

## Regular, On-Site Attendance Is Essential Function of Auditor Job, Sixth Circuit Rules

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The Sixth Circuit previously explained in [\*Hostettler v. College of Wooster\*, 895 F.3d 844 \(6th Cir. 2018\)](#) that regular, in-person attendance is not a per se essential function of every job. Rather, employers must tie time-and-presence requirements to the specific job at issue. In [\*Popeck v. Rawlings Co., LLC\*, No. 19-5092 \(6th Cir. Oct. 16, 2019\)](#), the Court ruled that Rawlings showed regular, on-site attendance was an essential function of Popeck’s auditor job, and Popeck was not a qualified individual under the Americans with Disabilities Act (“ADA”) because she could not perform this essential function.

### **Background**

Popeck worked as an auditor for Rawlings from 2009 until her termination in 2015. In 2013, Popeck’s doctor diagnosed her with irritable bowel syndrome (“IBS”). Shortly thereafter, Rawlings approved Popeck for intermittent FMLA leave—allowing her to arrive to work late or leave early when needed to address her IBS symptoms.

In November 2014, Popeck exhausted her FMLA leave for the year. Rawlings, however, as an ADA accommodation, continued to allow Popeck to come in late or leave early when her IBS symptoms flared up—bridging the gap until her FMLA leave renewed in December 2014.

In 2015, Popeck’s work performance dwindled. By July 2015, she exhausted her FMLA leave for the year. She again sought an ADA accommodation as a bridge until her next period of FMLA eligibility, but Rawlings denied the requested accommodation. Popeck continued to miss work, and Rawlings ultimately terminated Popeck for excessive tardiness.

Popeck then filed suit alleging, among other things, that Rawlings violated the ADA by failing to accommodate her and terminating her.

### **Sixth Circuit’s Decision**

The Sixth Circuit affirmed summary judgment for Rawlings on Popeck’s ADA claims. Because Popeck could not attend work regularly and in person, the Court had to decide whether regular, in-person attendance was an essential function of the auditor job at Rawlings.

The Court held “regular, in-person attendance constitutes an essential function of most jobs,” and it was an essential function of auditor jobs at Rawlings. The Court explained that auditors must access information about healthcare claims from secure computers in Rawlings’ offices, and Rawlings prohibits auditors from working remotely because of the “large volume of confidential and HIPAA protected personal information” in the claims they review.

Popeck argued in-person attendance was not essential because Rawlings allowed other employees to work remotely. The Court rejected this argument because the other employees Popeck pointed to were not auditors and had different job functions.

The Court then considered whether Popeck proposed a reasonable accommodation that would enable her to perform the essential functions of the job and concluded she did not. Popeck’s proposed accommodation—occasional flexibility to arrive late and leave early when her IBS symptoms flared—did not allow her to perform the essential function of regular, on-site attendance because the evidence showed that by the end of her employment she missed work nearly 60% of the time.

## **Takeaway**

As the Sixth Circuit explained in *Hostettler*, regular, in-person attendance is not an essential function “simply because an employer says that it is”; rather, “an employer must tie time-and-presence requirements to some other job requirement.” While issues of fact existed as to the human resources job at issue in *Hostettler*, Rawlings successfully made this connection as to Popeck’s auditor job. As highlighted by these Sixth Circuit decisions, employers should always conduct a fact-intensive analysis of the job position at issue when considering work schedule and work location accommodations.

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