

## Timely Attendance Isn't An Essential Job Function?!?

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According to a recent 2nd Circuit Court of Appeals (covering CT, NY and VT) decision ( [McMillan v. City of New York](#)), employers cannot rely upon their old standby of regular attendance at work as an “essential job function” under the ADA in all cases. The Court held that in this particular case, the City could not show that arriving in a timely fashion at a set time was an essential job function. The City was a victim of its own lax past practice of not only having a 1-hour flex-time to arrive at work but also permitting this particular employee arrive to work outside of the flex-time for a number of years without any objections. When they began to more strictly enforce the 1-hour “flex” time, then the employee was deemed to be unqualified and was eventually given a 30-day unpaid suspension. The 2nd Circuit overturned the District Court’s order granting summary judgment in favor of the City, finding that the City could not prove that timely attendance was an essential job function since the employee offered to work later to make up for missed time.

This is completely contrary to the 7th Circuit Court of Appeals (covering IL, IN and WI) decision during the same time frame ([Basden v. Professional Transportation, Inc.](#)). The *Basden* court held that an “employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance.” Where a plaintiff requested an indefinite leave of absence with no diagnosis, no prescribed treatment plan and no estimated date when the plaintiff could return to work, the employee was deemed unqualified and then was terminated. The 7th Circuit upheld the employee’s termination despite the fact that the employee provided documentation of a potential diagnosis of MS and that the employee granted no leave of absence beyond the normal 8 point attendance policy.

Based on the disagreement among the federal Circuit Courts, employers should have “regular timely attendance” listed as an essential job function in employee’s written job descriptions to assist them in the defense of claims that they have failed to accommodate disabled employees.

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