

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2015

PHILADELPHIA, TUESDAY, FEBRUARY 16, 2016

VOL 253 • NO. 30

An **ALM** Publication

EMPLOYMENT LAW

Regular On-site Attendance an Essential Function of Lawyer's Job?

BY SID STEINBERG

Special to the Legal

There are always questions about whether regular and predictable attendance is an essential function of a job under the Americans with Disabilities Act. In *Fischer v. Pepper Hamilton*, No. 15-02413, 2016 U.S. Dist. Lexis 10603 (E.D. Pa. Jan. 29, 2016), the U.S. District Court for the Eastern District of Pennsylvania found that regular on-site attendance may not be essential for a project attorney hired by a law firm. The parties have since filed a joint motion to dismiss the case, putting an end to a trial that was scheduled to begin last week.

HABITUAL LATENESS

Andrew Fischer worked as a project attorney for Pepper Hamilton. In that role, Fischer's job was to report to the firm and work on projects as assigned. These projects included reviewing documents, contracts and settlement agreements, which were accessible both online and in hard copy. Project attorneys typically worked an eight-hour work day between the hours of 7 a.m. and 7 p.m. with the core hours between 9 a.m. to 5 p.m. Though project attorneys worked in teams and participated in team meetings at the office, they rarely interacted with clients, according to the opinion.



SID STEINBERG is a principal and chair of Post & Schell's employment and employee relations and labor practice groups. Steinberg's practice involves virtually all aspects of employee relations, including litigation experience defending employers against employment discrimination in federal and state courts. He also represents employers before federal, state and local administrative agencies, and regularly advises employers in matters including employee discipline, labor relations, and the creation or revision of employee handbooks. He can be reached at ssteinberg@postschell.com.

Fischer was consistently late to work and often arrived to work after noon. In 2007, the firm directed Fischer (and other project attorneys) to bring their attendance into compliance with the firm's attendance policy. Fischer responded that he was going to do his best to comply with the business hours requirement and advised that he was going to have a sleep evaluation completed by his neurologist. Fischer's lateness continued for several more years, with Fischer regularly arriving to work after 1 p.m., the opinion said.

DELAYED SLEEP PHASE SYNDROME

Nearly two years after being advised to bring his attendance into compliance and three months after the firm requested

medical documentation providing specific details of his limitations, Fischer provided the firm with a doctor's note stating that he suffered from delayed sleep phase syndrome (DSPS), the opinion said. Fischer's DSPS delayed his "sleepiness time" such

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that he fell asleep at a later time than the average person and, as a consequence, woke up later in the morning.

ATTEMPTS TO ACCOMMODATE

As an accommodation, the firm authorized Fischer to start work later in the day. In addition, the firm allowed Fischer to work until 8:30 p.m. when necessary. However, Fischer was encouraged to minimize the amount of time he billed outside of the firm's core business hours.

In February 2012, upon the firm's request, Fischer presented another doctor's

note that stated DSPS caused him to have “distributed sleep” with an inability to fall asleep before 2 a.m. His doctor went on to explain that Fischer’s disorder required him to obtain eight hours of sleep and given the time it takes to get to work, he would likely to arrive to work between 11:30 a.m. and 1 p.m.

Fischer’s work schedule was again re-adjusted and the firm authorized him to arrive to work between noon and 2 p.m. In addition, in instances when Fischer arrived to work after 2 p.m., he was allowed to telecommute from home to make up any hours he missed. Less than a week after his schedule was readjusted (for the second time), Fischer requested an additional hour of “wiggle room,” according to the opinion.

TERMINATION FOR CONTINUED TARDINESS

Notwithstanding the revisions to his work schedule, Fischer’s lateness persisted. Fischer arrived to work after 2 p.m. on 50 occasions and despite having the opportunity to telecommute, Fischer regularly failed to make use of this option. The firm ultimately terminated Fischer due to his tardiness and Fischer brought suit alleging disability discrimination based on disparate treatment, failure to accommodate and retaliation in violation of the Americans with Disabilities Act (ADA) and the Pennsylvania Human Relations Act (PHRA).

REGULAR ON-SITE ATTENDANCE MAY NOT BE ESSENTIAL FUNCTION

The principle issue in this case concerned whether the firm failed to provide Fischer with a “reasonable accommodation.” To answer this question the court considered whether regular and predictable on-site attendance is an essential function of a project attorney’s job. In doing so, the court turned to the U.S. Equal Employment Opportunity Commission’s regulations and the U.S. Court of Appeals for the Third Circuit’s decision in *Miller v. University of Pittsburgh Medical Center*, 350 Fed.

Appx. 727 (3d Cir. Pa. 2009), for guidance.

According to the EEOC’s regulations, “essential functions” are the “fundamental job duties” of a position. To aid in determining whether a particular activity is an essential function, the regulations provide a list of factors that courts may consider in this inquiry. Among these factors are the amount of time spent performing the activity on the job, the employer’s judgment as to which functions are essential and the experience of an employee working that job. As would be expected, the firm argued that regular and predictable on-site attendance was an essential function of the job of a project attorney and Fischer maintained the opposite.

In *Miller*, the Third Circuit found that attendance can constitute an essential function under the ADA. Given the plaintiff in *Miller* was an emergency room technician, the Third Circuit affirmed the district court’s holding that the plaintiff’s attendance was an essential function of that position. Nevertheless, the court did not pronounce a definitive ruling on the issue.

After reviewing federal court decisions both within and outside the Third Circuit, which explained that regular on-site attendance is an essential function where a job requires face-to-face interaction with customers or other employees or requires the use of equipment or materials available only on-site, the district court found that absent definitive guidance from the Third Circuit, the issue was best left to a jury to decide.

The court noted that project attorneys worked in teams and participated in team meetings at the office; however, they seldom interacted with clients. Further, many of the materials used by project attorneys (documents, contracts, and settlement agreements) could be accessed online. Also significant to the court’s decision was the fact that a number of project attorneys were permitted to telecommute.

In light of these facts, the district court declined to dismiss Fischer’s ADA and PHRA failure-to-accommodate disability claims, reasoning that it could not conclude

as a matter of law that regular and predictable attendance on-site attendance was an essential function of a project attorney’s job.

INTENTIONAL DISCRIMINATION, RETALIATION CLAIMS DISMISSED

Though Fischer’s failure-to-accommodate claims survived summary judgment, the district court dismissed Fischer’s disparate treatment and retaliation claims as Fischer could not point to any evidence demonstrating that the firm’s articulated reasons for terminating his employment was pretextual. The court highlighted that the firm had consistently documented Fischer’s poor attendance and despite several schedule adjustments, Fischer continually failed to work within the adjusted parameters. With respect to Fischer’s retaliation claim, the court found that the eight-month gap between his complaints and his termination was not the “type of unusually suggestive proximity that establishes causation.” The court also found that Fischer failed to establish temporal proximity between his requests for an accommodation and his termination. Finally, there was no temporal proximity between Fischer’s complaints of discrimination and his required attendance and the firm’s expectation that he work a full-time schedule, both of which Fischer argued were adverse actions.

The court’s decision calls into question whether regular and predictable attendance is in fact an essential function for several classes of employees who have the ability to telecommute and perform their jobs remotely. What is clear from the court’s decision is that the determination of whether regular and predictable attendance is an essential job function is a fact-intensive inquiry that will turn on the specific requirements and details of an individual’s position. •