

Preserving Punctuality as an Essential Job Function under the ADA

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In most jobs, arriving to work on time is an essential job function. However, the Second Circuit Court of Appeals, which covers Connecticut, recently held that for purposes of the American's with Disabilities Act (ADA) punctuality is not an essential job function per se. Instead, employers must be able to prove that being on time is an essential function. Further, even where it is shown to be an essential function, employers must provide work schedule flexibility, unless they can prove doing so would create an undue hardship on the organization.

In McMillan v. City of New York, 2013 U.S. App. LEXIS 4454 (2d Cir. Mar. 4, 2013), the employee worked for many years for the City of New York. At some point he was diagnosed with schizophrenia and treated with calibrated medication, which made him sluggish in the morning. As a result, he often arrived late for work. Following repeated tardy arrivals, he was disciplined. The employee then filed a complaint under the ADA claiming (1) punctuality was not an essential job function; and (2) even if it was, the employer failed to reasonably accommodate his disability by providing greater work hour flexibility.

In ruling in favor of the employee, the Court found that punctuality is not automatically an essential job function, and that the employer failed to establish that it was for purposes of plaintiff's job. In doing so it noted that the employer had tolerated over 10 years of late arrivals without disciplining the employee. Further, it had a flex time policy that suggested arrival at a particular time was not essential. Employees were also allowed to apply accumulated PTO to periods of lateness so they would not lose pay.

The Court also provided guidance on analyzing whether a job function was essential. It stated that while an employer's judgment on what constitutes essential functions is crucial, other elements include written job descriptions, the amount of time spent on the job performing the function, whether the function is mentioned in a collective bargaining agreement, the work experience of past employees in the same position, and the work experience of current employees in similar positions. In essence, a fact specific inquiry must be made into both the employer's description of the job and how the job is actually performed in practice.

It then turned its attention to whether the employee's requested accommodations were reasonable. The employee offered his employer several options that he believed would permit him to do his job satisfactorily. These included changing his start time so he could arrive one hour later while working an additional hour at night, or allowing him to work through lunch.

The Court noted that such accommodations might be reasonable, unless the employer can show they would create an undue hardship. It emphasized that because of the City's history of allowing the employee to arrive late on a continual basis, its flex time policy, and its practice of allowing other employees who are late to use banked PTO, accommodating plaintiff's request was unlikely to cause an undue hardship. It also rejected the City's arguments that allowing plaintiff to work later into the evening was unreasonable because no supervisor would be on duty. The Court found that the employee often worked in an unsupervised setting, including when he left the office to visit clients at their homes.

This case points out the need to clearly establish the essential job functions in a written job description and then hold employees to those requirements. Lax enforcement of attendance requirements may thwart an employer's argument that granting work schedule flexibility would cause an undue hardship. Further, it highlights the need to engage in a fact specific interactive

dialogue with the employee making the request, and not reject suggested accommodations out of hand.

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