

Four Circuits Agree: Regular and Reliable Attendance is an Essential Job Function

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Recently, the United States Eighth Circuit Court of Appeals reaffirmed that regular and reliable attendance is an essential function of most jobs under the Americans with Disabilities Act (“ADA”). *Lipp v. Cargill Meat Solutions Corp.*, 911 F.3d 537 (8th Cir. 2018). In that case, the parties agreed that the employee had a disability. Even so, the employer terminated her employment after she accumulated 195 violations of the employer’s attendance policy. The employee sued, alleging intentional discrimination and failure to accommodate under the Iowa Civil Rights Act and the ADA. The district court granted summary judgment to the employer, and the employee appealed.

The Eighth Circuit affirmed the district court’s holding, reasoning that the employee failed to establish that she was a qualified individual with a disability who was entitled to the ADA’s protection because she could not regularly and reliably attend work—an essential function of her position. Important to the decision, the employer actively maintained a written attendance policy that expressly stated “regular attendance is crucial” to its operations, and specified that excessive violations of the policy could result in termination of employment.

The Eighth Circuit’s decision in *Lipp* aligns with several other recent decisions from the Second Circuit (*Vitti v. Macy’s Inc.*, 2018 WL 6721091, No. 17-3493 (2d Cir. Dec. 21, 2018)), the Fifth Circuit (*Credeur v. State of Louisiana*, 860 F.3d 785 (5th Cir. 2017)) and the Ninth Circuit (*Ogden v. Public Utility District No. 2 of Grant Cty.*, 722 Fed. App’x 707 (9th Cir. 2018)), which all held that individuals who are unable to regularly attend work are not qualified individuals with a disability for purposes of the ADA. In some instances, employers may have to provide qualified workers with leave as a reasonable accommodation. However, the ADA does not require employers to 1) provide *unlimited* leave; 2) allow employees to work from home indefinitely; or 3) abandon their work attendance policies when the employer determines regular work-site attendance is an essential function of a given position.

These rulings counsel that employers would do well to maintain written attendance policies that provide for progressive discipline, and should also review job descriptions to ensure they reflect the employer’s need for regular, physical on-site attendance (if attendance is indeed job-related and consistent with business necessity). Employers with questions regarding the ADA and attendance policies or job descriptions should consult with competent counsel.

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