

# Attendance Problems: Court Turns Down Nurse's Disability Discrimination Lawsuit.

The hospital's attendance policy stated that:

*To provide quality care and service to our patients, residents, members and customers, employees are expected to be at their work area on time, for their regular work schedule.*

*The hospital recognizes, however, that employees may need time away from work for a variety of personal reasons. Time off requested and approved in advance allows for replacement planning and reduces or eliminates negative impact on productivity, coworker or department operations.*

*Unplanned or unreported absences, including tardiness or partial day absences, may result in disciplinary action up to and including termination.*

*Employees are expected not to exceed five (5) occurrences of unscheduled, unapproved absences or tardy events in a rolling twelve (12) month period.*

*Unplanned absences related to family medical leave, military leave, work-related illness or injury, jury duty, bereavement leave and other approved bases are not counted as occurrences under this policy.*

## **Nurse's Disability Fibromyalgia**

The US District Court for the District of Oregon noted for the record that fibromyalgia causes chronic diffuse muscle pain and tenderness that results in fatigue and sleeplessness and may cause difficulties with concentration, standing, lifting and pushing.

There is no definitive diagnostic procedure or laboratory test for fibromyalgia. The patient's physician must rely on the patient's subjective reports of pain. However, the subjective aspect of the diagnosis does not mean that a condition does not qualify as a legitimate disability under the Americans With Disabilities Act.

Over the years the nurse received positive reviews in all aspects of her performance aside from her attendance issues. Those issues led to corrective plans as she began to exceed the hospital's upper limit for absences not approved in advance.

She requested part-time status and was given part-time status, but even that did not work out and she was eventually terminated.

***The hospital is entitled to judgment in its favor.***

***Because the nurse was not able to live up to the hospital's attendance expectations for her job, she is not a qualified individual with a disability.***

***That is, the nurse's job description as a neonatal nurse clearly stated that her regular presence at the hospital was essential, and she was not able to perform that one very essential function of her job notwithstanding her disability.***

***Greater flexibility than the hospital allowed her coworkers would have been unduly burdensome for the hospital.***

***An accommodation to an employee's disability which is unduly burdensome and imposes a hardship on the employer's business operations is not a reasonable accommodation, even if the employee in question has genuine proof of a legitimate disability.***

***The courts give wide latitude to the employer's judgment as to the essential functions of the job and usually look to the job description that existed for the employee's job before questions came up about the employee's disability.***

UNITED STATES DISTRICT COURT  
OREGON  
August 23, 2010

In her disability discrimination lawsuit against the hospital both sides agreed that the only problem with her performance was her attendance and that that problem was directly related to her fibromyalgia.

## **Disability Discrimination Legal Standard**

Employers are prohibited by law from discriminating against a qualified individual with a disability. A qualified individual is one who, with or without reasonable accommodation, can perform the essential functions of the employment position the individual holds or desires.

A disability is a physical or mental impairment that substantially limits one or more of the major life activities of the individual. In this case the nurse's fibromyalgia affected her ability to sleep and the insomnia detrimentally affected her ability to function in waking life.

The Court was willing to accept the fact the nurse had a legitimate disability. That being said, however, the Court was not willing to accept the argument that she was a qualified individual with a disability.

The Court agreed with the hospital that regular attendance is an essential function of a neonatal intensive care nurse's job in a hospital.

A hospital's mission requires it to provide nursing care to patients in need of regular and immediate medical care. Sporadic and unpredictable absences by nursing personnel interfere with the hospital's basic practice of requiring employees to follow regular schedules of attendance.

It is especially burdensome for a hospital to alter that general practice, given that the predictability of a certain level of staffing being present in the hospital is essential for proper patient care, the Court went on to state.

A hospital is not required to tolerate frequent, unplanned, unpredictable absences by a direct patient-care nursing employee, even if those absences can be related to a genuine condition which fits the legal definition of a legal disability.

In this case the hospital was granted summary judgment dismissing the nurse's lawsuit. ***Samper v. Providence St. Vincent, 2010 WL 3326723 (D. Or., August 23, 2010).***