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Employment Law Post-Op – The Tale of the Tardy Technician

Woody Allen famously said that 80% of success is showing up. However, in some settings, including hospitals, it is not enough to show up. You also have to show up on time! This point was recently emphasized in a case out of Arizona – [Cooper v Dignity Health](#).

The case, which shows how to properly handle an accommodation request, was filed by Heather Cooper, an employee of Dignity Health, which operated as St. Joseph's Hospital and Medical Center. Cooper held the position of Intraoperative Neuro Monitoring Technologist (a catchy title, but I will just call them "Techs"). Cooper was fired for failing to show up to work on time.

Saying that Cooper had trouble getting to work on time is like saying the Incredible Hulk is stronger than average. In 2011, Cooper was late to work more than 70 times over a four-month period. This remarkable achievement led the Hospital to put her on a corrective action in October 2011. Then, in February 2012, Cooper was again placed on a corrective action – this time for being late an additional 40 times since the previous October.

In August 2012, Cooper started claiming that she was having panic attacks, and her inability to get to work on time was the result of side effects from the medication she was taking, which made it difficult for her to get ready for work in the morning. There was no mention of the impact the medications had on her ability to set her alarm a half-hour earlier.

Cooper's pattern of tardiness continued through January 2013, when she was late 15 more times. That February, she received another written warning, which cautioned her that if she arrived late again, she could be fired. Although I may be a bit of a stickler, I submit this was a reasonable position on the part of the Hospital since her number of late arrivals was now in the triple digits.

Now that the Hospital had made it clear to Cooper that her inability to get to work on time had put her job in jeopardy, Cooper decided it was finally the time to broach the subject of her medical

problems with her supervisor and the department manager.

Initially, Cooper asked for and was granted intermittent leave under the [Family and Medical Leave Act](#) (“FMLA”) between mid-February and late May of 2013. Her FMLA leave allowed Cooper to take off work up to four days per month as needed. She used the leave to take off work when she was too sick in the mornings to come to work at all, but she still was required to report to work on time when she did not take FMLA leave.

While Cooper was on FMLA leave, she asked the Hospital’s HR administrator if she could arrive at work between 9:00 and 10:00 a.m. However, she was told that the FMLA did not provide for a late start time and that she needed to ask HR for an accommodation under the [Americans with Disabilities Act](#) (“ADA”).

Cooper did meet with HR and requested that she be taken off on-call shifts on Wednesday evenings so she could attend therapy sessions and was granted additional paid time off even though she was not entitled to any. HR also suggested that Cooper could take additional unpaid time off, but Cooper said that she could not afford to take unpaid leave.

In June 2013, Cooper and the other Techs were told that instead of 7:00 a.m., they would now have to clock in for work by 6:45 a.m. to make sure that they had enough time to prepare all of the equipment and other items necessary to ensure that the scheduled surgeries could start on time.

It should come as no surprise that this earlier start time did not work out well for Cooper. She clocked in late six more times after the new start time was implemented, which led to the Hospital issuing her a final written warning due to her continued tardiness. Cooper responded to the final warning by showing up late to work two more times, and she was placed on administrative leave.

After being placed on leave, Cooper requested that she be allowed a late start time as an accommodation and also informed the Hospital that she was filing an Equal Employment Opportunity Commission (“[EEOC](#)”) charge. The Hospital denied her accommodation request, explaining that being at work at 6:45 was an essential function of her position because the Hospital had to

make sure that the Techs had adequate time to prepare everything for surgeries. Following two meetings to discuss her accommodation requests, the Hospital terminated Cooper's employment.

Cooper responded by filing another EEOC charge and eventually a lawsuit claiming, among other things, that the Hospital had violated the ADA by not only failing to provide her with an accommodation, but also failing to engage in the interactive process. The Hospital successfully petitioned the Court to have Cooper's lawsuit dismissed before trial.

This case provides a good opportunity to review an employer's obligations under the ADA and gives a good example for how to potentially avoid liability by properly handling accommodation requests and establishing essential job functions.

Summary of the ADA

Briefly, the ADA prohibits discrimination against employees with disabilities. The ADA provides a detailed definition of what a disability is, but following its most recent amendments, a disability can be pretty much anything as long as it is not transitory or minor.

The ADA basically bars employers from discriminating against qualified individuals with a disability. Under the Act, a "qualified individual" is someone that can perform the essential functions of his or her position with or without an accommodation. Although employment lawyers have grown used to this awkward phraseology, it may be a little more difficult for normal humans to unpack what this means in English. Basically, the Act provides that someone with a disability who can perform their job should be allowed to do so, even if that might require the employer to take some additional step to help them perform their job. This additional step is what is referred to as an accommodation.

Although the ADA does require an employer to provide an accommodation, it does not require that the employer provide an accommodation that is unreasonable. So, an employer may have to provide the employee with an ergonomic chair or stand-up desk, but not provide a specially designed nuclear-powered, robotic

exoskeleton. These determinations of reasonableness are made on a case-by-case basis and depend on a number of factors, including the size of the employer and the cost of the proposed accommodation.

To make the determination of what accommodation may be appropriate, the ADA requires that the employer talk to the employee requesting the accommodation. This discussion is designed to allow both parties to reach an agreement as to what type of accommodation might work and is referred to as the “interactive process.” While the ADA does provide that an employer has to provide a disabled employee with a reasonable accommodation, it does not require that the employer give the employee whatever accommodation he or she may want. Instead, this interactive process is designed to be a back-and-forth discussion between the employee and the employer to determine what accommodation may make sense.

Ultimately, it is the employee’s responsibility to come up with an accommodation that will work, but both the employer and the employee have to participate in coming up with a mutually agreeable solution.

The other component of ADA requirements is that the disabled employee has to be able to perform the essential functions of his or her job – whether with the help of an accommodation or not. So, if there is no accommodation that will allow the employee to perform the essential functions of his or her job, then the ADA does not consider them to be a “qualified individual with a disability,” and they are not entitled to job protection under the ADA. For example, if a special chair will allow a clerk to sit for long enough to crank out whatever report they are assigned on a daily basis, then they are a qualified individual with a disability under the Act. However, if the individual has an incurable, crippling fear of water, then they are not going to be able to work as a lifeguard, since swimming is an essential function of the job and there is no accommodation that will allow the individual to perform that essential function. In this latter case, they are not a qualified individual.

Now, turning back to our tale of the Tech, Cooper’s job involved making sure that everything was properly set up to allow for

surgeries to proceed as scheduled, and this required her to be at work on time. Due to concerns with patient safety, rushing in at the last minute to try to get everything done was not an option.

The Hospital was able to establish that being at work on time was an essential function of the position and was able to demonstrate that they engaged in discussions with Cooper about what options might be available to allow her to perform her job despite her disability. Cooper's desired accommodation was to be able to come in late. But that would not work because of concerns for patient safety and the efficient operation of the Hospital. The Court concluded that Cooper was basically asking the Hospital to eliminate an essential job function as an accommodation, which the ADA clearly does not require. Because there was no accommodation that would allow Cooper to be able to satisfy an essential function of her position – showing up on time – the Court concluded that the Hospital was justified in terminating her employment.

Evidencing an Essential Function

There were a number of things that the Hospital did right in this case. First, it made clear that showing up to work on time was an essential function of the job and provided a legitimate basis for that requirement. While there may be some jobs where regular on-time attendance is not always necessary, work involving preparation for surgeries is not one of them. Although this may seem obvious, listing regular, predictable, on-time attendance as an essential job function in the job description, along with a brief justification, can go a long way in setting up a successful defense to an ADA claim.

The Hospital's "Interactive Process"

The Hospital also engaged in the interactive process with Cooper instead of simply blowing her off when she requested to start later. Instead, the Hospital had discussions with her about alternatives – including taking FMLA leave or additional unpaid leave. The Hospital was also consistent in disciplining all employees for tardiness, which enabled them to refute the allegation by Cooper that she was being treated differently because of her disability. Finally, the Hospital was more than patient in working with Cooper. However, allowing Cooper

to come to work late more than 100 times before finally terminating her may have been overly indulgent.

The ADA has allowed individuals suffering from disabilities to enjoy full and productive work lives. Properly managed, the ADA is a beneficial tool for both employers and employees. However, the ADA does not require employers to allow people to remain in jobs that they cannot perform. As the Court in this case noted: “an employer need not provide accommodation that compromises performance quality – to require a hospital to do so could, quite literally, be fatal.”

I have helped employers of all types, including those in the healthcare setting, navigate the ADA, FMLA, and other employment law issues. For more information on this case or help with your employment law issues, please do not hesitate to contact me, [Rich Moore](mailto:rlmoore@fbtlaw.com) (rlmoore@fbtlaw.com; 513.651.6496).

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