



WEB EXCLUSIVE - Flurry Of Recent ADA Cases Can Be Instructive For Employers, Part Two

Insights

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There has been a burst of recent Americans with Disabilities Act (ADA) decisions from around the country that can teach valuable lessons to employers. Last month, we looked at three cases examining the question of whether an employee was “disabled” under the terms of the ADA. This month, we look to three more recent cases that examine another touchstone issue when it comes to disability discrimination litigation: whether a particular job task is an essential function of the job.

Issue No. 2: Is The Specific Job Requirement An Essential Function Of The Job?

After you have determined that your worker has an ADA-qualifying disability, you need to determine whether they are capable of performing the “essential functions of the job,” with or without reasonable accommodation, in order to be protected by the ADA. Simply put, essential functions are the basic job duties that an employee must be able to perform in order to get the job done.

If a worker cannot do those tasks, even with accommodation, they are not considered qualified and therefore cannot maintain a claim. Moreover, employers never have to sacrifice essential job functions when accommodating an employee’s disability, making the determination a critical component of every ADA analysis.

To determine whether a function is essential, you should look to whether the reason the position exists is to perform that function, how many other employees are available to perform the function, and the degree of expertise or skill required to perform the function. For example, imagine a worker who is instructed by their doctor that they can no longer drive a car because of their disability. If that person works for you as a delivery driver, the court will almost certainly consider driving to be essential because that’s the very reason the position exists—to drive. But if that person works as your general office clerk and rarely ever drives as part of the job, and there are multiple other clerks available to drive if necessary to complete an errand, and driving to run such errands takes little skill, then that function is likely not essential.

The Perfect Case For Employers: All Signs Point Towards “Essential Functions”

Our first of three cases involves a man named Jerry Lee Faidley; he worked as a delivery driver for United Parcel Service in Iowa for over 20 years before he began to suffer injuries to his back and hip. After a six-month leave of absence following surgery, he returned to work with no medical restrictions in April 2012.

His return to work was immediately fraught with problems due to the physically intensive nature of his job. His second day back saw him work over 9.5 hours, and on his fourth day, he saw he was scheduled to work nearly 12 hours. “The way I’m feeling there’s no way I can get that done,” Faidley told his supervisor after he saw the schedule. He was excused from working that day, but returned to work the next week and soon was consistently working close to 10 hours a day.

Within several weeks, his doctor told Faidley that he needed to work limited duty, no more than 8 hours per day. Faidley then turned in an accommodation request to UPS, asking not to work any overtime from then on. He pointed out that there were over 100 other drivers at his local center and that he was sure that those drivers could handle any additional work necessitated by his restriction. UPS responded by stating that the ability to work overtime—9.5 hours per day or more—was an essential function of the job, and therefore his inability to do so rendered him unqualified for the job. Faidley responded by filing a lawsuit and claiming that UPS violated the ADA by not reasonably accommodating him.

The lower court dismissed Faidley’s claim, and on May 11, 2018, the 8th Circuit Court of Appeals affirmed the dismissal. The court noted that four factors should be examined when determining whether a function is essential or not. This case shows that employers can easily win such claims when each of them point in their favor:

- **Employer’s judgment:** The company noted that daily workloads can increase unpredictability, especially during the holidays or because of poor weather conditions, requiring drivers’ hours to remain flexible and adaptable.
- **Written job description:** UPS pointed to the fact that the “requirement to work overtime” was listed in the package car driver job description, developed well before Faidley filed his lawsuit.
- **Applicable collective bargaining agreement:** The issue of mandatory overtime was negotiated with the Teamsters, with drivers agreeing to be scheduled up to 9.5 hours (and more when necessary) in exchange for the ability to request two shorter days per month.
- **Consequences of not requiring workers to perform the function:** UPS pointed out that a driver automatically abandoning their workload at the eight-hour mark could force other drivers to be sent off to finish deliveries, or would result in untimely deliveries, either of which would adversely impact the company’s business.

Faidley tried his best to salvage his claim, contending that the ability to work overtime should not be considered an essential function because he usually completed his required route in less than eight hours. But that was not enough to convince the court to rule in his favor, especially because he admitted that he did, on occasion, work overtime. “A task may be an essential function even if the employee performs it for only a few minutes each week,” the court concluded.

Employers Can Prevail Even Under Tough Circumstances

But the stars do not need to always perfectly align in order for an employer to prevail in an ADA

claim turning on the question of essential functions. Today's opinion is a lesson straight out of the school of hard knocks," the 1st Circuit Court of Appeals said at the beginning of a recent opinion where the facts weren't necessarily in favor of the employer. "No matter how sympathetic the plaintiff or how harrowing his plights, the law is the law and sometimes it's just not on his side."

Victor Sepulveda-Vargas worked as an assistant manager for a fast food franchise owned by Caribbean Restaurants, Inc. in Puerto Rico. In 2011, while making a bank deposit on behalf of his employer at the end of his shift, he was attacked at gunpoint, struck over the head, and had his car stolen. The attack left him with PTSD and major depressive disorder.

He sought several accommodations in order to be able to return to work as an assistant manager. The biggest request: Sepulveda-Vargas wanted to be consistently assigned to one timeslot, working only a fixed work schedule. All assistant managers for Caribbean rotated among three different 10-hour work shifts starting at either 6:00 a.m., 10:00 a.m., or 8:00 p.m. Initially, his managers let him work one consistent shift while they considered his request. But after they had a chance to think it over, they informed him that he would have to return to working rotating shifts. Because Caribbean would not accommodate him as he requested, Sepulveda-Vargas resigned from his position and filed an ADA lawsuit against the company.

On April 30, 2018, the federal appeals court ruled in Caribbean's favor and determined that the ability to work rotating shifts was an essential function of the job; Sepulveda-Vargas's inability or unwillingness to do so doomed his ADA claim. Interestingly, many of the critical facts that led the 8th Circuit to dismiss Faidley's claim against UPS did not exist in this situation—there is no mention of a prewritten job description with this function listed as essential, and there was no collective bargaining agreement. So why did the court rule for Caribbean, especially with such sympathetic facts?

The court looked to ensure that the employer's asserted requirements were "solidly anchored in the realities of the workplace, not constructed out of whole cloth;" once satisfied they were, it had no trouble ruling for the employer. Caribbean contended that it was necessary to rotate shifts to ensure that all assistant managers faced an equal distribution of work, given the various requirements of each time period. The court agreed, noting that the permanent assignment of one specific shift to Sepulveda-Vargas would have inconvenienced all other assistant managers, each of whom would have been required to consistently work "unattractive shifts" instead of Sepulveda-Vargas. It also pointed to the job application and an original want ad in the newspaper for the position, each of which mentioned the necessity of working rotating shifts.

Finally, Sepulveda-Vargas argued that the company's act of temporarily assigning him one specific shift while it sorted out his situation "proved" that such an arrangement was feasible and reasonable. The court rejected this argument, and said that this action did not box the company into accepting the arrangement permanently. "To find otherwise," it said, "would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of employers."

Lack Of Specificity On Job Description Can Be Costly

Finally, another recent case presents a situation that should offer an important lesson to all employers about the importance of clear and specific job descriptions. Stanley Snead worked as a campus security officer for Florida A&M University (FAMU) for over eight years before a game-changing decision was made by the university: the new campus police chief changed all of the officers' work schedules from eight-hour shifts to 12-hour shifts, hoping to better serve the school.

Snead tried the new system, but soon found himself physically ill and sought medical care. His doctor diagnosed him with high blood pressure and pointed to the new 12-hour shifts as the culprit. Snead sought the accommodation of reverting back to his eight-hour shift schedule in order to minimize his physical ailments, but the university denied the request as unreasonable. Snead retired instead of continuing in his position and sued FAMU under the ADA.

Snead's case went all the way to a federal court trial, where a jury ruled in his favor and awarded him over \$250,000 in lost wages and mental and emotional anguish. FAMU filed an appeal with the 11th Circuit Court of Appeals hoping to overturn the verdict, but the appeals court sided with Snead in a February 21, 2018 opinion.

FAMU's main argument was that the ability to work a 12-hour shift should have been considered an essential function of the job, and therefore any accommodation request that sought to eliminate the requirement of a worker performing that length of shift should have been considered unreasonable. It argued that letting Snead off immediately upon the conclusion of an eight-hour shift could disrupt the handling of ongoing situations; it could also lead to diminished manpower or forcing others to work overtime.

But the appeals court was swayed to affirm the jury verdict for one main reason: FAMU's job description for the security officer position did not list the ability to work 12-hour shifts as an essential function. The court pointed to the fact that the document included an "Essential Functions" section, specifically describing certain tasks as "fundamental to the position," but failing to include any specified shift length among these functions. "From all of this, the jury could have reasonably concluded that the essential functions of Snead's job were those functions—and only those functions—listed as 'essential' on the job description," the court concluded.

Practical Lessons

Looking at these three cases as a whole, certain lessons stand out as "essential" to your human resources practices. First and foremost, ensure that your written job descriptions include a specific and detailed listing of each and every one of the functions that you consider to be essential to the performance of the job. Next, you might also consider including such a listing on the job application and any advertising you do for the position so that your consideration is noted consistently and thoroughly.

It might also help if you conduct a mini-audit of the job description to make sure it is "solidly anchored in the realities of the workplace" as opposed to being more of a fantasy. It is not a pleasant

unmoored in the realities of the workplace—as opposed to being more of a fantasy. It is not a pleasant surprise for your human resources or legal department to learn that the carefully crafted job description is not at all grounded in reality, whether it is because positions naturally evolve over time or because the job has never actually encompassed all that was originally conceived when the description was developed. So spend time talking with supervisors, managers, and the workers themselves to make sure the description is accurate (perhaps doing so regularly during the annual evaluation period) and make any adjustments to the job description—or the job itself—as necessary.

Finally, if faced with an accommodation request and a question is raised about whether a certain function is truly “essential,” work with your legal counsel to determine how a government investigator, court, or jury might examine the situation, and respond accordingly. You might even be able to experiment and try to roll out a temporary accommodation before determining that the specific function impacted is so essential that it cannot be avoided; if you are located in a jurisdiction like the 1st Circuit above, the mere act of you experimenting with a possible accommodation will not necessarily force you into accepting the accommodation on a permanent basis.

For more information, contact the authors at MCreighton@fisherphillips.com (404.420.4285) or RMeneghello@fisherphillips.com (503.205.8044).

Related People



Myra K. Creighton

Partner

404.240.4285

Email





Richard R. Meneghello
Chief Content Officer
503.205.8044
Email

Service Focus

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