

## 194 Absences Are Enough – Any More and You Can Be Fired.

Article By:

Richard P. Winegardner

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One of the most headache-inducing issues for any employer is how to deal with an employee with a medical condition who continues to miss work even after they have been granted the full 12 weeks of leave under the FMLA. While many courts have held that providing additional leave can be a reasonable accommodation, a federal circuit court overseeing several Midwestern states has held that post-FMLA requests for intermittent leave do not have to be accommodated—at least when the request follows a lengthy period of continuous leave.

In *Lipp v. Cargill Meat Solutions*, the Eighth Circuit (which has responsibility for federal lawsuits in North Dakota, South Dakota, Minnesota, Iowa, Nebraska, Arkansas and Missouri) confirmed a summary judgment issued by an Iowa federal court against an employee who sued after being fired for her 195th attendance occurrence in a single year. Most of these occurrences were covered by an approved nine-month leave, but when the employee returned from that leave, she asked for additional time off anytime her medical condition “flared up.” The court found that such a request was unreasonable, coming as it did almost immediately following her lengthy leave of approved absences.

Critical to the court’s reasoning was the existence of a published policy that said “regular attendance is crucial” to the employer’s operations, a history of the employer’s enforcement of its attendance policy and the presence of a job description which confirmed that being present at the facility was one of the job duties for the employee in question. Based on these facts, the court was able to easily conclude that the employer did not have to provide additional intermittent leave on top of the nine months of leave it had already provided.

This case is another example of how an employer can draw a line against granting excessive additional leave in circumstances where an employee has already been on leave for an extended period of time. To maintain maximum flexibility, however, the employer should have in place policies and job descriptions which confirm that regular and predictable attendance is an essential function of the job and be prepared to establish that it enforces those policies on a regular basis. Moreover, because there is a wide degree of variance on how courts interpret the need to provide additional post-FMLA leave, companies should always consult with their employment counsel before making a decision to terminate an employee who asks for an extended medical leave.

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