

Ninth Circuit Provides Guidance for Employers on When Attendance Constitutes an Essential Function of the Job*

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Introduction

Employers continuously face the challenges presented by employees who fail to follow workplace attendance policies. The problem is exacerbated when the employee claims that his or her failure to follow attendance policies is due to a disability. In such situations, employees may request an accommodation such as a different work schedule or leave of absence to accommodate their inability to comply with the attendance policy. The employer must then decide whether attendance is an essential function of the job and, if so, whether the employer can grant a reasonable accommodation, such as working at home, which would enable the employee to perform the essential functions of his or her job.

In a recent Ninth Circuit decision, *Samper v. Providence St. Vincent*,¹ the court considered the important question of whether or not attendance is an essential function of the job, holding that it is a "common-sense notion that on-site regular attendance is an essential job function" for certain jobs.² This is a crucial point for employers, because an employee is not qualified for protection under the Americans with Disabilities Act ("ADA")³ or the Fair Employment and Housing Act ("FEHA")⁴ unless the employee can perform the essential functions of his or her job, with or without an accommodation.

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¹ 675 F.3d 1233, 2012 U.S. App. LEXIS 7278 (9th Cir. 2012).

² *Samper*, 2012 U.S. App. LEXIS 7278, at *10.

³ 42 U.S.C. § 12101 et seq.

⁴ Cal. Gov't Code § 12900 et seq.

Overview

Monika Samper ("Samper") worked for Providence St. Vincent Medical Center ("Providence") as a neo-natal intensive care unit ("NICU") nurse. Because she suffered from fibromyalgia and had personal problems related to a divorce, she incurred numerous absences from work. Although Samper received various accommodations from Providence, these proved unsuccessful in enabling her to report to work as required. Ultimately, Samper requested that Providence allow her to opt out of its attendance policy (which sanctioned five unplanned absences of unlimited duration, in addition to other permitted absences) as an accommodation. This would have provided her with an unspecified number of unplanned absences from her job. Providence refused to grant the accommodation and terminated Samper for violating its attendance policy. Samper sued the medical facility, alleging a violation of the ADA for failure to accommodate her disability. The district court granted summary judgment in favor of Providence, holding that attendance is an essential function of a neo-natal nursing position at the medical facility. In a favorable decision for employers, the Ninth Circuit affirmed.

Background

Samper worked for eleven years as a NICU nurse for Providence, a medical facility in Portland, Oregon, that provides medical services, including intensive care for premature infants. According to Providence, absences among NICU nurses can jeopardize patient care because such nurses require special training and, thus, there are a limited number of qualified personnel who can cover a shift at the last minute. Further, because of the nature of a neo-natal intensive care unit, being understaffed is "highly undesirable and, potentially, can compromise patient care."⁵ In spite of these obstacles, Providence had a liberal attendance policy that allowed its employees to take up to five unplanned absences during a rolling twelve-month period. Under the attendance policy, unplanned absences related to family medical leave, jury duty and bereavement leave, were *not* counted towards this limit. In addition, each absence, regardless of the length of time taken by the employee, counted as one occurrence. Samper, who suffers from fibromyalgia, which disrupts her sleep and causes chronic pain, challenged the application of this absence policy to her, arguing that the medical facility should have granted an accommodation exempting her from compliance.

Although Samper worked part-time throughout her employment with Providence, she still regularly exceeded the number of allowable unplanned absences. In July 2000,

⁵ *Samper*, 2012 U.S. App. LEXIS 7278, at *2.

while on a leave of absence, Providence provided Samper with a performance appraisal indicating that the seven unplanned absences she had taken over the course of a year exceeded the number permitted by its attendance policy. Although Providence advised Samper that her attendance needed improvement, and she received a second negative attendance review, her chronic attendance problems continued for two more years. At that time, following a meeting with her manager, Providence agreed to allow Samper to call in if having a bad day and, when necessary, move her shift to another day in the week. The medical facility did not, however, require Samper to find another nurse to cover her shift. Subsequently, in spite of this accommodation, Samper again violated the attendance policy and, as a result, received a corrective action notice, which was later withdrawn.

Providence eventually consented to another accommodation under which the medical facility agreed to not schedule Samper's two shifts-per-week on consecutive days. In spite of this, Samper continued having attendance problems, and Providence issued a verbal warning. At this point, Samper requested that Providence exempt her from its attendance policy altogether as a reasonable accommodation for her disability; however, the medical facility would not grant that particular accommodation. The absences continued, and Providence eventually terminated Samper for violation of its attendance policy.

Procedural History

Samper filed a lawsuit against Providence alleging, among other claims, a violation of the ADA for failure to accommodate her disability. The district court granted summary judgment in favor of Providence, reasoning that because Samper could not adhere to Providence's attendance policy, she was unqualified for her position as a matter of law and, therefore, not entitled to protection under the ADA. The court also held that Samper's request to obtain a waiver from the five unplanned absence limit as an accommodation was unreasonable. Samper appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit's Decision

The Ninth Circuit upheld the district court's grant of summary judgment to Providence, reasoning that regular attendance was an essential function of Samper's job as an NICU nurse. The court analyzed a trinity of requirements that make on-site attendance an essential function of the NICU nurse position. Specifically, Samper's job requires teamwork, face to face interaction with patients and their families, and working with the hospital's medical equipment. Thus, Samper's absences had a negative impact on teamwork and caused a hardship when her co-workers must cover for her. Moreover, the Ninth Circuit noted that Samper's job description specified that attendance

and punctuality are essential functions of the job, and Samper's former supervisor testified it is very difficult to find replacements for NICU nurses since they must have specialized training.

Thus, the Ninth Circuit concluded that since Samper could not attend work regularly with or without a reasonable accommodation, she was not a "qualified" individual with a disability under the Americans with Disabilities Act ("ADA")⁶ and, therefore, was not protected by the statute. The court did emphasize, however, that regular attendance is not an essential function of all jobs, since on-site presence is not always required.

In addressing Samper's additional argument that an exemption from Providence's attendance policy would constitute a reasonable accommodation, the Ninth Circuit held that Samper was essentially requesting that she be allowed to come and go as she pleased. As the court emphasized, "Samper essentially asks for a reasonable accommodation that *exempts* her from an essential function. . . . Samper's approach would eviscerate any attendance policy, leaving the hospital with the potential for unlimited absences."⁷

Discussion

Attendance Can Be an Essential Function of the Job

Attendance can be an essential function, depending on the specific nature of the job. If attendance is an essential function of the job, then an employer may have to accommodate a disabled employee who is experiencing attendance problems due to his or her disability. Failure to do so can subject the employer to a claim of disability discrimination pursuant to the ADA. However, in order to establish a *prima facie* case for failure to accommodate under the ADA, an employee must prove that he/she:

- (1) is disabled within the meaning of the ADA;
- (2) is a qualified individual able to perform the essential functions of the job with reasonable accommodation; and
- (3) suffered an adverse employment action because of the disability.⁸

⁶ 42 U.S.C. § 12101 et seq. In California, failure to accommodate a disabled employee can also subject an employer to a claim of disability discrimination under the Fair Employment and Housing Act ("FEHA"), Cal. Lab. Code § 12940 et seq.

⁷ 2012 U.S. App. LEXIS 7278, at *17.

⁸ *Samper*, 2012 U.S. App. LEXIS 7278, at *7 (citing 42 U.S.C. § 12111(8)).

In *Samper*, Providence did not dispute that Samper was disabled, that she had the requisite technical skills for the job, or that she suffered an adverse employment action. Instead, Providence argued that attendance constituted an essential function of Samper's job, which she could not meet even with the accommodations that had been provided by the medical facility. Samper disagreed, arguing that Providence should have accommodated her with an exemption from their attendance policy.

The issue of an employee's ability to perform the essential functions of his or her job is significant because an individual only qualifies for protection under the ADA if he or she can perform the essential functions of their job, with or without an accommodation. Further, the employer has the burden of proof in establishing what job functions are essential.

Providence was able to establish that Samper's position as an NICU nurse required regular attendance and, therefore, attendance was an essential function by offering a declaration from Samper's former supervisor stating that because NICU nurses must have specialized training, it is difficult to find replacements, particularly for unscheduled absences. In addition, Providence submitted its job description for a NICU nurse, which listed attendance and punctuality as essential job functions.

It is important for employers to note that job descriptions do not conclusively establish whether or not a particular job duty is essential; however, they do provide employers and employees with specific guidelines regarding job duties, including essential functions. Further, as the *Samper* case demonstrates, in the event of a disability discrimination lawsuit, they serve as an important piece of evidence regarding the employer's burden of proof on essential functions.

If an employee cannot meet an employer's attendance standards, he or she may not "qualify" for protection under the ADA. In *Samper*, the Ninth Circuit noted that numerous circuits have held that in those jobs where performance *requires attendance at the job*, irregular attendance compromises the ability of an employee to perform essential job functions. The court provided the following examples of situations in which attendance could be an essential job function:

- (1) work requiring participation with a team;
- (2) work requiring face-to-face interaction with clients and other employees; or
- (3) work requiring interaction with items and equipment that are on the employer's worksite.

According to the Ninth Circuit, Samper's job duties combined this "trinity of requirements that make regular on-site presence necessary for regular performance:

teamwork, face-to-face interaction with patients and their families, and working with medical equipment" thereby meeting the elements required to make attendance an essential function of her job.⁹

The court also distinguished Samper's circumstances from cases in which attendance did not constitute an essential function of the job, including situations where workers are fairly interchangeable so it does not matter who is performing the job on any particular day. In such cases, attendance does not constitute an essential function because the absent employee can be temporarily replaced.

Similarly, the Ninth Circuit distinguished its decision in *Humphrey v. Memorial Hospitals Association*, in which it noted that "regular and predictable attendance is not *per se* an essential function of all jobs."¹⁰ The *Humphrey* case involved a medical transcriptionist who suffered from a mental disability that impeded her ability to conform with a medical facility's attendance policy. The medical facility denied the employee's request to work at home as an accommodation, even though it allowed other transcriptionists to work at home. Eventually, the medical facility terminated the employee for attendance problems, and she filed a disability discrimination lawsuit alleging a failure to accommodate. Although the medical facility argued that attendance was an essential function of the job, the transcriber prevailed because she showed that attendance was not required for performance and, therefore, did not constitute an essential function of the job.

In the *Samper* case, the court noted that except under unusual situations, such as where an employee can effectively perform all job duties at home, an employee who fails to report to work generally cannot perform his or her essential job duties.

Accommodating Attendance Problems Related to a Disability

Samper argued that Providence failed to accommodate her inability to report regularly to work, which was allegedly caused by her disability. According to the Ninth Circuit, "Samper attempts to gild the lily by claiming not that attendance in general is an essential function, but, rather that her proposed variation to the attendance policy constitutes a reasonable accommodation."¹¹ The appellate court observed that Samper failed to quantify the number of additional unplanned absences she was seeking, and it appeared that the only satisfactory outcome for Samper was a completely flexible schedule that would allow her

⁹ 2012 U.S. App. LEXIS 7278, at *10–11.

¹⁰ *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1135, n.11 (9th Cir. 2001).

¹¹ *Samper*, 2012 U.S. App. LEXIS 7278, at *15.

to come and go as she pleased. Such an accommodation would enable Samper to miss work whenever she wanted. In the opinion of the Ninth Circuit, it would not have been a reasonable accommodation, because Providence would be excusing her from performing an essential function of her job.

The court also held that "Providence was under no obligation to give Samper a free pass for every unplanned absence."¹² More importantly, Providence had already provided Samper with various accommodations, including allowing her to call in when having a bad day; moving her shift to another day in the week; scheduling her for a maximum of two daytime shifts a week with no two days back to back; and permitting a history of extended leaves that the medical facility did not count towards the attendance policy. In spite of these accommodations, Samper still failed to meet the medical facility's attendance requirements. Thus, even though Providence exercised immense patience and provided numerous accommodations, it did not appear that Samper's conduct would change, which left Providence with little choice but to terminate Samper.

The Ninth Circuit concluded its decision by emphasizing that reliable and dependable performance in the workplace requires reliable and dependable attendance. Moreover, the court stated that employers do not need to provide accommodations that compromise performance standards.

Conclusion

The *Samper* case is important because it confirms that attendance can be an essential function of the job unless performance is not dependent on attendance. Factors to consider in determining whether attendance is an essential function include whether the job requires participation with a team, face-to-face interaction with clients and other employees, or interaction with items and equipment that are on the employer's worksite.

Samper is also noteworthy because it is an important reminder that employers should have clearly-worded, accurate and current job descriptions detailing the essential functions of the job. In addition, *Samper* emphasizes that employers may be required to accommodate an employee whose performance is negatively impacted by his or her disability, unless doing so would pose an undue hardship on the employer. Here, Providence more than sufficiently attempted to accommodate Samper's disability-related attendance problems, and only decided to terminate after years of providing various accommodations.

In addition to the concerns addressed in *Samper* related to essential job functions and accommodating attendance problems, the *Samper* decision raises important considerations surrounding attendance policies. In light of this, employers should:

- ✓ Implement a compliant attendance policy.
- ✓ Clearly communicate that policy to employees.
- ✓ Be sure their attendance policy indicates a willingness by the employer to consider excusing absences under the provisions of the Fair Employment and Housing Act ("FEHA"),¹³ the ADA, the Family Medical Leave Act ("FMLA"),¹⁴ the California Family Rights Act ("CFRA")¹⁵ and other similar laws.
- ✓ Develop internal systems for tracking the reasons for employee absences and, in particular, for identifying absences taken pursuant to the FEHA/ADA, FMLA/CFRA, etc.
- ✓ Train managers and supervisors so that they understand the company's attendance policy, can properly implement the policy, and can clearly communicate to human resources when an absence is related to FEHA/ADA, FMLA/CFRA, etc.
- ✓ Be sure that job-protected absences are not considered in an employee's annual performance review or the subject of any disciplinary proceedings, unless there has been employee misconduct.
- ✓ Uniformly enforce attendance policies and procedures.

Although Providence may have gone beyond what is required of an employer, the outcome would likely have been much different if the medical facility had not properly accommodated Samper.

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¹² 2012 U.S. App. LEXIS 7278, at *18.

¹³ Cal. Lab. Code § 12940 et seq.

¹⁴ 29 U.S.C. § 2601 et seq.

¹⁵ Cal. Gov't Code § § 12945.2, 19702.3.