

## Attendance Really *Is* Essential: The Ninth Circuit Confirms That Hospital Attendance Policies Need Not Be Ignored Under the ADA

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Providence St. Vincent Medical Center (“Providence”) in Portland, Oregon faced a common dilemma regarding one of the nurses employed in its neo-natal intensive care unit (“NICU”). Year after year, Monika Samper’s absences from work greatly surpassed the number of absences allowed under Providence’s attendance policy. But Samper, who suffered from fibromyalgia, unquestionably constituted a “qualified individual with a disability” under the Americans with Disabilities

Act (“ADA”). Faced with balancing its obligations to provide safe and consistent patient care and its legal obligations to accommodate Samper’s disability, Providence spent years attempting to craft a workable solution for Samper’s poor attendance. Finally, however, Providence terminated Samper’s employment.

Samper subsequently filed suit under the ADA, claiming that Providence’s termination decision was improperly based on her disabili-

ty because her absences stemmed from her fibromyalgia. The Ninth Circuit Court of Appeals’ recent decision in the case provides clarification regarding employers’ obligations under the ADA. “Just how essential is showing up for work on a predictable basis?” queried the Court. *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1235 (9th Cir. 2012). The answer allows healthcare employers to breathe a sigh of relief: “In the case of a neo-natal intensive care nurse, we conclude that attendance really *is* essential.” *Id.*

In order to succeed on a disability discrimination claim under the ADA, an employee must prove that he or she is disabled, as defined by the ADA; that he or she is able to perform the essential functions of the position with or without a reasonable accommodation; and that he or she suffered an adverse employment action because of a disability. Samper was able to demonstrate that she was disabled due to her fibromyalgia and that she suffered an adverse employment action – her termination because of her fibromyalgia-induced absences from work. But

the Court's conclusion that Samper's attendance was an essential function of her position stopped her ADA claim in its tracks. As the Court clarified, Samper's demand that she be completely exempted from Providence's attendance policy was *not* a reasonable accommodation request because it would have exempted her from an essential function – something that is not required by the ADA.

Although the *Samper* Court's analysis focused on NICU nurses, its reasoning extends to other employees who provide direct patient care. In analyzing whether regular attendance was an essential function of Samper's position as a NICU nurse, the Court identified a "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." *Id.* at 1238. These requirements are equally applicable to a large number of healthcare providers and staff.

In addition, the Court emphasized the fact that "NICU nurses must have specialized training, and it is very difficult to find replacements, especially for unscheduled absences." *Id.* Unlike cases in which "workers were basically fungible with one another, so that it did not matter who was doing the [job] on any particular day," in *Samper* the Court recognized that "Samper's regular, predictable presence to perform specialized, life-saving work in a hospital context" was essential. *Id.* The Court further distinguished *Samper's* circumstances from cases in which on-site presence was not necessary

for performance, holding:

[I]n the context of a neo-natal nurse, it is necessary to *provide* that treatment in the first place. Not only is physical attendance required in the NICU to provide critical care, the hospital needs to populate this difficult-to-staff unit with nurses who can guarantee some regularity in their attendance. *Id.* at 1239.

In addition, the Court acknowledged the critical point that, in a hospital setting, "[u]nderstaffing compromises patient care." *Id.* at 1238.

*Samper* does not change healthcare providers' duty to avoid attendance discipline for absences due to protected leave such as leave under the Family and Medical Leave Act. When determining accommoda-

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tion obligations, employers should also check state disability accommodation law, which may differ from federal law in some cases. In circumstances where healthcare employees are required to provide direct patient care, however, and particularly where such employees receive specialized training that renders them difficult to replace when unscheduled absences arise, the *Samper* case provides clear

guidance that the ADA does not require the employer to compromise its reasonable attendance policy. Healthcare employers can now rely on the *Samper* Court's recognition of the critical nature of employee attendance requirements: "An employer need not provide accommodations that compromise performance quality – to require a hospital to do so could, quite literally, be fatal." *Id.* at 1241.

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