time of the injury. Id. at ¶ 21.

4. If the employee's condition prevented him from performing one or more essential functions of his job, or it otherwise incapacitated him for three or more calendar days, and either he was hospitalized or, as is most likely, he paid two visits (or one, followed by a regimen of treatment such as a prescription) to a psychiatrist, psychologist, doctor of osteopathy, licensed clinical social worker, or other health care provider capable of providing health care services, then his condition would be a serious health condition under the FMLA.

5. If the employee is qualified for FMLA leave and the employer is a covered employer under the FMLA, then the employee would be entitled to FMLA leave, including possibly intermittent FMLA leave if the requisite certification(s) from a health care provider are obtained. The employer should scrutinize the employee's certification carefully to ensure that it is complete and that the health care provider was fully informed of the employee's duties. The employer should also seriously consider exercising its right to a second or third certification, if appropriate.

6. The employer should designate the leave as FMLA as soon as possible, so as to leave no question about when it commenced and in order to exhaust the twelve week entitlement as soon as possible.

7. FMLA leave should not be counted under the employer's attendance policy.

8. The workers' compensation carrier should be notified, if state law covers the condition.

VII. CONCLUSION

The situation analyzed here tests the limits of the fairness and reasonableness of the protections provided to employees under the ADA, the FMLA, and state workers' compensation laws. For the sake of employers, the authors hope that it will not arise frequently.