

Practice Note

One of the most difficult and frustrating type of case is where there is an employee who has legitimate medical problems and is absent from the work site on an intermittent basis; i.e. in one moth, out the next, back in for several weeks, etc. This type of case involves both reasonable accommodation and adverse action principles.

The MSPB has held, most recently in *Combs v. Social Security Administration*, 102 FMSR 5142 (Feb. 26, 2002) that an employee who is frequently absent, on approved leave, can be the subject of an adverse action. The Board, citing *Cook v. DA*, 18 MSPR 610 (1984) held that certain criteria must be met. The Agency must establish:

1. The employee was absent for compelling reasons beyond his control so that agency approval or disapproval was immaterial because the employee could not be on the job,
2. the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular, full-time or part-time basis, and
3. the position needed to be filled by an employee on a regular, full-time or part-time basis.

The charge brought against the employee in *Combs* was “Inability to Maintain Regular Attendance”. It has also been called “Excessive Use of Unscheduled Absences”.

Cook noted that if the absences were under the Agency’s control, such as approving leave for the employee to attend to his personal affairs, then the action would fail.

The Appellant in Combs would work for several months, sustain an injury, and then be out for a period of time. She would then return to work on a limited basis. This pattern repeated itself several times. The Board noted that from January 1995 until August 1997 the Appellant was absent from the workplace 53.1% of the time. The Board emphasized the negative impact that the Appellant's absence had on the office and on the other employees.

In bringing this type of action, one can expect that a disability discrimination claim would be asserted, and the appellant in Combs did in fact do so.

It is therefore recommended that the Agency ensure that it meets its burdens under the reasonable accommodation cases of the EEOC. The employee should be asked to provide medical information and have the physicians address reasonable accommodation. The Job Description should be given to the employee to provide to his physician. If there is a post physician he can assist in interpreting the medical information and providing his own professional opinion based on the information he reviews. If accommodation cannot be made and the three criteria above apply, the Agency can proceed with the removal.