

# Regular Attendance Remains an Essential Job Requirement Notwithstanding Employer's Work-At-Home Policy

## Labor & Employment Law Update

on January 8, 2015

The 7<sup>th</sup> Circuit's recent decision in *Taylor-Novotny v. Health Alliance Medical Plans, Inc.*, 772 F.3d 478 (7<sup>th</sup> Cir. 2014) provides a reminder to all employers that in order for an employee to establish an ADA claim he or she must show they are a "qualified individual with a disability." That is, the employee must be able to perform the essential functions of the job with or without reasonable accommodation. In this case, the 7<sup>th</sup> Circuit reiterated that regular attendance is an essential function of most jobs and the fact that an employer allows flexibility through a work-at-home policy does not automatically eliminate the essential nature of regular attendance.

Novotny began work in November 2005 and experienced almost immediate punctuality and attendance problems. She was rated poorly in this area during her January 2007 performance evaluation. A few months later Novotny was diagnosed with multiple sclerosis. The company adjusted Novotny's start time and made other accommodations to Novotny's physical work space. Novotny was also approved for intermittent leave under FMLA.

In 2008, Novotny began working from home two days a week under a work-at-home policy. The company required Novotny to adhere to an agreed-upon work schedule, to be available by phone, email, voice mail, pager, or modem during that scheduled time, to report absences, and to be available for staff meetings and other in-services. Novotny continued to have difficulties with attendance and tardiness. The company documented the ongoing issues and stressed that Novotny could use intermittent FMLA leave when applicable, but she would be subject to discipline if she failed to timely communicate the absence or tardiness and for absences and tardiness unrelated to FMLA.

In May 2010, the company issued a final warning due to Novotny's ongoing late arrivals. Following this final warning, Novotny logged in late on multiple occasions while working from home. Novotny provided excuses for logging in much later than her start time, but there was no dispute that Novotny did not

timely notify her supervisor when logging in late. In July 2010, Novotny was terminated. Novotny filed suit alleging disability discrimination, among other things.

While the court noted that Novotny's claim would fail because she was not meeting the company's legitimate expectations, it disposed of her claim by ruling that she cannot allege disability discrimination because she was not a "qualified individual" with a disability. Novotny's condition was a "disability" under the ADA, but the evidence was clear that Novotny had ongoing attendance and punctuality problems. As such, Novotny could not perform an essential function of the job (i. e. maintain reliable and regular attendance) with or without accommodation. Novotny pointed out that she was allowed to work from home arguing that attendance and punctuality standards were flexible and not an essential function of the job. The court disagreed by emphasizing that the work from home arrangement was pursuant to a written policy that clearly articulated requirements for her to maintain a regular schedule and be available at scheduled times.

The company was able to defeat Novotny's claim largely because it had clear documentation to establish that regular attendance and punctuality were essential job functions. Employers should keep in mind that the courts give employers a fair amount of discretion in determining what aspects of a job are essential, but the employer's policies, job descriptions, and other writings must be reviewed and updated to remain consistent with the employer's expectations of what constitutes an essential job function.

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