

## Is Regular Attendance an Essential Job Function?

The Americans with Disabilities Act (ADA) prohibits unlawful discrimination based upon disability. To establish a *prima facie* case of employment discrimination under the ADA, a plaintiff must demonstrate that (1) he/she has a disability, (2) he/she is a qualified individual, that is, one who is able to perform the essential functions of the employment position that he/she holds with or without reasonable accommodation, and (3) the employer unlawfully discriminated against him/her because of the disability. A federal district court in Florida recently faced the issue of whether regular attendance is an essential job function.

In the Florida case, the plaintiff (Mecca) was employed by Tampa General Hospital as a “PICC” nurse. A PICC nurse inserts into patients a PICC line, which is an intravenous catheter typically inserted through a large vein in a patient's upper arm and then manipulated to a point next to the patient's heart. A PICC nurse position is a specialized job that requires adherence to proper protocol and strict sterile techniques to avoid a high risk of infection. Mecca’s main responsibility involved performance of these PICC procedures.

Mecca sought accommodations for what he asserted was a panic attack and anxiety disability, manifesting itself in symptoms that included nervousness, anxiety, incontinence, and sleeplessness. Mecca was allowed to take leave under the Family and Medical Leave Act (FMLA) on numerous occasions during his employment, both intermittently and for consecutive weekly periods. The Hospital also changed his schedule at his request. Ultimately, after Mecca returned from several weeks of FMLA leave and refused to see any patients, he left prior to the end of his shift. After being informed that failing to see patients would subject him to discipline, including termination, Mecca resigned.

When Mecca sued the Hospital for, among other things, discrimination and retaliation under the ADA, it responded by arguing that Mecca was not qualified to perform the essential functions of his job, which included having regular attendance. The court first noted that the ADA regulations identify three bases on which a job function may be deemed essential: (1) the reason the position exists is to perform the function; (2) there are a limited number of employees available among whom the performance of the job function can be distributed; and (3) the function is highly specialized so that the incumbent in the position was hired for his/her expertise or ability to perform the particular function. In certain situations, daily attendance may be an essential function of a position, but that is not always the case. The court went on to conclude that regular attendance was an essential job function in this instance. It found persuasive a Ninth Circuit Court of Appeals opinion holding that the specialized training required for a neo-natal nurse and the high risk of jeopardizing patient care made that plaintiff's regular attendance an essential function of the job. *Mecca v. Florida Health Services Center, Inc.* No. 8:12-cv-2561-T-30TBM (M.D. Fla. Feb. 3, 2014).

Cases should always be discussed with Human Resources and the Office of Counsel as soon as an employee mentions having a disability.