

Re: CLIENT ADVISORY 2015-06  
**Avoiding “Work Whenever You Want” Schedules**

Although the employer ultimately prevailed on different grounds, the DC Circuit Court of Appeals rejected that a “work whenever you want schedule” is unreasonable as a matter of law.

Lacking the litigation budget of the U.S. Department of Homeland Security, are you prepared to address a “work whenever you want” accommodation request?

The decision in *Doak v. U.S. Department of Homeland Security*, 798 F.3d 1096 (D.C. Cir. August 8, 2013) provides instruction.

### **Request for Work Schedule Accommodation – Termination**

Edna Doak suffered from a variety of debilitating conditions that caused her to miss a significant amount of work, with little or no predictable pattern or advance notice to her employer, the United States Coast Guard. She sought various accommodations from the Coast Guard, which granted many of her requests. But it denied her requests for a later start time and the option to telecommute, among others, because the Coast Guard determined that those accommodations were neither justified by the medical documentation Doak had submitted nor compatible with her job duties. The Coast Guard eventually fired Doak when her attendance did not improve.

The following facts are quoted directly from the opinion.

From November 2007 until October 2010, Edna Doak worked in the Office of Acquisition Resources Management at the United States Coast Guard, first as a Program Analyst, then as a Management Program Analyst. Her day-to-day responsibilities included monitoring the budget for the Coast Guard's Surface Program, making procurement requests, and attending in-person meetings with a program manager and support team to plan for the building of boats.

On January 19, 2010, Cohen [the supervisor] notified Doak in writing that she had nearly exhausted her twelve weeks of FMLA leave and had negative balances of 233 hours of sick leave and 35.15 hours of annual leave. Cohen also explained to Doak that her continued absences and late arrivals were having a negative impact on the office's work.

A week after the April 9 deadline [to do so], Doak submitted her first request for accommodation and supporting medical documentation to human resources. She included a letter from her doctor, Elizabeth P. Berbano, explaining that Doak suffered from major depressive disorder, obstructive sleep apnea, hyperthyroidism, and migraines. Dr. Berbano recommended the

following accommodations for Doak: (i) telecommuting; (ii) full-spectrum light for her work space; (iii) an anti-glare computer screen; (iv) a cubicle in an area free from cold air currents; (v) a work schedule of 11 a.m. to 7 p.m. due to Doak's difficulty getting up in the morning; and (vi) the option of weekend hours to make up for missed weekday hours.

Cohen explained that he did not approve an 11:00 a.m. start time because Doak's position required her to interact daily and frequently with various staff and Doak would be unable to perform those duties with the modified schedule, burdening other employees who would have to pick up work she could not perform.

The chief doctor also opined that, in light of Doak's unpredictable condition, Doak could not work a fixed schedule because her conditions and the treatment for them completely and unpredictably incapacitated her.

On August 9, Cohen provided Doak with a notice recommending that she be terminated because of her (i) “medical inability to perform the essential duties of [her] position,” including “maintain[ing] [a] regular work schedule,” and (ii) extensive hours during which she was absent without leave. The notice indicated that, from January 31, 2010 to August 9, 2010, Doak missed approximately 52% of her scheduled work hours. The notice further explained that Doak's position required her to be in the office on a daily basis due to the need to interact frequently with project staff. After weighing the matter further, Souther [the manager] ultimately decided, on September 30, 2010, to terminate Doak's employment, effective October 8, 2010.

### **Making Your Case that Attendance is an Essential Function**

Remember that the pertinent ADA regulations provide in determining the “essential functions” of a job, “consideration shall be given to the employer's judgment as to what functions of a job are essential[.]” If an employer “has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”

Consider the following:

1. If onsite regular attendance is essential to performing a job, employers should develop a job analysis demonstrating this. Ideally, both employee and management input should be included.
2. Cross reference the job analysis in any job description.

3. The job analysis does not need to be performed separately for each discreet job – an analysis of all the jobs in a particular department, for example, would be appropriate.
4. Ensure that your job descriptions state that regular attendance is an essential function.
5. Flesh out the regular attendance requirement – “needs to participate in interactive on-site meetings during normal business hours and on a regular basis” would have sufficed in *Doak*.