

BLOGS

Archives;Discrimination;Diversity & Inclusion;Leave

The Interaction of Unauthorized Absences Under an Attendance Policy and a Reasonable Accommodation Under the ADA

In December of 2018, the 8th Circuit Court of Appeals addressed the interaction between a reasonable accommodation under the Americans with Disabilities Act (ADA) and a work attendance policy holding that unauthorized absences under an attendance policy can be used to terminate an employee for whom accommodations are being made under the ADA. In *Lipp v. Cargill Meat Solutions Corporation*, the 8th Circuit affirmed dismissal of an employee's lawsuit alleging her employer discriminated against her when it failed to accommodate her need for intermittent absences under the ADA and terminated her employment. In particular, the 8th Circuit held that the employee was not a qualified individual under the ADA because 195 unplanned absences in the course of one year amounted to an inability to regularly and reliably attend work, an essential function of her job.

Sheena Lipp worked for Cargill from 1995 until her termination in 2014. In 2000, Lipp was diagnosed with an incurable lung disease which required several work restrictions starting in 2012, including: out of town doctors appointments, days off during flare ups, a working environment free from dust or dirt, and lifting assistance. Cargill accommodated each and every request. Cargill had a progressive disciplinary attendance policy that allowed six unplanned absences a year without discipline. Additional absences would trigger written warnings followed by termination. The attendance policy also stated that employees may be required to provide medical verification of an illness related absence.

In January of 2014, Lipp went on a nine month unplanned absence related to the health conditions of her mother. When she returned in October, Lipp had accrued 194 unplanned absences and was given a last chance warning. Shortly after, Lipp called in sick to work without medical verification (as required by Cargill policy) and was terminated from her employment.

The 8th Circuit affirmed the lower courts summary judgment in favor of Cargill finding that Lipp could be terminated because Lipp was not a qualified individual under the ADA due to the high number of unplanned absences which amounted to an inability to meet an essential function of her job attendance. The court further held that Lipp's argument that Cargill failed to accommodate her after she returned to work by refusing to provide intermittent time off for her lung condition was not reasonable because additional absences would not enable her to perform the essential function of regular and reliable attendance but would

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actually relieve her of that function which is not required under the ADA's protections. Finally, Lipp argued that 195 absences were reasonable because although Cargill could have terminated Lipp after 9 unauthorized absences it did not do so. The 8th Circuit noted that an employer who bends over backwards for its employees must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation.

As redeeming as this decision may seem to employers well-versed with absentee employees, it is important to remember that discrimination and reasonable accommodation cases are *very* fact specific. We cannot stress enough the importance of the interactive process between an employer and employee. An employer must be careful when determining which absences are authorized and unauthorized especially if the employer is looking to change course from how it made attendance decisions in the past.