



REQUIRING EMPLOYEES TO EXPLAIN HEALTH-RELATED ABSENCES MAY BE UNLAWFUL

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In *E.E.O.C. v. Dillard's, Inc.*, a federal district court in California ruled that a retail chain's attendance policy, which required employees to provide a doctor's note identifying the nature of a health-related absence for such absences to be excused, violated the Americans with Disabilities Act.

Background

Corinna Scott, an employee at one of Dillard's stores, was absent from work from May 29 to June 3, 2006 for health-related reasons. To excuse her absence, Scott gave the assistant store manager a note from her doctor stating "off work this week return 6/5/06." The manager did not excuse Scott's absences because the note failed to state the nature of the condition being treated, as required by Dillard's attendance policy. Scott refused to provide any further information regarding the health reasons for her absence, and was terminated on June 6 for absenteeism.

Scott filed a charge of discrimination with the EEOC. After investigating the charge, the EEOC brought suit against Dillard's on behalf of Scott and other similarly situated employees. Among other things, the EEOC claimed that Dillard's attendance policy violated the ADA's prohibition against disability-related inquiries. The ADA

provision at issue prohibits covered employers from "mak[ing] inquiry of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). The EEOC, in its enforcement guidance, has interpreted "disability-related inquiries" within this provision to include questions that are likely to elicit information about a disability.

The Court's Ruling

The court held that Dillard's attendance policy was unlawful on its face because it permitted supervisors to conduct disability related inquiries in violation of the ADA. Adopting the EEOC's interpretation of the ADA provision, the court reasoned that the policy invited intrusive questions regarding employees' medical conditions that would tend to elicit information about an actual or perceived disability. Dillard's argued that the policy was necessary to verify the legitimacy of medical absences and to ensure that employees can safely return to work without posing a threat to themselves or others. The court rejected these arguments, opining that Dillard's did not need to know the nature of an employee's



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medical condition to accomplish these goals.

Insights For Employers

The Dillard[®] decision exemplifies the challenges for employers when managing health-related absences and leave in an ever-changing legal environment.

Employers have a legitimate interest in curbing excessive absenteeism and abuse of their sick leave policies. Though it may seem natural for a supervisor to ask about the circumstances of a health-related absence to verify the validity of the absence, such inquiries may run afoul of the ADA. The court[®] ruling is troubling for employers because it suggests that seemingly innocuous questions about an employee[®] reasons for taking sick leave, even well-intentioned questions of concern, may be construed by a court as an improper

inquiry into an employee[®] disability. It is therefore imperative for management and human resources personnel to limit health-related inquiries to the employee[®] ability to perform his or her job responsibilities.

The decision is noteworthy for several other reasons. First, it is one of few opinions interpreting the ADA[®] prohibition on disability-related inquiries. As the court noted in its decision, only two federal circuits[®] not including the Seventh Circuit[®] have addressed this issue in depth. As previously reported, recent legislative and regulatory amendments expanding the definition of "disability" are expected to result in many more ADA cases being decided on the merits. Second, the fact that the EEOC chose to prosecute this case reflects the agency[®] current enforcement priorities, which are heavily focused on disability claims.