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LABOR AND EMPLOYMENT BULLETIN

July 25, 2007

APPEALS COURT: PUNCTUALITY MAY NOT BE AN ESSENTIAL JOB FUNCTION

A recent decision by the Eleventh Circuit Court of Appeals deserves careful attention by all employers covered by the Americans with Disabilities Act—particularly those with “no-fault” attendance and punctuality policies.

The Plaintiff, Tommy Holly, was a long-time former employee of defendant, Clairson Industries. For the entire duration of his employment at Clairson, Holly was paraplegic. Holly’s disability had often prevented him from clocking in to work on time. For 17 years, Holly made up for his lost time by working late or through breaks; his supervisors said he was able to get his work done and didn’t hold up the work of other employees.

About 17 years into Holly’s employment, Clairson implemented a new “no fault” attendance and punctuality policy. As part of the new policy, employees were no longer allowed to make up time by working later or through breaks. Largely because of his disability, Holly still had difficulty getting to work on time: after the policy was implemented, he accumulated 18 instances of tardiness, totaling 73 minutes. Twelve of those times, Holly had been no more than one minute late.

Citing its “no-fault” policy, which was spelled out in the employee handbook, Clairson terminated Holly’s employment. In response to Holly’s suit under the ADA, Clairson claimed that strict punctuality was necessary because an employee’s tardiness could delay production,



resulting in increased overtime, overhead, and difficulty filling orders. A lower court agreed with Clairson, and dismissed Holly's case.

The Court of Appeals disagreed, noting that Holly's disability made it impossible for him to meet the strict punctuality requirement. Moreover, the fact that Clairson had informally accommodated Holly's occasional tardiness for 17 years undercut the employer's assertion that strict punctuality was in fact an essential function of the job. Indeed, the employee's two direct supervisors testified—apparently contrary to official company policy—that such strict punctuality was not necessary for Holly's specific job position and duties.

The Court of Appeals found it particularly important that Holly had a 17-year history of exemplary job performance, appraisals, and merit raises. In fact, Holly had received a merit pay increase only a few weeks before he was terminated for tardiness. Given these facts, together with the employer's long history of informal accommodation, the Court ruled that a jury should have been allowed to determine whether strict punctuality was an essential function of the plaintiff's job. It was not necessary for Holly to prove that Clairson applied its "no-fault" policy in a discriminatory fashion, such as by being more lenient on a similarly situated non-disabled employee.

In light of the Eleventh Circuit's decision, employers should carefully review their attendance and punctuality policies and practices. While the Court's ruling allows for the possibility that a strict punctuality policy might be an essential job function for some particular jobs and employees, it also makes clear that the courts will scrutinize "no-fault" attendance and punctuality policies on a case-by-case basis. Equally clear is that a blanket "no-fault" attendance rule does not pass muster under the ADA simply because it is applied to non-disabled and disabled employees alike. Rather, employers must make reasonable accommodations to "no-fault" attendance and punctuality policies, where accommodation would be reasonable and not an undue burden in the individual circumstances at hand.

The case is *Holly v. Clairson Industries*, No. 06-13365 (11th Cir., July 19, 2007).



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L A B O R A N D E M P L O Y M E N T C O N T A C T S

BIRMINGHAM, AL

David R. Boyd
 205.226.3485
dboyd@balch.com

Leslie Allen Coyne
 205.226.3484
lallen@balch.com

Aaron L. Dettling
 205.226.8723
adettling@balch.com

Monica G. Graveline
 205.226.8722
mgraveli@balch.com

Douglas B. Kauffman
 205.226.8758
dkauffman@balch.com

Lisa J. Sharp
 205.226.8714
lsharp@balch.com

M. Jefferson Starling, III
 205.226.3406
jstarling@balch.com

JACKSON, MS

R. Pepper Crutcher, Jr.
 601.965.8158
pcrutcher@balch.com

Armin J. Moeller, Jr.
 601.965.8156
amoeller@balch.com

David M. Thomas, II
 601.965.8157
dthomas@balch.com

E. Russell Turner
 601.965.8159
rturner@balch.com

ATLANTA, GA

T. Joshua R. Archer
 404.962.3556
jarcher@balch.com

Michelle Rothenberg-Williams
 404.962.5349
mrothenberg-williams@balch.com

MONTGOMERY, AL

David R. Boyd
 334.269.3132
dboyd@balch.com

W. Pete Cobb, II
 334.269.3128
pcobb@balch.com

Charles B. Paterson
 334.269.3143
cpateroso@balch.com

John G. Smith
 334.269.3150
jgsmith@balch.com

Dorman Walker
 334.269.3138
dwalker@balch.com

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