CHAPTER 4

ATTENDANCE ISSUES: A PEA SOUP OF FMLA, ADA, CONTRACTUAL LEAVE RIGHTS, AND THE EMPLOYER'S NEED TO CONTROL ATTENDANCE

I. THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT ON ATTENDANCE ISSUES: AN ANACHRONISM IN THE MAKING?

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Writing of the impact of the Americans with Disabilities Act (ADA)[1] on problems of employee attendance that surface in labor arbitration is somewhat like opining on the relevance of the eight-track tape player to today's digital audio systems. It is hard to shake the sense that the ADA, although only a little more than a decade old, is already an anachronism in attendance issues, or at least is fast becoming one.

The Truncated Legal Landscape of the ADA: Recent Decisions of the U.S. Supreme Court

It cannot be gainsaid that the federal courts, specifically the U.S. Supreme Court, have sharply curtailed the use of the ADA in employment disputes. Indeed, in the first four months of 2002, the Supreme Court issued two opinions that seem poised to render that section of the statute almost an irrelevancy.

In *Toyota v. Williams*,[2] a unanimous Court held that, for the purpose of deciding the threshold issue of whether a worker is "disabled" under the statute and therefore a fit subject for "reasonable accommodation" by her employer, the individual must have an impairment that "prevents or severely restricts her from doing activities that are of central importance to most peoples' daily

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[1]42 U.S.C. §12101 (1994).

[2]122 S.Ct. 681 (2002).

lives."[3] In *Williams*, the plaintiff had carpal tunnel syndrome and tendinitis so severe that she was prevented from doing almost all of her assembly line manual chores. She could not, for example, lift or carry objects of 10 pounds or more, flex her wrist or elbows, or work with her arms raised above her shoulder blades. However, these conditions were held not enough to render her "disabled" under the ADA, because she was still able to perform "the manual tasks central to daily life," which the Supreme Court, again unanimously, defined as "walking, seeing and hearing."[4] Thus, although the plaintiff's health limitations barred her from access to between 15 and 50 percent of the existing labor market (according to estimates to which Toyota itself conceded at oral argument),[5] the Court ruled that the auto company had no legal requirement to even consider whether she was entitled to an accommodation, because she was not, under the statute, truly "disabled."

In April 2002, a somewhat fractured Court, in *U.S. Airways v. Barnett*,[6] held that, absent "unusual circumstances," an employer does not have to accommodate a disabled employee if to do so would require the employer to violate a seniority system. The Court concluded that the "importance of seniority to employee-management relations" rendered it generally immune from being tampered with under the guise of seeking to "reasonably accommodate" a disabled employee.[7] The opinion in *Barnett* was not unexpected: lower federal courts had unanimously held that, under the Rehabilitation Act of 1973[8] (from which the ADA borrowed much of its language and its interpretation), reasonable accommodation did not require reassignment of a disabled employee in violation of a bona fide seniority system.[9] Perhaps the greatest significance of *Barnett*, however, was that it did not draw any principled distinction between a unilaterally promulgated seniority system and one that is collectively bargained. Both systems, according to the Court, "provide[] important employee benefits by creating, and fulfilling,

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[3] *Id.* at 686.
[4] *Id.* at 690. The Court, in so doing, cited with approval the definition of "major life activities" contained in regulations promulgated by the Department of Health, Education and Welfare (HEW) in 1977 to administer the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq. *See* 45 C.F.R. §84.3(j)(2)(ii) (2001).
[5] Lithwick, *Crippled Logic*, Slate Magazine (Nov. 7, 2001).
[6] 122 S.Ct. 1516 (2002).
[7] *Id.* at 1524.
[8] 28 U.S.C. §701 et seq.
[9] 122 S.Ct. at 1524 (collecting cases).

employee expectations of fair, uniform treatment."[10] Therefore, the Court disagreed with the lower court, which had held that the presence of a seniority system was "only a factor" in determining whether the employer had a duty to reasonably accommodate a disabled employee.[11] Rather, "in the run of cases," the mere *presence of* a seniority system, *in and of itself*, is sufficient to provide the employer with an adequate defense against a claim that it failed to reasonably accommodate the disabled employee, if such an accommodation would run counter to that system's rules and practices.[12]

The Use of Statutory Law by Labor Arbitrators: Foot on the Pedal or Foot on the Brake?

Before turning to the possible impact that *Barnett* and other ADA cases might have on the specific issues of absenteeism and attendance, one must add a cautionary note about the uses of statutory law in arbitration. In modern experience, arbitrators generally do not hesitate to apply statutory principles to decide contractual disputes. Historically, however, that has not always been the case.

As far back as the famed *Steelworkers Trilogy*,[13] the U.S. Supreme Court suggested that an arbitrator who reached a decision based on an act of legislation could be considered to have exceeded the scope of the arbitral submission. Indeed, this idea clearly affected the outcome in *Alexander v. Gardner-Denver Co.*,[14] where the Court indicated that an arbitrator "has no general authority to evoke public laws that conflict with the bargaining between the parties" and that where "a collective bargaining agreement [CBA] conflicts with Title VII, the arbitrator must follow the agreement."[15] In later cases, however, notably *Gilmer v. Interstate/Johnson Lane Corp.*,[16] the Court took a more favored view of arbitrators' ability to resolve cases that turn on statutory claims.

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[10] *Id.*
[11] *Barnett v. U.S. Air*, 228 F.3d 1105, 1120 (9th Cir. 2000) (en banc).
[12] *Barnett*, 122 S.Ct. at 1524.
[13] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).
[14] 415 U.S. 36 (1974).
[15] *Id.* at 53, 57.
[16] 500 U.S. 20 (1991).

The National Academy of Arbitrators (NAA) has itself featured a lively debate on this topic for decades. In the proceedings of the 20th Annual Meeting of the Academy in 1967, Arbitrator Bernard D. Meltzer opined that where there is a clear conflict between a labor agreement and the law, the arbitrator "should respect the agreement and ignore the law."[17] In a sharp retort to Meltzer's thesis, delivered at the same Academy annual meeting, Arbitrator Robert Howlett insisted that "[a]rbitrators, as well as judges, are subject to and bound by law, whether it be the Fourteenth Amendment to the Constitution of the United States or a city ordinance."[18] At the Academy's next annual gathering, Arbitrator Richard Mittenthal considered both views and then advanced what some consider the *intermediate* hypothesis that an arbitrator's award "may *permit* conduct forbidden by law but sanctioned by the contract," but "should not *require* conduct forbidden by law, even though sanctioned by the contract."[19] Thus, when discussing the impact of statutory authority—such as the ADA—on attendance issues that arise in the context of labor arbitration, one should not ignore the conflict that sometimes exists between arbitral law and statutory law.

Two preliminary challenges must therefore be surmounted by labor advocates who seek to use the ADA to challenge a disciplinary decision based on an employee's absence record. First, they must recognize the truncated legal landscape of the ADA, and realize that its efficacy as a source of protection for the employee appears to be shrinking all the time. Second, they must be mindful that many arbitrators are not enthusiastic about relying on statutory sources as guidance in deciding a contractual issue such as whether management has "just cause" to discipline or discharge the chronically absent or tardy employee.

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[17]Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), 16–17.

[18]Howlett, *The Arbitrator, the NLRB, and the Courts*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), 67–83.

[19]Mittenthal, *The Role of Law in Arbitration*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 42, 50.

"Reasonably Accommodating" the Absent Employee: What the Current Cases Say and What Future Courts May Hold

The Statistics of Absenteeism Versus Replacement

The "absent employee" costs employers money. A 1984 study, which *did not* factor in losses for reduced productivity, replacement training, and recordkeeping, estimated that absenteeism wreaks an annual toll on American business of $26 billion.[20] On the other hand, a 1990 survey by the Small Business Administration found that the costs of permanently replacing an employee are significantly greater than the costs of granting a worker's request for leave. Uncontested dismissals resulting from illness and disability cost employers between $1,131 to $3,152 per dismissal, whereas granting an employee's request for leave costs between $.97 and $97.78 per week of leave.[21] Similarly, in 1992, the Families and Work Institute, a highly respected nonpartisan, nonprofit group, found that the cost of accommodating an employee's unpaid leave averaged 20 percent of their annual salary, whereas replacing that employee cost between 75 and 150 percent of that same salary.[22] Therefore, while one cannot minimize the costs of absenteeism, they should be measured against the costs of replacement when considering the desirability of accommodating the absent employee.

"Attendance" as an "Essential Function"

An employee mounting a challenge under the ADA to an adverse disciplinary action taken because of attendance problems has a substantial first hurdle to clear: Under the ADA, a worker must be able to perform the "essential functions" of the job, with or without an accommodation to his or her disability.[23] In addition, courts have fairly consistently held that an employee who cannot meet the attendance requirements of the job is not a "qualified individual" under the ADA, because "a regular and reliable level of

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[20]Morgan & Baker, *Do You Need an Absenteeism Control Program?* Supervisory Management 33 (Sept. 1984). I am indebted to Arbitrator M. David Vaughn, a speaker at the 54th Annual Meeting of the National Academy of Arbitrators, for this citation.

[21]*See* Hickox, *Absenteeism Under the Family and Medical Leave Act and the Americans With Disabilities Act*, 50 DePaul L. Rev. 183, 214 (Fall 2000) (citing S. Rep. No. 103-3, at 18 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 19).

[22]*Id.*

[23]*U.S. Airways v. Barnett*, 122 S.Ct. 1516 (2002).

attendance is a necessary element of most jobs."[24] This is particularly the view when the employer designates "regular attendance" as a key feature of the job. The ADA gives "consideration" to the employer's judgment in determining what is and what is not a critical function of a particular classification,[25] and the courts apply this standard when the employer requires a uniform attendance level for all employees and consistently and objectively applies it, for example, by promulgating and abiding by a no-fault absence policy.

Nevertheless, employees with a history of absenteeism can still sometimes successfully argue that their record does not render them "unqualified" for accommodation under the ADA. In *Carlson v. Inacom Corp.*,[26] the court found that an executive secretary's average of nine absences per year did not render her "unqualified," because her rate of absenteeism was not excessive and was not "unduly disruptive" to the employer's operations.[27] In that case, however, the employer had no published policy on absenteeism.[28]

But even where such a policy exists, employees with absenteeism problems that prevent them from performing all the duties of their position can on occasion prevail by asserting that, if granted temporary leave, they could perform those essential functions upon their return. Courts are more likely to accept this argument if the requested leave is of a fixed, finite duration, and if the evidence establishes that it is likely the employee will be able to perform adequately upon return to work. The test courts use to place boundaries on such leave is whether it will "presently, or in the immediate future" enable the employee to "perform the essential functions of the job in question."[29] In these cases, allowing for such leave constitutes "reasonable accommodation."[30] Some courts, however, have gone farther and have held that a request for leave is not an unreasonable accommodation simply because there was no certainty that the employee could return to work after its conclusion. Thus, in *Powers v. Polygram Holding*,[31] an employee who

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[24] *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994); *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994).
[25] 42 U.S.C. §12111(8) (1994); 29 C.F.R. §1630.2(m) (1999).
[26] 885 F. Supp. 1314 (D. Neb. 1995).
[27] *Id.* at 1321.
[28] *Id. See* Hickox, *supra* note 21, at 207.
[29] *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995).
[30] *Id. See* Hickox, *supra* note 21, at 207.
[31] 40 F. Supp. 2d 195 (S.D.N.Y. 1999).

suffered from manic depression and who had taken 13 weeks of leave to deal with his disability was held to have stated a claim under the ADA when he was discharged after he requested another month off, even though he could not be certain he would be able to return to work after the additional time off. The court held that, to find such a leave request "unreasonable" as a matter of law, would be to "eviscerate much of the protection afforded under the ADA."[32]

Will Application of a "No-Fault" Attendance Policy Defeat a Claim of Failure to Provide "Reasonable Accommodation"?

There is an undeniable tension between an employer's legitimate need to compel attendance and an employee's claim that he or she cannot meet the employer's uniform attendance requirements because of a disability. That tension is reflected in cases where an employer terminates an employee for "excessive absenteeism" in response to an employee's request that he or she be "excused" from strict adherence to an employer's no-fault attendance policy because he or she has a qualifying disability.

On this issue, the courts currently appear to be split. In *Teahan v. Metro-North Commuter Railroad Co.*,[33] a case decided under the analytically analogous Rehabilitation Act of 1973, the Second Circuit held that an employee terminated for excessive absenteeism stated a claim for relief under the Act, because it appeared that his absenteeism was caused by alcoholism, a covered "handicap" under the Rehabilitation Act.[34] The court found that, so long as the plaintiff's absenteeism and alcoholism truly were causally connected, the employer could not shield itself from liability by claiming that the absenteeism provided the lone justification for the discharge.[35]

In *Fritz v. Mascotech Automotive Systems Group, Inc.*,[36] the court held that a plaintiff with juvenile onset diabetes who was terminated for being absent or late 106 days during a 45-week tenure did not

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[32] *Id.* at 202. *See* Hickox, *supra* note 21, at 212.
[33] 951 F.2d 511 (2d Cir. 1991).
[34] *See, e.g., Rodgers v. Lehman*, 869 F.2d 253, 258 (4th Cir. 1989).
[35] 951 F.2d at 515–17.
[36] 914 F. Supp. 1481 (E.D. Mich. 1996).

"forfeit the protection of the ADA solely by virtue of his poor attendance."[37] Rather, the court found that the plaintiff had created a triable issue of fact as to whether the employer could have reasonably accommodated his disability "simply [by] permitting him to arrive late on those occasions when his diabetic condition so dictated" and allowing him to stay at work as late as necessary to "perform the truly essential functions of his job."[38]

Similarly, in *Dutton v. Johnson County Board of Commissioners,*[39] the plaintiff suffered from migraine headaches and unsuccessfully sought a modification of the employer's attendance policy to allow him to use vacation time for unscheduled absences when he had exhausted his sick leave. The court held that he stated a claim under the ADA that his employer failed to "reasonably accommodate" his disability. The court conceded that "regular attendance is no doubt an essential part of almost every job," but observed that "the question is one of degree."[40] The court then held that the employer had not established "that permitting plaintiff to use unscheduled vacation to cover absences due to illness would be either an unreasonable accommodation or one that caused undue hardship."[41]

Finally, in *Barnett v. Revere Smelting & Refining Corp.*,[42] the court allowed a claim of an employee that his chest pains occasioned his "excessive absenteeism," for which he was terminated, to go forward to trial under the ADA. The court reasoned that, "where an employer asserts excessive absenteeism as a non-discriminatory justification for an employee's termination, that justification cannot analytically be considered apart from the alleged disability causing the absenteeism."[43]

By contrast, the Fifth Circuit, in *Hypes v. First Commerce Corp.*,[44] upheld the discharge of a plaintiff with obstructive lung disease who was fired for excessive absenteeism and tardiness. The court rejected the plaintiff's claim that his disability precipitated his absences and ruled that, even if his absences were linked to his disability, he was not "otherwise qualified" under the ADA because

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[37] *Id.* at 1488.
[38] *Id.*
[39] 859 F. Supp. 498 (D. Kan. 1994).
[40] *Id.* at 507.
[41] *Id.* at 508.
[42] 67 F. Supp. 2d 378 (S.D.N.Y. 1999).
[43] *Id.* at 392.
[44] 134 F.3d 721 (5th Cir. 1998).

it was an essential function of his job that he "be in the office, regularly, as near to normal business hours as possible, and that he work a full schedule."[45] And, in *Bailey v. Amsted Industries*,[46] the court held that an employer's written policy prohibiting excessive absenteeism allowed it to terminate an employee with a series of "unexcused absences" that the employee contended were linked to his two disabilities, Graves' disease and depression. The court credited the employer's claim that it discharged the plaintiff "because of its policy on excessive absenteeism, a policy necessary to its efficient operation."[47]

It seems apparent from these authorities that a difference of opinion exists between the Second Circuit on the one hand and the Fifth and Eighth Circuits on the other. The Second Circuit appears unwilling to draw an analytical distinction between an employee's absence and the disability that may have caused that absence. The Fifth and Eighth Circuits seem content to find that an employer's neutral, nondiscriminatory attendance policy prohibiting excessive absences provides a shield against liability under the reasonable accommodation protections of the ADA. A clue to the potential stance of the U.S. Supreme Court on this issue may be found in the recent pronouncement in *Barnett* of the reach of the ADA.[48]

Barnett suggests that three members of the present court—Justices Bryer, Rehnquist, and Kennedy—appear poised to rule that a facially neutral policy of an employer, even one that is unilaterally promulgated rather than contained in the CBA, will usually suffice to defeat a claim that a reasonable accommodation to an employee's disability requires alteration or modification of that policy. Two other Justices—Stevens and O'Connor—would agree with that analysis, provided, particularly in Justice O'Connor's case, that the policy was "legally enforceable"—in other words, part of an employment contract or a CBA.[49] Of the four dissenting Justices, two—Scalia and Thomas—quite predictably do not come down on the side of disabled employees. Rather, their dispute with the reasoning of the majority is that it created only a "rebuttable" presumption that an exception to a seniority rule is an "unreasonable accommodation."[50] They would likely hold that a facially

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[45] *Id.* at 726.
[46] 172 F.3d 1041 (8th Cir. 1999).
[47] *Id.* at 1045.
[48] *U.S. Airways v. Barnett*, 122 S.Ct. 1516 (2002).
[49] *Id.* at 1526 (O'Connor, J., concurring).
[50] *Id.* at 1528 (Scalia, J., dissenting).

neutral policy of an employer never needs to be modified to "accommodate" the "handicapped" employee unless it "pose[s] . . . [a] *distinctive* obstacle to the disabled."[51]

Therefore, if a workplace features a garden-variety no-fault attendance policy, especially one that is a child of collective bargaining, there would appear to be at least seven solid votes on the Supreme Court for the proposition that such a policy should, in the normal case, triumph over an employee's claim that a disability prevents him or her from meeting the policy's attendance requirements. *Barnett* left the door slightly ajar by indicating that "special circumstances" might warrant an exception to the seniority system. Potentially, an employee who could show that his or her disability was the "sole" reason for his or her failure to meet the employer's attendance expectations might somehow entice the court with a "catch-22" argument. However, such an employee would still be struck with the general trend of the law that, in most cases, it remains an "essential function" of the job to appear for work on a regular basis.

For this reason, it is not outlandish to suggest that in the near future, the employment protections of the ADA may vanish entirely for the employee with attendance problems, even if that employee's absences are occasioned by his or her disability. The disabled worker who has such issues will have to then turn to the Family and Medical Leave Act[52] to attempt to obtain any degree of statutory solace from an adverse employment action.

II. CURRENT ISSUES IN ATTENDANCE

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The great philosopher Woody Allen once said something to the effect that nine-tenths of life is just showing up. "Showing up," as used in the workplace, is the most basic and universal employee obligation. It is the point from which both pay and work begin. The regularity with which employees show up for work is a reliable measure of productivity and profitability.

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[51] *Id.*
[52] 29 U.S.C. §2615 (1993).
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