

## Disability Discrimination: Court Rules That Regular Attendance Is An Essential Job Function.

The US District Court for the Middle District of Pennsylvania rejected a registered nurse assessment coordinator's disability discrimination lawsuit she filed against her former employer.

The nurse had two back fusion surgeries for an old on-the-job injury. Her physician wrote a medical restriction for ambulatory dysfunction, meaning the nurse was not supposed to walk on wet surfaces. She began calling in reporting she was unable to come to work any time it rained or snowed or rain or snow was forecast.

Her supervisors offered to provide van or taxi transport from her home to the front door or to transfer her back and forth from her parked vehicle via wheelchair.

She refused to consider anything short of *carte blanche* permission to call in any and all so-called inclement-weather days.

### **Regularly Scheduled Attendance Is an Essential Job Function**

Even if an employee has a legitimate disability, the court pointed out, the employee must be a qualified individual with a disability to be protected by state and Federal disability discrimination laws.

It is up to the employee to prove he or she is a qualified individual with a disability. The nurse herself admitted she was not able to come in to work on a regularly scheduled basis even with any of the reasonable accommodations offered to her.

She attempted to argue, instead, that she was qualified for her position even though she could not meet her employer's expectations for regularly scheduled attendance on the job.

The court ruled the nurse was not a qualified individual with a disability, that is, her disability discrimination lawsuit was missing a basic essential element.

### **No Retaliation In This Case**

Supervisors have to be mindful that even if an employee or former employee does not have a valid discrimination claim, the employee cannot be subjected to retaliation for raising the issue, albeit unsuccessfully. **Flory v. Pinnacle Health, 2008 WL 2782664 (M.D. Pa., July 15, 2008).**

***A qualified individual with a disability is an individual who can perform the essential functions of the position, even if it means the individual requires reasonable accommodation.***

***It is not reasonable accommodation to allow a nurse to call in on any and all inclement weather days, since regular attendance is an essential job function.***

***The supervisors discussed several reasonable accommodations, even an aide meeting her at her car with a wheelchair, but the nurse rejected everything short of being allowed to call in.***

***An employee who cannot come to work on a regularly scheduled basis is not a qualified individual with a disability and cannot sue for disability discrimination.***

***A supervisor had tolerated her calling in when it rained or snowed or looked like it might rain or snow.***

***However, giving someone a bit of leeway does not impose a permanent ongoing burden on the employer to tolerate behavior that, for one reason or another, falls short of the employer's legitimate expectations.***

UNITED STATES DISTRICT COURT  
PENNSYLVANIA  
July 15, 2008