Punctuality Is Not Always An Essential ADA Job Function

By Jonathan R. Mook



It may seem axiomatic that municipalities can fire employees who are habitually late to work. Not so fast—employers should double-check the Americans with Disabilities Act before taking action.

In today's time-obsessed world, punctuality may well rank as one of the cardinal virtues of the modern age. Indeed, Mussolini is still remembered as being the Italian leader who made the trains run on time. Accordingly, it should not strike one as being unusual that the courts generally have said that coming to work on time and having regular, reliable attendance constitute bedrock job requirements that a disabled individual must be able to satisfy in order to be considered a qualified individual with a disability entitled to invoke the protections of the Americans with Disabilities Act ("ADA").[1]

Nonetheless, this is not always the case, and there certainly may be exceptions that prove the rule. Therefore, as a matter of law, being physically present at a job by a specific time of the day (or night) is not always deemed by the courts to be an essential job requirement.[2] As New York City recently learned in *McMillan v. City of New York*, there may well be certain jobs where workplace punctuality is not necessary in order to get the job done.[3] In that case, the Second Circuit Court of Appeals reversed a trial court decision upholding the City's determination that it had no obligation to continue tolerating the tardiness of an employee whose mental impairment interfered with his ability to arrive at work on time. The court remanded the case to the trial court for further factual development.

McMillan's Employment with New York City

The case that led to the Second Circuit's decision was brought by Rodney McMillan, who has schizophrenia that is treated with medication. McMillan worked as a case manager for New York City's Human Resources Administration, and his job duties included conducting annual home visits, processing social assessments, recertifying clients' Medicaid eligibility, and meeting with clients daily in the office and addressing their concerns. The City's flex-time policy allowed employees to arrive at work between 9:00 and 10:00 a.m., and they were not considered late unless they arrived after 10:15 a.m. Because McMillan's morning medications made him 'drowsy" and "sluggish," however, he often arrived later for work, sometimes after 11:00 a.m. For at least ten years, McMillan's tardy arrivals were either explicitly or tacitly approved.

Beginning in 2008, however, McMillan's supervisor started refusing to approve any additional late arrivals. McMillan formally requested that he be allowed a later start time due to the effects of his medication, and he offered to work during his lunch hour and into the evening so as to put in a full eight-hour day. McMillan presented letters from his treating psychiatrist to support his request. Nevertheless, the City's Equal Employment Opportunity office rejected McMillan's proposed schedule changes. Based upon the terms of the applicable collective bargaining agreement, the City had a general policy that employees could not work through lunch. Also, because no supervisor was present after 6:00 p.m., the City said that McMillan could not work into the evening to make up for a later start time. Subsequently, McMillan continued arriving at work after 10:15 a.m., and he was given a 30-day suspension without pay.

McMillan's District Court Lawsuit and Dismissal

In response to his suspension, McMillan brought suit against the City in the federal district court for the Southern District of New York, alleging violations of the ADA and state and local laws. McMillan argued that he was a qualified individual with a disability because even with a late arrival time, he still could complete the essential functions of his position by remaining at work into the early evening.[4]

District court Judge Jed S. Rakoff disagreed, however, and granted summary judgment to the City.[5] In doing so, the court gave deference to the City's determination that arriving to work within a designated time period constituted an essential function of McMillan's job and that the City not need alter this essential requirement as a reasonable accommodation.[6]

McMillan's Second Circuit Appeal-Existence of Essential Function Issue

McMillan appealed the dismissal of his case to the Second Circuit Court of Appeals. In his appeal, McMillan contended that arriving to work by 10:15 a.m. did not constitute an essential function of his job and that he could perform the essential functions of a case manager with the accommodations of a later start and end time, as he had requested. A three-judge panel at the Second Circuit agreed. In an opinion written by Circuit Judge John M. Walker, Jr., and joined by Circuit Judges Deborah Ann Livingston and Christopher F. Droney, the appeals court held that a reasonable juror could find that arriving at a specific time was not an essential function of McMillan's case manager position and that he had suggested, but was denied, plausible accommodations that would have allowed him to perform the essential functions of his job.

In his opinion, Circuit Judge Walker noted that in addressing disability discrimination cases, a court generally will give "considerable deference" to an employer's determination as to what job functions are essential.[7] Additionally, Judge Walker acknowledged that a number of court decisions have recognized that an employee's presence during specified business hours is an essential job function and that a request for flexible start-times would not consti

Moreover, the fact that the City had in place a flex-time policy allowing all employees to arrive for work within a one hour window, in Judge Walker's view, implied that punctuality and workplace presence at precise times may not be an essential job requirement.

Most notably, for many years prior to 2008, the City had accommodated McMillan's late arrivals. Moreover, the fact that the City had in place a flex-time policy allowing all employees to arrive for work within a one hour window, in Judge Walker's view, implied that punctuality and workplace presence at precise times may not be an essential job requirement. Accordingly, Judge Walker concluded that there existed a reasonable dispute as to whether McMillan's late and varied arrival times substantially interfered with his ability to perform his job responsibilities. As Judge Walker explained, "a reasonable juror could find that arriving at a specific time was not an essential function of the case manager position, provided that McMillan still would be able to complete his work in a sufficiently timely fashion."[8] In this regard, Judge Walker noted that McMillan had offered suggestions that would allow him to complete his work, such as working through his lunch hour and working late.

City's Burden to Show Hardship

Because McMillan had suggested plausible accommodations that would allow him to perform his job duties, the burden then shifted to the City to demonstrate that the proposed accommodations would present undue hardships and, therefore, be unreasonable. The City had rejected McMillan's proposal that he work late at the office to make up for his late arrival times because there would be no supervisor past 6:00 p.m. Agreeing with the district court, the Second Circuit said that assigning a supervisor to work past 6:00 p.m. would constitute an undue hardship for the City. Nonetheless, the question remained as to whether McMillan needed to be supervised when he worked late. As Judge Walker noted, when McMillan made home visits to clients or when he had worked past 6:00 p.m. in the past, he presumably was unsupervised. Thus, it remained unresolved as to whether McMillan could reasonably perform his job without supervision, apparently as he had been permitted to do in the past.

Additionally, although the City had a general policy, based on a collective bargaining agreement, of not allowing employees to work through lunch, that policy contained an exception where the employee received advance approval. Thus, Judge Walker reasoned that the City's policy did not prevent it from allowing McMillan to work through his lunch hour, as long as the City pre-approved his working. For the City to do so did not strike the appeals court as requiring any significant difficulty or expense that would rise to the level of an undue hardship.[9] In sum, the Second Circuit concluded that it could not find as a matter of law that McMillan's suggested accommodations of working through lunch or working late to make up

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for his late arrival times would constitute undue hardships to the City or otherwise be unreasonable.

Remand to Lower Court

Given these unresolved factual issues pertaining to whether arriving at work at a specific time actually constituted an essential function of the case manager position, and whether allowing McMillan to work through lunch and in the evenings to make up for his late arrivals would constitute an undue hardship to the City, the Second Circuit remanded the case to the district court for further development of the factual record. In doing so, Judge Walker's opinion emphasized that "[a] court must avoid deciding cases based on 'unthinking reliance on intuition about the methods by which jobs are to be performed.' " Instead, Judge Walker stated that "a court must conduct 'a fact specific inquiry into both the employer's description of a job and how the job is actually performed in practice.' "[10]In McMillan's case, Judge Walker noted that the district court had appeared to rely heavily on the City's representation that arriving at work at a consistent time was an essential function of McMillan's position and the court's own assumption that "physical presence is 'an essential requirement of virtually all employment,'"[11] without delving more closely into the specific facts of the case before it.

Need for Factual Analysis

The Second Circuit's decision in *McMillan* "highlights" what Judge Walker said was "the importance of a penetrating factual analysis" as to what in the specific factual circumstance constitutes the essential functions of the job.[12] While timely arrival may normally be an essential function, Judge Walker's opinion makes clear that a court must still conduct "a fact specific inquiry." The error in the district court's decision was that it failed to conduct such an inquiry and, instead, relied upon the City's say-so and general assumptions. To successfully establish that timely arrival constitutes an essential job function, therefore, an employer must be able to demonstrate that the unpredictability of an employee's arrival at work would be unduly disruptive to the work of other employees or result in unfinished work or lost business.

Importantly, an employer may not contend that allowing a disabled employee to have a flexible schedule would be unreasonable or constitute an undue hardship due to the negative effect on morale of other employees who may be required to adhere to stricter attendance requirements.

As the *McMillan* case demonstrates, factors in considering the strength of an employer's showing will include:

- Whether the disabled employee or other employees, in the past, have been allowed to work flexible schedules;
- Whether a disabled employee's presence is necessary for other employees to perform their job functions;
- Whether the disabled employee's presence during specific hours is necessary because that employee supervises other employees;
- Whether the job tasks performed by a disabled employee must be performed at certain times, e.g., a receptionist at a law office must be physically present during normal office hours, such as 9:00 a.m. to 5:00 p.m., but a lawyer may be able to perform his or her job on a more flexible schedule;
- Whether there is a specific daily deadline that could not be met if a disabled employee has a flexible arrival time; and;
- Whether a disabled employee who has a later arrival time can make up the time and complete the job tasks by working late at the office, at home in the evenings, or on weekends;

All of these, as well as additional considerations, will enter into a determination as to whether in a particular situation a flexible arrival time at work may be a reasonable accommodation for a disabled employee.[13]

Importantly, an employer may not contend that allowing a disabled employee to have a flexible schedule would be unreasonable or constitute an undue hardship due to the negative effect on morale of other employees who may be required to adhere to stricter attendance requirements. The U.S. Equal Employment Opportunity Commission has said that "the negative effect on morale, by itself, is not sufficient to meet the undue hardship standard" for the denial of a reasonable accommodation to a disabled employee.[14] Nonetheless, if the lowered morale of other employees is due to their need to work harder or longer hours due to the accommodation of an individual with a disability, the Commission has opined that the "negative impact on the . . . ability of . . . employees to perform their jobs" is a valid consideration.[15]

Importance of Accommodation Process

With the passage of the ADA Amendments Act of 2008,[16] Congress' expansion of the definition of "disability" has significantly changed the focus of ADA law and litigation. In the past, the primary issue in ADA cases was whether the plaintiff satisfied the stringent definition of disability. Now, the focus no longer will be on who is covered by the statute, but rather on whether the employer has complied with its statutory obligations, including the obligation to reasonably accommodate disabled job applicants and employees. Alternative work schedules are a common accommodation sought by individuals with disabilities who, like McMillan, may seek a later arrival time due to the effects of medication or who need to take time off during the work day for medical treatment. Other employees who have sustained injuries or who are recovering from various physical or mental impairments also may seek a part-time schedule in order

to facilitate the recuperation process before transitioning to full-time work.

The Second Circuit's *McMillan* decision emphasizes that an employer must undertake a rigorous, fact specific analysis to determine whether or not the accommodation requested would be unduly disruptive to the workplace environment or would require the employer to incur significant difficulty or expense. Such an analysis needs to be undertaken at the time a disabled employee makes a request for an accommodation. Employers should not wait until a lawsuit is filed to engage in the type of investigation and analysis that should occur when the accommodation request is first made. In dealing with the requirements of the ADA, an ounce of prevention is always worth a pound of cure.

Notes

1. The employment provisions of the ADA prohibit discrimination against a "qualified individual on the basis of disability." 42 U.S.C. § 12112(a). A "qualified individual" is defined as a disabled person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 41 U.S.C. § 12111(8). For cases recognizing that punctuality and regular attendance are essential job functions, see Earl v. Merlyn's, Inc., 207 F.3d 1361 (11th Cir. 2000) (punctuality held to be an essential function of plaintiff's job as a store area coordinator); Brenneman v. Medcentral Health Sys., 366 F.3d 412, 416 (6th Cir. 2004) (employee who had 34 late arrivals or early departures and 193 unapproved absences during a five-year period was not qualified to perform the essential functions of his job); Waggoner v. Olin Corporation, 169 F.3d 481, 484 (7th Cir. 1999) (employee with erratic, unexplained absences was not qualified to perform essential job functions); Rask v. Fresenius Medical Care North America, 509 F.3d 466 (8th Cir. 2007) (essential functions of a patient care technician was to have regular predictable attendance); Johnson v. Children's Hospital, 1995 U.S. Dist. LEXIS 7743 (E.D. Pa. 1995), aff'd, 79 F.3d 1138 (3d Cir. 1996) (radiology aide who was frequently absent or late to work was not qualified to perform the essential functions of her job); Guice-Mills v. Derwinski, 772 F. Supp. 188, 199 (S.D.N.Y. 1991) (essential function of head nurse position was arriving to work at 7:30 or 8:00 a.m.), aff'd, 967 F.2d 794, 798) (2d Cir. 1992)); Carr v. Reno, 23 F.3d 525, 529 (D.C. Cir. 1994) (allowing employee to have a flexible arrival time would not allow employee to perform essential job duties); Tyndall v. National Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994) ("[A]n employee who cannot meet the attendance requirements of the job at issue cannot be a 'qualified' individual protected by the ADA.").

2. *See* Holly v. Clairson Indus., L.L.C., 492 F.3d 1247 (11th Cir. 2007) (genuine dispute of material fact existed as to whether or not strict punctuality was an essential element of mold polisher's job); Conneen v. MBNA American Bank, N.A., 334 F.3d 318 (3d Cir. 2003) (declining to hold that bank managers beginning work at a specified hour constituted an essential job function); Ward v. Massachusetts Health Research Inst., Inc., 209 F.3d 29 (1st Cir. 2000) (declining to rule that requiring a data entry clerk to begin work between the hours of 7:00 – 9:00 a.m. constituted an essential job function). For a discussion of the Eleventh Circuit's decision in Holly v. Clareson Industries, *see* J. Mook, "'Strict Punctuality' Not Necessarily an ADA Essential Function," 7 *Bender's Lab. & Empl. Bull.* 500 (Nov. 2007).

3. McMillan v. City of New York, 2013 U.S. App. LEXIS 4454 (2d Cir. 2013).

4. There was no issue that McMillan's schizophrenia constituted a legally protected disability.

5. McMillan v. City of New York, 2011 U.S. Dist. LEXIS 95062 (S.D.N.Y. Aug. 23, 2011).

6. The U.S. Equal Employment Opportunity Commission has said that the ADA does not require courts to eliminate essential job functions. See 29 C.F.R. App. § 1630.2(o). The courts have taken a similar position. See Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212, 1218 (8th Cir.), cert. denied, 528 U.S. 821 (1999) ("an employer is not required to hire additional employees or so to redistribute essential functions to other employees."); Soto-Ocasio v. Federal Express Corp., 150 F.3d 14, 20 (1st Cir. 1998) ("ADA does not require an employer 'to reallocate job duties in order to change the essential functions of a job.' "); Bradley v. University of Tex., M.D. Anderson Cancer Ctr., 3 F.3d 922, 925 (5th Cir. 1993), cert. denied, 510 U.S. 1119 (1994) (the ADA does not require an employer to eliminate or reallocate essential functions of a position in order to provide reasonable accommodation); Burch v. City of Nacogdoches, 174 F.3d 615 (5th Cir. 1999) ("the ADA does not require an employer to relieve an employee of any essential functions of his or her job, modify those [essential] duties, reassign existing employees to perform those jobs, or hire new employees to do so."). See also Dropinski v. Douglas County, 298 F.3d 704, 710 (8th Cir. 2002) (ADA does not require an employer to reassign existing workers to assist disabled employee in his essential job duties).

7. *McMillan*, 2013 U.S. App. LEXIS 4454, at *11.

8. *Id.*, at *15.

9. Under the ADA, an undue hardship is defined as "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10)(A).

10. *McMillan*, 2013 U.S. App. LEXIS 4454, at *11(quoting Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140 (2d Cir. 1995)).

11. *McMillan*, 2013 U.S. App. LEXIS 4454, at *11.

12. *McMillan*, 2013 U.S. App. LEXIS 4454, at *12.

13. Breen v. DOT, 282 F.3d 839, 843 (D.C. Cir. 2002) (flexible work schedules are not unreasonable as a matter of law). *See also* Shannon v. N.Y. City Transit Auth., 332 F.3d 95, 100 (2d Cir. 2003) ("A reasonable accommodation can never involve the elimination of an essential function of a job.").

14. 56 Fed. Reg. 35,726, 35,733 (1991).

15. 29 C.F.R. App. 1630.15(d) (2011). The courts have reached a similar conclusion. *See* Barth v. Gelb, 761 F. Supp. 830 (D.D.C. 1991), aff'd, 2 F.3d 1180 (D.C. Cir. 1993) (where accommodation would have effect of demoralizing other employees and hamper the operations of the employer, an accommodation is not required because it would create an

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undue hardship); Hill v. State of Florida Dep't of Health and Rehabilitative Servs., 1992 U.S. Dist. LEXIS 8971, at *25 (M.D. Fla. 1992) (requiring other employees on ongoing basis to carry out the job duties of disabled employee not required because of "resentment this situation could generate among coworkers."); Blumhagen v. Clackamas County, 91 Ore. App. 510, 756 P.2d 650 (1998) (where accommodation sought by disabled employee would have negative impact on morale of a police department, and impact the department's operations, accommodation would not be required) (decided under Oregon law). *But see* Carlson v. Inacom Corp., 885 F. Supp. 1314, 1321 (D. Neb. 1995) (employee suffering from migraine headaches who was termination for nine unscheduled absences still was a qualified individual with a disability; although the employee's absences "inconvenienced and annoyed" her coworkers, there was no evidence that the absences resulted in either threatened or actual lost business or profit).

16. Public Law No. 110-325, 122 Stat. 3553 (2008). **M.**

Brownfields *Cont'd from page 9*

opportunity to conduct a "pilot test" to prove its technological solution could work, we did not want this testing to lead to a further delay in the remediation. Further, in exchange for agreeing to this "pilot test," the City insisted that PPG excavate the chromium in the event that the company could not convincingly demonstrate that its proposed chemical treatment was effective.

PPG, the DEP and Jersey City reached a settlement that was approved by the New Jersey Superior Court, pursuant to which PPG is remediating the site based on the strictest residential guidelines for chromium remediation,[14] and on a five-year schedule under the guidance of a court-appointed Site Administrator.[15]The Site Administrator is responsible for setting up and ensuring the adherence to a master schedule for the remediation, achieved by having regular meetings with the parties and by facilitating the resolution of any disputes or problems that arise during the remediation process. Moreover, while the NJDEP has final authority over all remediation decisions, a technical consultant selected by the Site Administrator assists the agency: The technical consultant reviews all submittals and makes recommendations as to their completeness and appropriateness.

As a result of this process, PPG is excavating and removing essentially all chromium-contaminated soil down to 20 feet deep – or to the so-called "meadow mat," a naturally occurring geological barrier. The settlement process caused PPG to abandon its plan to use chemical treatment to remediate large swaths of chromium contaminated soil – a significant milestone, as the City, the DEP and the court-appointed Site Administrator all opposed PPG's initial plans.[16] A website describing the clean-up process - one designed to also keep the community informed on clean-up progress - is located at http://chromiumcleanup.com/overview.html.

Conclusion

In sum, federal law provides municipal attorneys the significant opportunity to reshape their cities, by transforming contaminated wastelands into productive parcels of property. While the sheer number of contaminated sites – not to mention the severity of the contaminants on them – can be overwhelming to even contemplate, the City of Jersey City stands as an example: The elimination of City brownfields via affirmative litigation has helped speed the City's development into a thriving and trendy destination for residents and businesses alike – and the promise of future development is quickly erasing the memories of the City's polluted past.

Notes

1. U.S. Housing and Urban Development Website, Brownfields Frequently Asked Questions, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/bedi/bfieldsfaq (last visited July 21, 2013).
2. *Id.*
3. *See*, e.g. Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469, 1481 (9th Cir. 1995) (noting that CERCLA was enacted to protect public health, and thus, should be construed broadly); see also United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) (recognizing that RCRA is a remedial statute that should be construed liberally).
4. Interfaith Community Organization v. Honeywell Intern. Inc., 263 F.Supp.2d 796, 835 (D.N.J. 2003).
5. *Id.* (emphasis in original).
6. 42 U.S.C. § 6972(e).
7. Janet S. Kole, Attorney Fees Awards Under RCRA § 7002, Environmental Law Reporter, 25 ELR 10256 (1995) (quoting Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 260-63 (1975)).
8. Kerr McGee Chemical Corp. v. Lefton Iron and Medical Corp., 14 F.3d 321, 325 (7th. Cir. 1994).
9. City of Colton v. American Promotional Events Inc. et. al, __ F.3d __ (9th Cir. 2010) WL 2991399 quoting Carson Harbor Village Ltd. v. County of Los Angeles, 433 F.3d 1260, 1265 (9th Cir. 2006).
10. ICO v. Honeywell, 263 F.2d 796 (D.N.J. 2003).
11. *Id.*
12. The State recently passed legislation that allows for the use of private environmental engineering firms to assist in the remediation of such sites. *See* The Site Remediation Reform Act, N.J.S.A. 58:10-c, 1 et seq.
13. RCRA authorizes citizen suits under 42 U.S.C. § 6972.
14. In 2007 then Commissioner of the DEP Lisa Jackson, whom President Obama subsequently selected to lead the United States Environmental Protection Agency, issued a memorandum ending the suspensions on NFAs and setting forth a new standard for chromium remediation of soil. For land dedicated to residential development, Lisa Jackson's policy required that any soil containing readings for higher than 20 ppm for hexavalent chromium had to be excavated to a depth of 20 feet or treated to lower the concentration of hexavalent chromium below 20 ppm.
15. Importantly, the parties were able to agree on the identity of the Site Administrator - and the court appointed Mike McCabe, who had previously served as a Regional Administrator for the Environmental Protection Agency and, ultimately, the agency's Deputy Administrator under President Bill Clinton.
16. Of note, a consortium of community and non-profit organizations – spearhead-