

ASKING SPECIFIC REASON FOR ABSENCE RISKS ADA VIOLATION

By Scott J. Wenner

The retailer Dillard's had an attendance policy with provisions commonly found in other attendance policies. Under the policy employees were allowed up to three unexcused absences. However, a fourth unexcused absence required the discharge of the offending employee. For an absence to be "excused" under the policy, the employee was required to submit a physician's note that provided "the nature of the absence (such as migraine, high blood pressure, etc.)." Several former employees of Dillard's brought this policy to the attention of the Equal Employment Opportunity Commission ("EEOC"), and claimed that they were fired under the policy for presenting doctors' notes that did not specify the medical condition that caused their absences. The EEOC filed suit in the Southern District of California claiming that the attendance policy violated the Americans With Disabilities Act's ("ADA") prohibitions, at §12112(d)(4)(A), against making disability-related inquiries to applicants and employees in most circumstances. Dillard's moved for summary

1. *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, (EEOC, July 27, 2000), <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>.
2. It also observed that even where the general diagnosis does not disclose a disability, it could give rise to the perception of a disability, and discrimination on that basis also is impermissible.
3. *Lee* was brought under the Rehabilitation Act, a law with similar prohibitions, but which has a somewhat higher threshold of conduct to establish a violation. The grounds for the Court's decision, however, did not implicate this distinction and were largely based on its disagreement with the Second Circuit's *Conroy* analysis under the ADA.

judgment and the District Court denied that motion. *EEOC v. Dillard's Inc.* (S.D. Calif. 2012).

The *Dillard's* opinion observed that there were two opposing lines of authority from the U.S. Courts of Appeals on whether an attendance policy can require a diagnosis specifying the medical reason for an absence before excusing it. In 2003, the U.S. Court of Appeals for the Second Circuit held that policies requiring disclosure of the medical condition violated the ADA. *Conroy v. New York Department of Correctional Services*, 333 F.3d 88. More recently, a decision of the Sixth Circuit reached the opposite result. *Lee v. City of Columbus*, 636 F.3d 245 (6th Cir. 2011).

The Second Circuit's *Conroy* decision gave great deference to the EEOC's published position on what constitutes a prohibited 'disability-related inquiry': "A 'disability-related inquiry' is a question that is likely to elicit information about a disability..."¹ However, more central to its decision was its application of that standard to the policy there in question. The employer in *Conroy* required employees to provide "a brief general diagnosis that is 'sufficiently informative as to allow [the employer] to make a determination concerning the employee's entitlement to leave or to evaluate the need to have an employee examined ... prior to returning to duty.'" The court found that the requirement to provide a general diagnosis "may tend to reveal" a disability. Therefore, it was closer to an inquiry that could elicit information about a disability than it was to permissible questions about the employee's general well-being or whether they can perform job functions.² It thus was prohibited under the ADA unless justified by the rigorous "business necessity" defense which, it found, was not applicable in that case.

In *Lee*, the Sixth Circuit examined a similar policy³

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and it flatly disagreed with the analysis of the Second Circuit in *Conroy*. It took a more pragmatic approach to the policy's requirement and explicitly declined to find, as did the Second Circuit, that the general diagnosis required to excuse an absence under the policy was, in effect, an inquiry into whether the employee has a disability, or into its nature or severity under the ADA. The Sixth Circuit panel leveled the following criticism of the *Conroy* decision:

By painting with such a broad brush, and finding suspect any routine or general inquiry simply because it “may tend to reveal” an employee's disability, the *Conroy* court has unnecessarily swept within the statute's prohibition numerous legitimate and innocuous inquiries that are not aimed at identifying a disability.

Id., 636 F.3d 245, 254.

The *Dillard's* Decision

In opposing the summary judgment motion in the *Dillard's* case, the EEOC urged the District Court to defer to its position by following the Second Circuit's *Conroy* decision and find that a similar policy such as *Dillard's* would violate § 12112(d)(4)(A) of the ADA. Rejecting the Sixth Circuit's pragmatic approach, the Court adopted the EEOC's view, and held, consistent with *Conroy*, that requiring disclosure of the condition that caused an absence would “invite intrusive questioning into the employee's medical condition and tend to elicit information regarding an actual or perceived disability.”⁷⁴

4. In following *Conroy*, the District Court observed that the Court of Appeals for the Ninth Circuit, which has jurisdiction over California, had not yet decided what constitutes an unlawful inquiry under § 12112(d)(4)(A). It noted, however, that the Ninth Circuit had ruled on other limits that section imposes on employer intrusion into medical issues in *Indergard v. Georgia-Pacific Corporation*, 582 F.3d 1049 (9th Cir. 2009). *Indergard*, in turn, had cited the Second Circuit's *Conroy* decision approvingly in narrowly restricting the scope of employer inquiry at issue in that case. The District Court was of the view that *Indergard* supported its holding in *Dillard's*.

Observing that finding the attendance policy requirement on its face violates a provision of the ADA did not terminate the analysis, the District Court noted that *Dillard's* would have the chance to justify the disclosure requirement by proving the requirement to be job related and consistent with business necessity. This would require it to demonstrate, using evidence, why it was necessary for the employee's physician to disclose the medical condition causing the absence. While *Dillard's* had argued that the requirement allowed it to confirm the legitimacy of the absence and was necessary to ensure that the employee's return to work did not place workplace safety at risk, the Court remarked that no evidence was submitted to support its claims.

Mandatory Disclosure of Medical Condition to Excuse Absence After *Dillard's*

In pursuing the *Dillard's* action, the EEOC sent a clear message that it intends not just to strictly construe and defend its existing guidance on employer inquiries into employee disabilities. Instead, *Dillard's* demonstrates that the Commission wishes to extend the prohibitions of ADA § 12112(d)(4)(A) to — and even beyond — a fair reading of the boundaries set by Congress in the statute and by the EEOC in its published guidance.

Indeed, paraphrasing the Sixth Circuit in *Lee*, the EEOC's position, which both the Second Circuit Court of Appeals and the district court in *Dillard's* adopted, does not merely forbid an employer from inquiring into the condition that prompted a medical absence. Rather, the Commission insists that the law prohibits *any* inquiry that could “tend to” elicit information from the employee about a protected disability, whether or not the employee is even disabled and regardless of whether the supervisor or manager asking the question intended to obtain information about a disability protected by the ADA. The rule advocated by the EEOC and adopted by two courts now equates merely asking what symptoms required the employee to take sick leave with a demand that the employee disclose any of his or her disabling medi-

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cal conditions. It thus broadly would prevent any manager or supervisor from asking what, specifically, caused the absence, whether posed out of concern for the employee, suspicion over the employee's pattern of absences, or simply to complete a form to submit to human resources confirming that an absence was excused. This seems like overkill of the kind that will fuel "gotcha" violations and enforcement actions and will serve no more useful purpose.

As the EEOC has demonstrated how aggressively it will seek to enforce §12112(d)(4)(A), and we have seen how readily some courts have deferred to the Commission's view, it makes little sense to risk violating the ADA by not paying close attention to *Dillard's* and its predecessor, *Conroy*, overbroad though their holdings may be. Further, because these cases disapproved of a disclosure requirement that commonly is found in attendance policies, many employers could be required to make changes to their attendance policies at a minimum.

Until and unless the EEOC changes course, employers ordinarily should consider specific information about an employee's health and medical condition to be unnecessary to monitor employee adherence to its absenteeism policy and for that reason off limits. Employers also should consider:

1. Reviewing their attendance policies and amending those that require disclosure of the medical condition that caused an absence for any reason, whether by a treating physician or the employee.

2. Instructing all managers, supervisors and human resources staff not to ask an employee to identify the medical condition that caused or is causing an absence.
3. Directing managers, supervisors and human resources staff as a general rule to limit all questions concerning an employee's health strictly to the employee's ability to perform the functions of the position — until it is appropriate to commence an interactive process concerning reasonable accommodation. ♦

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For more information about Schnader's Labor and Employment Practices Group or to speak with a member of the Firm at a particular Schnader office location, please contact:

*Scott J. Wenner
212-973-8115; 415-364-6705
swenner@schnader.com*

*Michael J. Wietrzychowski
856-482-5723; 215-751-2823
mwietrzyshowski@schnader.com*

www.schnader.com

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