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Working Rotating Shifts May Be Essential Job Duty

Terri Kallail worked for Alliant Energy Corporate Services as a resource coordinator in Cedar Rapids. Resource coordinators have to work rotating schedules, working in teams that alternate between 12-hour and 8-hour shifts and between day and night shifts.

Kallail has Type I diabetes and is insulin-dependent. Her doctor recommended that she work only straight day shifts, as rotating shifts caused erratic changes in her blood pressure and blood sugar and caused her to be at a higher risk of complications and mortality.

Alliant said that being able to work rotating shifts was an essential job requirement for resource coordinators. Alliant offered Kallail three other jobs with less demanding schedules. She rejected one because it required walking, which she is unable to do; one because it paid less and the third because she would have had to move or have a long commute.

She applied for an administrator position, a job two grades higher than her current job, but Alliant hired another applicant. Kallail and Alliant discussed other positions, but none worked out. She went on long-term disability and then sued Alliant for failing to accommodate her disability by not

letting her do the resource coordinator job on a straight day-shift basis. She lost.

The Court said that Alliant had reasonably determined that the rotating shift requirement was essential for this position. It provided the employees with enhanced experience and training, and helped them respond to emergencies better. And if they let Kallail work straight day shifts, other employees would have had to work more nights and weekends, which would not have been fair to them.

Kallail argued that because Alliant had considered, years earlier, creating permanent day shifts for two resource coordinators, creating such a position must be reasonable. But the Court pointed out that Alliant had decided not to do so, based on legitimate business concerns. Kallail also argued that because another Alliant district has straight day shifts for some resource coordinators, it must be reasonable. But the Court said that each district was making decisions based on their own special circumstances, and what is reasonable in one district is not necessarily reasonable in another.

The case is Kallail v. Alliant Energy Corporate Services, Inc., 2012 WL 3792609 (8th Cir. 2012).

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EEOC Sues Adult Day Care

Katrina Holly applied for a job to teach developmentally disabled adults at Pace Solana in Vallejo, California. Pace Solano provides adult day care services.

The facility offered her a job, but first she had to take a pre-employment physical exam. She apparently passed that exam as well as all other job requirements. After accepting the offer, Holly told the examiner that she had partial paralysis in one hand. She provided documentation from her doctor that she was fit to do the job. Nevertheless, Pace Solano withdrew its job offer.

Holly said that a Pace Solano employee told her that her condition would be a liability. "When they told me I

wasn't getting the job, I was sure there was some mistake. I was shocked to be told that it was because of my disability. Most people are unaware of it, and it didn't prohibit me from doing any of the tasks they tested me on."

An attorney for the facility said that the Equal Employment Opportunity Commission, which is suing the company on Holly's behalf, "has the facts wrong. The job has a physical component. Physical requirements are part of the job description. Ms. Holly could not perform the duties of the job and we're not able to accommodate her."

An attorney for the EEOC said, "It's highly ironic that Pace Solano, an organization dedicated

to assisting people with disabilities, rejected a fully capable and qualified applicant because of her disability. As a result, they closed the door on an instructor who could have been a valuable and loyal employee."

Employers have the right to require applicants for employment to take a post-offer, pre-employment physical exam, and they have the right to reject applicants who are unable to do the essential duties of the job with or without a reasonable accommodation. In this case, at least judging from the EEOC press release, it sounds as if the employer designed a medical exam to help it determine if an applicant could do the job, but then rejected an applicant who had passed the exam. The lawsuit is pending.

Wellness Incentive Programs Don't Violate ADA

Broward County, Florida, offered a group health insurance plan to its employees that included a wellness program. The wellness program consisted of two components: tests for glucose and cholesterol and an on-line health risk assessment questionnaire.

Broward's insurer, Coventry Healthcare, used the assessment to identify employees who had asthma, hypertension, diabetes, congestive heart failure or kidney disease. Employees with one of these conditions were offered a chance to participate in a disease manage-

ment coaching program, and if they did so, they were eligible to receive co-pay waivers.

Broward did not make the wellness program mandatory. But employees who did not participate were charged \$20 on each biweekly paycheck for about a year, until Broward suspended the program.

One employee, Bradley Seff, sued, arguing that the wellness program, along with its penalty for not participating, was a violation of the Americans with Disabilities Act (ADA). The

ADA says that employers may not require employees to take a medical exam unless doing so is job-related and consistent with business necessity. But the law also contains a "safe harbor" provision, allowing employers to establish insurance plans that classify risks.

Both the District Court and the Court of Appeals found that Broward County's wellness program fell within the ADA's safe harbor provisions, and thus it was not a violation of the ADA. The case is Seff v. Broward County, 691 F. 3d 1221 (11th Cir. 2012).



Do Prisons Have to Provide Kosher Meals to Non-Jewish Inmates?

The Indiana Department of Corrections (DOC) has been ordered by a federal judge to provide kosher meals "to all inmates who, for sincerely held religious reasons, request them in writing."

Jeffrey Rowe, an inmate, made the required written request. He is a member of "Identity Christianity," sometimes called "The Church of Jesus Christ Christian, Aryan Nations."

Rowe said he follows the biblical food laws found in Leviticus 11 and Deuteronomy 14, essentially Jewish kosher laws. He does not

require that his food be blessed by a rabbi, but does require that the food be prepared and distributed according to kosher rules. His belief is not an official doctrine of Identity Christianity; he and a fellow inmate decided it was required based on their own study of the Bible.

The prison denied Rowe's request, saying his needs could be met by providing him with vegan meals. He sued under the federal Religious Land Use and Institutionalized Persons Act. The Court said that if his desire for a kosher meal plan was motivated by a sincerely held religious belief rather than by

a preference for certain foods, then the DOC had to provide him with kosher meals. He does not have to be Jewish to be entitled to kosher meals.

DOC provided a statement from the company that prepares the vegan meals for inmates, showing that their meals do not include any food that Rowe is not allowed to eat. However, there was no evidence that the vegan meals were prepared in a way that would prevent any possible contamination by prohibited ingredients found in kosher-certified food has. The case is Rowe v. Lemon, 976 NE2d 129 (Indiana Court of Appeals 2012).

Does FMLA Require Employers to Tolerate Tardiness or Frequent Restroom Breaks?

The federal Family and Medical Leave Act requires covered employers to allow employees to take leave, paid or unpaid, to deal with serious health concerns for themselves or their families. There are limits to what it covers, however.

Angela Beem was frequently late for work and was repeatedly warned about her lateness. After she was fired, she said that she should have been able to take FMLA time to cover her lateness, usually 15 minutes or less, on an intermittent basis. The FMLA does allow intermittent leave, but typically this is for medical treatments or recovery. FMLA regulations give examples of other types of intermittent leave; to deal with the onset of an asthma

attack or for a pregnant woman's morning sickness. The Court in the Beem case said that punctuality was an essential function of her job, and she could not take FMLA time to cover her frequent tardiness. Beem v. Providence Health & Services, 2011 WL 4852301 (E.D. Wash 2011).

In a similar case involving a woman who had trouble getting to work on time, the Court said that allowing FMLA intermittent leave "for the brief duration of the lateness distorts the English language and trivializes the purposes of the Act." The Court said that the plaintiff was seeking "immunity for perennial lateness of a few minutes, caused by a medical condition that made her resist getting out of bed to go to

work. Lateness is not leave." Brown v. Eastern Maine Medical Center, 514 F. Supp. 2d 104 (D. Maine 2007).

In another case, the plaintiff wanted to take intermittent FMLA leave to take short breaks throughout the day to use the restroom because he had temporary uncontrollable bowel movements. The Court in that case said that "We are unable to locate a case where 'temporary' FMLA leave was awarded in such a context - where the leave given does not constitute time away from a place of work, but merely periodic time away from a desk throughout the day." Mauder v. Metropolitan Transit Authority, 446 F. 3d 574 (5th Cir. 2006).

Applicants Sought for City Boards and Commissions

City Clerk Regina Moore has announced that applications for anticipated end-of-term vacancies for the City's boards and commissions are now being accepted. Term expirations occur at the end of January.

A number of openings are expected on the City's boards and commissions, from those dealing with issues affecting women, children and the elderly to human rights, animal welfare, housing, utilities, the environment, arts and sustainability. Application review will begin in mid-January and will continue until the positions are filled.

City boards and commissions are citizen-staffed and operated, and serve to advise the common council and the administration on issues affecting Bloomington. Most positions require residency within the City of Bloomington.

A complete list and description of boards and commissions as well as application materials can be found at www.bloomington.in.gov/clerk. Information and applications are also available at the City Clerk's Office in City Hall at 401 N. Morton Street.

For more information or questions, please contact the City Clerk's office at 349.3408.



Is Missing First and Second Day of Work Grounds for Termination?

Adrianna Becerril was offered a job with the New York City Department of Health and Mental Hygiene in the spring of 2007. She was told that her first day of work would be September 4, 2007, and she should report to 125 Worth Street in NYC. Instead, she reported to 125 Wall Street. She tried to call someone at the correct office, was unsuccessful and returned home. Later that day, she was able to reach someone at the office. She explained the problem and they agreed she should come to work the next day.

The next day, September 5, Becerril again did not report to work as scheduled. At 11:25, she called the office, said she was ill and that she would report to work the next day with a doctor's note.

Not surprisingly, supervisors at the office began to wonder if they had made a good choice when they offered Becerril the job. They discussed "pulling back" the job offer. They then learned that Becerril was five months pregnant and had gone to the hospital on September 5 after experiencing contractions. They decided to withdraw the job offer anyway. As one supervisor said, they were "concerned that someone who could not find their way to the office, wouldn't be able to find their way to Bronx, Queens, Brooklyn or Manhattan, and someone that was not responsible enough to call and say they can not come to work is not someone we can rely on. The fact that she had gone to the hospital with contractions is irrelevant to me." This supervisor said that if Becerril could not call, someone could have called on her behalf.

Becerril sued, alleging pregnancy discrimination, and lost. The Court said that the employer had a legitimate, non-discriminatory reason for rescinding its job offer: Becerril's "lack of responsibility, evidenced by her failure to call the local DOH's office on September 4 and promptly communicate with DOH as to her hospitalization on September 5." There was no evidence that DOH rescinded the job offer because of her pregnancy. The case is Becerril v. City of New York Department of Health and Mental Hygiene, 2012 WL 1660677 (N.Y. Supp. 2012).