

# Legal Briefings

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## **Qualified Under the ADA: The New Legal Battleground After the ADA Amendments Act<sup>1</sup>**

Since Congress passed the ADA Amendments Act in 2008, courts have largely complied with the Act's directive to construe the definition of disability "in favor of broad coverage . . . to the maximum extent permitted by the terms of th[e] Act."<sup>2</sup> As a result, courts are now spending less time analyzing whether a plaintiff has a disability as defined by the ADA,<sup>3</sup> shifting the legal battleground in ADA cases to whether a plaintiff is "qualified." As an example of the stark contrast between pre- and post-ADA Amendments Act cases, some employers in recent ADA cases have opted not to even challenge whether the plaintiff has a disability, focusing exclusively on whether the individual is qualified.<sup>4</sup>

This shift is not completely unexpected. In fact, legal scholars predicted that the broadened definition of disability under the ADA Amendments Act would result in more cases focusing on whether an individual is qualified with or without a reasonable accommodation.<sup>5</sup> One scholar even conducted a study of post-ADA Amendments Act cases and concluded that a greater prevalence of ADA decisions focus on whether the plaintiff is a qualified individual.<sup>6</sup>

Due to the renewed attention to the issue of qualified, it is important for people with disabilities and employers to understand issues related to the term's definition and interpretation. This Legal Brief reviews the definition of qualified as defined by the ADA, outlines the definition of "qualified" as interpreted by the Equal Employment Opportunity Commission (EEOC), and explores how courts are analyzing cases where the core issue is whether the plaintiff is qualified.

### **Statutory and Regulatory Definition of Qualified**

According to the statutory text, a "qualified" individual is one "who, with or without reasonable accommodation, can perform the essential functions of the employment

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position that such individual holds or desires.”<sup>7</sup> The EEOC’s regulatory interpretation of the term “qualified” divides this inquiry into two steps. First, to be qualified, an individual must “satisf[y] the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires.”<sup>8</sup> As explained by the EEOC, the first step requires an examination of the individual’s “credentials.”<sup>9</sup> The second question is whether the individual “with or without reasonable accommodation, can perform the essential functions of such position.”<sup>10</sup> The second step actually has two parts: identifying which functions are essential, and then determining whether the individual can perform those functions with or without a reasonable accommodation.<sup>11</sup>

The ADA and its implementing regulations also provide instruction on how to determine whether a job function is essential, which is critical to understanding the definition of “qualified.” The statute provides that “consideration shall be given to the employer’s judgment as to which functions of a job are essential, and 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.”<sup>12</sup>

Additional EEOC guidance defines “essential functions” as “the fundamental job duties of the employment position the individual with a disability holds or desires” which do “not include the marginal functions of the position.”<sup>13</sup> EEOC regulations also explain that a job function may be essential because the position exists to perform the function, there are a limited number of employees available who can perform the function, and/or because the function is highly specialized so the individual is hired for his or her expertise or ability to perform the function.<sup>14</sup>

Finally, while emphasizing that this list is not exhaustive, the EEOC regulations list relevant factors to consider when determining whether a particular function is essential.<sup>15</sup> The factors are as follows:

- The employer’s judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent on the job performing the function;
- The consequences of not requiring the incumbent to perform the function;
- The terms of a collective bargaining agreement;
- The work experience of past incumbents in the job; and/or
- The current work experience of incumbents in similar jobs.<sup>16</sup>

A comparison of the EEOC’s factors to the statutory text reveals that two of these factors overlap (employer judgment and job descriptions), while the remaining five are factors added by the EEOC. As discussed in this Legal Brief, courts regularly consider each of these factors when determining whether a particular function is essential.

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EEOC guidance also clarifies that the relevant time period for determining an individual's qualifications is the time of the employment decision at issue, and should be based on the individual's capabilities, not on speculation that the employee may become unable to work in the future.<sup>17</sup>

## Judicial Interpretation: "Qualified" Analysis

### Step 1: Skill, Experience, Education and Other Job-Related Requirements

While the EEOC regulations spell out a two-step process to determine whether an individual is qualified under the ADA, in practice, courts rarely spend much time analyzing the first step, whether the individual "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires."<sup>18</sup> In fact, some cases skip this assessment completely. Courts that do engage in this analysis, however, have considered the individual's education and prior experience in the position, among other factors. In *Wirey v. Richland Community College*, for example, an employee with chronic fatigue syndrome worked for her employer for fifteen years, spending the last five in her final position as Director and Registrar.<sup>19</sup> Recognizing the employee's employment tenure, the court easily found that she had the skills and experience for the position under step one of the qualified analysis. Likewise, in *Torres v. House of Representatives of the Commonwealth of Puerto Rico*, the court found that the employee met the first prong of the qualified test in light of her Master's degree in social work, her license in social work, her history of meeting performance expectations, and specific initiatives that she led in the past.<sup>20</sup>

Although courts typically segregate the two factors in their analysis of "qualified," one recent case in the Sixth Circuit used the fact that the employee had the skills, experience and education required for the position (prong one) to support its conclusion that he could perform the essential functions of the job with or without accommodations (prong two). In *Keith v. County of Oakland*, the court considered whether a deaf individual was qualified to work as a lifeguard, specifically questioning whether he could effectively communicate.<sup>21</sup> In determining that the lifeguard was able to communicate effectively due to his deafness, in addition to other considerations, the Sixth Circuit emphasized that "by passing [the] County's lifeguard training program and earning his lifeguard certification," the lifeguard "demonstrated his ability" to perform certain essential functions of the lifeguarding position.<sup>22</sup>

### Step 2: Perform Essential Functions With or Without a Reasonable Accommodation

The vast majority of cases regarding "qualified" focus on whether the individual can perform the essential functions of the position with or without a reasonable accommodation. This, too, can be a two-step process, providing litigants two distinct arguments.<sup>23</sup> Parties may dispute which functions are essential functions, and whether the individual can perform the essential functions with or without a reasonable

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accommodation. For instance, the Sixth Circuit in *Demyanovich v. Cadon Plating & Coatings* considered both issues. It first held that lifting was not necessarily an essential function of a line operator job, as the employee's job description identified several essential duties, but did not include a lifting requirement. Next, it questioned whether the employee could perform the essential functions at the time of his termination, and found a genuine issue of fact. At the time of the employee's deposition, it was clear that he was no longer capable of several physically exerting activities; however, the court was presented with no evidence that the employee was unable to perform the job functions at the time of his termination.<sup>24</sup>

On the other hand, a review of recent case law suggests that the majority of summary judgment cases focus on which functions are essential, as opposed to cases about whether or not the plaintiff can perform the particular function. One possible reason for this is that when a court finds a genuine issue of material fact regarding which functions are essential, it may not need to proceed to the question of whether or not the individual can perform the function. In *EEOC v. Heartland Automotive Services*, a Jiffy Lube franchise failed to hire a deaf applicant for a lube technician position.<sup>25</sup> Because the parties provided conflicting evidence about the essential functions of a lube technician position, specifically, whether using a call-and-response system was essential, and how long technicians were required to stand, the court did not consider step two. The court explained that without a clear understanding of what the essential functions were for the position, it would be "impossible . . . to determine whether" the applicant was able to perform them.<sup>26</sup> Another possible reason that a court focuses on what functions are essential is that it is undisputed that an applicant or employee cannot do a particular task, requiring the courts to determine whether that task is actually essential.

While plaintiffs typically have the burden of establishing that they are qualified as part of their prima facie case, if defendants challenge their assertions about which functions are essential, courts generally find employers have the burden of showing that a particular function is essential.<sup>27</sup> The rationale behind this is that much of the information which determines which functions are essential lies "uniquely with the employer."<sup>28</sup>

When adjudicating disputes about whether a particular task is essential, courts consistently rely on the EEOC's factors, outlined above. While in certain cases, one or two factors prove to be determinative, courts frequently consider a mix of all of the factors in reaching a conclusion. As an example, in *Bambrick v. Sam's West, Inc.*, the issue was whether lifting 50 pounds was an essential function of the Photo Lab manager's position.<sup>29</sup> The defendant argued that the lifting requirement was essential, emphasizing the employee's job description and the employer's judgment. However, pointing to the absence of adverse consequences for failing to perform the function, the absence of a collective bargaining agreement, and the work experience of other employees, the court concluded that the lifting was not an essential function of this

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position. As discussed further in the job description section below, the court also discredited much of the job description in light of the fact that it was formulated years after the manager had started working with no real change in her job duties. This type of balancing approach is employed regularly by courts in deciding whether a function is essential or marginal.

## Deciding Essential Functions: Factor-Employer Judgment

As noted above, in determining whether a particular function is “essential,” the text of the ADA and the EEOC’s regulations both emphasize that employer judgment is a key consideration. While courts agree that employer’s opinions are “entitled to deference,”<sup>30</sup> the majority view is that employer judgment is just one factor to be considered.<sup>31</sup>

In *Henschel v. Clare County Road Commission*, the court considered whether hauling equipment to a job site was an essential function of an excavator operator position.<sup>32</sup> Although the employer considered hauling to be an essential function, the court explained that employer judgment “carries weight” but is “only one factor to be considered.”<sup>33</sup> Despite the employer’s judgment, the employee was able to demonstrate a genuine issue of material fact as to whether hauling equipment was an essential function based on the other factors articulated by the EEOC, including the employee’s job description (discussed below), that the excavator stayed at the job site 90% of the time, that there minimal consequences to the employer’s operations if the excavator did not haul equipment, and experiences of past incumbents.

An interesting case out of Louisiana demonstrates how an employee can convince a court about the true essential functions of a position, despite an employer’s judgment and job descriptions. In *Lee v. Harrah’s New Orleans*, Harrah’s argued that in its judgment, the position of seated box person required an employee to be able to bend, reach, kneel, twist and grip.<sup>34</sup> It asserted that the plaintiff, who had a history of severe back pain and had been diagnosed with fibromyalgia, was unqualified because she would be unable to perform these tasks without assistance from other personnel. However, the court rejected the employer’s argument, in light of the employee’s own evidence that she actually had worked in the box person position for almost a year without needing additional personnel to perform the tasks.

## Deciding Essential Functions: Factor-Job Descriptions

Job descriptions are frequently used by employees and employers to support arguments about the importance of a particular function. Recent case law provides important lessons for all litigants about the relevance of job descriptions.

The fact that a specific duty is omitted from a job description can also support an employee’s argument that a particular function is not essential. In *EEOC v. Heartland Automotive Services*, the fact that the duty of operating a “call and response system”

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was not included in the job description for a lube technician supported the applicant's argument that it was not an essential function of his prospective position, leading the court to allow the plaintiff's claim to proceed beyond summary judgment.<sup>35</sup>

Employers may have a particularly difficult time arguing that a particular function is essential if the function is omitted from the job description for the position in question, but appears in the job description of other positions. In *Henschel v. Clare County Road Commission*, the court considered whether hauling equipment was an essential function of an excavator operator.<sup>36</sup> The plaintiff had been in a motorcycle accident and used a prosthetic leg. In deciding not to return the employee to his position, the employer argued that the plaintiff would be unable to haul equipment to the job site, which it deemed an essential function. Arguing that hauling equipment was not essential, the employee asserted that his job description did not include the duty of hauling equipment, which was particularly relevant because hauling equipment was included in the job description for a different position, the truck/tractor driver position. Although the employer argued that the plaintiff's job description's inclusion of "other duties assigned" included hauling, the court held that not every other duty under the "other duties assigned" category is an essential function, and to find otherwise would render the job description meaningless. See also *Feldman v. Olin Corp.*, 692 F.3d 748 (7th Cir. 2012) (noting that the job description for the specific position in question did not mandate overtime, while other job descriptions did, in allowing the plaintiff's claim to proceed).

Employees can also successfully challenge the accuracy of a job description by comparing it to their own experience working in the position. In *Bambrick v. Sam's West, Inc.*, the plaintiff had a lower back injury and had a lifting restriction of 30 pounds.<sup>37</sup> She worked as a manager of the photo lab from 2001 to 2010, when she was told that due to her lifting restriction, she was offered a position with a significantly diminished compensation, and ultimately terminated. In defending this ADA case, her employer argued that a 50-pound lifting requirement is an essential function of the manager position, and produced a job description to support its claim. Noting that the job description was developed in 2007, many years after the manager had started working with no apparent changes to her job duties, the court stated that "a determination of whether physical qualifications are essential job functions should be based upon more than statements in a job description, and should reflect the actual functioning and circumstances of the particular enterprise involved, with focus on the position from which plaintiff was removed." Accordingly, the plaintiff's case was permitted to proceed. See also *Lee v. Harrah's New Orleans*, 2013 WL 3899895 (E.D. La. July 29, 2013) (rejecting Harrah's argument that bending, reaching, kneeling, twisting and gripping were essential functions in light of the employee's actual experience on the job).

Likewise, in *Rorrer v. City of Stow*, the plaintiff worked as a firefighter for nine years

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until he became blind in his right eye.<sup>38</sup> After receiving medical clearance to return, the plaintiff's supervisor denied him the opportunity to resume his job, and ultimately terminated the plaintiff's employment. The plaintiff had requested to be relieved of driving duties, due to his accident, and the employer cited a National Fire Protection Association ("NFPA") guideline as a reason for the plaintiff's termination. The NFPA guideline required firefighters to be able to operate "fire apparatus or other vehicles in an emergency mode with emergency lights and sirens." The court held that there was dispute as to what the guidelines actually provided, and whether or not the city actually adopted the NFPA guideline. Moreover, the court found that a department document identified the ability to drive as discretionary, not essential. Ultimately, the court reversed the finding of summary judgment and remanded the case.

Employers' retention of multiple job descriptions for the same job can also support an employee's argument that the job description is inaccurate, and thus, cannot be used to determine whether a function is essential. In *Zimple v. Hancock Fabrics, Inc.*, the court considered whether lifting was an essential function of a fabric store manager position, but the employer produced three different job descriptions.<sup>39</sup> For this, and other reasons, the court held that a genuine issue of material fact existed about the essential functions of the manager's job.

Litigants relying on job descriptions should closely review the words used in the actual description. In *Bisker v. GGS Information Services, Inc.*, the court held that the plaintiff was qualified, despite her need for telework, after determining that face-to-face interaction was not an essential function of the parts lister position.<sup>40</sup> The employee's job description indicated that the position required "occasional[] interact[ing] with engineers and technicians" and "frequent contact with employees" but did not specify whether the interactions and contact needed to be in-person. Reasoning that such interactions and contact could be done from home, the court found the employee to establish her initial burden of whether she was qualified under the ADA.

In addition to the tips learned from recent case law, employees and employers should remember that the ADA does not require an employer to develop or maintain job descriptions.<sup>41</sup> However, if an employer uses written job descriptions, such descriptions should be reviewed regularly to be sure that they accurately reflect the actual functions of the current job. Further, if an employer intends to use a job description as evidence of essential functions, the job description must be prepared before advertising or interviewing for a job, as a job description prepared after an alleged discriminatory action will not be considered as evidence.

## Deciding Essential Functions: Consequences of Removing Essential Function

Another factor identified by the EEOC in determining whether a particular function is essential is the consequences of not performing the function. The typical analysis under this factor considers the severity of the harm caused by removing an essential

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function. One example of this can be found in an older case out of the Sixth Circuit, *Brickers v. Cleveland Board of Education*.<sup>42</sup> In *Brickers*, the issue was whether lifting was an essential function of a school bus attendant who transported students with disabilities. While attendants may “seldom” be required to lift, the court found a genuine issue of material fact as to whether lifting to be an essential function in light of the consequences of not performing the function when necessary, given the severe consequences if the attendant was unable to lift students during an accident or fire.

When assessing this factor, courts have also held that if the consequence of not performing a function would require an employer to hire another employee, the function is likely considered essential. In *Moore v. Jackson County Board of Education*, the court considered whether cooking and cleaning were essential functions of the position of a cafeteria manager position.<sup>43</sup> Among the factors considered when holding that cooking and cleaning were essential functions of the position, the court emphasized that if the plaintiff had been permitted to return to work without performing her cooking and cleaning duties, the defendant would have been required to hire another person to perform those duties. Other than the manager, there were only two other employees to supply food for 200 students on a daily basis. Thus, cooking and cleaning were deemed essential functions for this job as a matter of law.

## Deciding Essential Functions: Additional Factor-Legally Defined Job Requirement

Courts have recognized additional factors, not specifically delineated by the EEOC, in their quest for determining whether a function is essential. One common reason for finding a task to be essential is the statutory, regulatory or administrative requirement behind it. For example, in *Proctor v. Northern Lakes Community Mental Health Authority*, the court found certain lifting requirements to be essential to the position of a resident care assistant and explained that individuals employed by this position must meet the State of Michigan’s physical exertion requirements.<sup>44</sup> The court explained that if a function is required by state legislation, then those qualifications are essential functions by their very nature. Likewise in the *Brickers v. Cleveland Board of Education* case discussed above, in addition to the severe consequences of a school bus attendant not being able to lift the students, the court emphasized that state legislation required school bus attendants to have the “physical capability of appropriately lifting and managing” students with disabilities “when necessary.”<sup>45</sup> Thus, the legally defined job requirements were essential by their very nature.

Of course, there could be a state law or regulation that conflicts with the ADA. If so, under federalism principles, the ADA would trump because it is a federal law.<sup>46</sup>

Interestingly, even if the qualification requirement in question came from a federal law or federal regulation, employers cannot shield themselves from ADA liability or successfully use it as a defense to an ADA claim if the requirement in question is applied too broadly. For example, in *Samson v. Federal Express Corporation*, the employee was offered a job as a vehicle technician, conditioned upon his passing a Department of Transportation (“DOT”) medical exam, which the Federal Motor Carrier

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Safety Regulations (“FMCSRs”) require for commercial motor vehicle drivers who transport property or passengers in interstate commerce.<sup>47</sup> The court found that the FMCSRs requirement did not apply to the position in question, as the position required only test-driving that did not constitute transporting property or passengers in interstate commerce. Therefore, the court reversed summary judgment in favor of the employer, holding that the legal requirement of FMCSRs did not afford a defense to the employee’s disability discrimination claims.

## Deciding Essential Functions: Managerial Positions

At times, managers become unable to do a job task typically performed by a non-managerial employee, requiring courts to determine what are the essential functions of managers. In the *Moore v. Jackson County Board of Education* case, discussed above, the cafeteria manager argued that her job was to perform managerial work, such as paperwork and operating the cash register, while the employer asserted that the position also included the non-managerial work such as cooking and cleaning.<sup>48</sup> Although the position was managerial, the manager acknowledged that she assisted other cafeteria workers with cooking and cleaning when she had the time. That admission, coupled with the fact that the employee who replaced the manager performed certain cooking and cleaning duties and other factors, led the court to conclude that the manager’s managerial title did not lead to the conclusion that cooking and cleaning were not essential functions of her position.

Even if a manager infrequently performs a specific function performed by her employees, courts can still find the functions to be essential if the manager performs them on at least some occasions. In *Gober v. Frankel Family Trust*, a maintenance foreman who could no longer work more than eight hours per day was terminated for his inability to be “on call.”<sup>49</sup> The foreman argued that the ability to be “on call” was not an essential function of his job because he held a supervisory position, and not the maintenance technician position, and that technicians were the only ones responsible for responding to the properties’ after-hours needs. The court disagreed, and held that foreman were also expected to report to properties after houses when necessary, rendering this an essential function. Likewise in *Knutson v. Schwan’s Home Service, Inc.*, a general manager argued that driving was not an essential function of the managerial position.<sup>50</sup> For a number of reasons, the court found otherwise. With respect to the managerial/employee distinction, the court explained that while driving or having the ability to drive was a rare need for a manager, it still, from time to time, was an essential job function for a manager to perform.

There have been multiple cases that assessed whether a restaurant manager’s essential job functions include performing the tasks of the wait staff that they manage. In one case, *Equal Employment Opportunity Commission v. Denny’s, Inc.*, the court held that it did not. There, a restaurant manager was terminated after she underwent an above-knee amputation.<sup>51</sup> The manager returned from medical leave and asked to

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work a light duty part-time schedule. Although Denny's initially agreed, it terminated the manager's employment after five days on this modified schedule after finding that she was a "safety hazard."<sup>52</sup> In its motion for summary judgment, Denny's asserted that the manager was not otherwise qualified, as she could not perform the essential functions of the restaurant manager position which entailed moving quickly between tasks and moving around the entire restaurant. Denny's argued that managers were expected to step in and perform the tasks of other positions, such as cleaning, cooking, stocking, and lifting. Disagreeing with Denny's, the court relied on the manager job description which listed only supervisory and administrative tasks. The court also considered the manager's description of her own job, which she testified was not physically demanding as she spent most of her time interacting with customers, handling paperwork, and instructing other employees. The court was further persuaded by a vocational counselor that observed the restaurant operations for two days and never observed a manager performing a non-managerial task that could not have been performed by another available employee as a matter of managerial discretion.

Another court, however, came to the opposite conclusion. In *Burnett v. Pizza Hut of America, Inc.*, the plaintiff, a restaurant manager, started to experience sleeplessness, muscle and joint pain, depression, and generalized fatigue and was ultimately diagnosed with fibromyalgia, musculoskeletal pain, and inflammatory arthritis.<sup>53</sup> Her doctor issued various restrictions on her including inability to lift more than 20 pounds and inability to do repetitive motions of her upper extremities. After a medical leave, the restaurant manager sought to return to her managerial position with restrictions, but Pizza Hut denied her this opportunity. On Pizza Hut's motion for summary judgment, the court considered whether the manager was qualified to perform the essential job functions of a restaurant manager and concluded that she was not. While the manager argued that a managerial position was only to manage and did not include the physical tasks otherwise performed by supervised employees, the court found that Pizza Hut provided ample evidence that it had legitimate business reasons for expecting and requiring managers to assist in performing physical labor tasks when necessary, such as training employees, filling in for late or absent employees, and covering positions during scheduled low volume periods. Pizza Hut also provided evidence that all restaurant managers were responsible for ensuring that all jobs were performed, including those of a physical and repetitive nature.

## Deciding Essential Functions: Distinguishing the Manner of Performing Essential Function From the Function Itself

The EEOC has made clear that in identifying an essential function, the employer should focus on the function and the result to be achieved, not on the manner in which the function is presently performed.<sup>54</sup> This is an important distinction because an individual with a disability may be qualified to perform the function, but a reasonable accommodation would enable the individual to perform the task in a different way. Thus, although the function itself may be essential, the way that it is performed may

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not be.

Courts have generally applied this concept. In *Keith v. County of Oakland*, the parties agreed that communicating was an essential function of a lifeguard's position.<sup>55</sup> However, they disagreed on whether verbal communication was essential. In this case, Keith had successfully completed lifeguard training and applied for a lifeguard position at Oakland County's wave pool. Keith received an offer of employment, subject to a pre-employment physical. During the physical, the doctor looked at Keith's medical history and stated: "He's deaf; he can't be a lifeguard."<sup>56</sup> In defending this lawsuit, Oakland County argued that Keith was not "otherwise qualified" to be a lifeguard because due to Keith's deafness, he could not effectively communicate with other lifeguards, patrons, emergency personnel, and injured persons. Keith, on the other hand, asserted that he could communicate with his colleagues and with guests, through non-verbal forms of communication. The Sixth Circuit determined that Keith presented sufficient evidence of his ability to communicate through non-verbal means. Specifically, the court looked to the fact that Keith could communicate with distressed swimmers through the "10/20 standard of zone protection" where lifeguards scan their entire zone every ten seconds and ensure their ability to reach any part of their zone within twenty seconds, a technique that is purely visual. Similarly, Keith could also communicate with other lifeguards; even if he could not hear another lifeguard's whistle, by looking at other lifeguards while scanning his zone. The court also explained that Keith could communicate to enforce safety rules by relying on physical gestures such as shaking his head, motioning his hand backward, or signaling the number one, all non-verbal strategies typically employed by lifeguards. The *Keith* case highlights the importance of looking beyond initial beliefs about how a specific function can be achieved.

The function versus manner distinction was also emphasized by the court in *Zombeck v. Friendship Ridge*, where the issue was whether a nurse's aide was qualified in light of her lifting restrictions.<sup>57</sup> In *Zombeck*, a nurse's aide stopped performing the lifting portion of her nursing aid duties after experiencing two work-related injuries. She worked in this modified position for thirteen years, but was ultimately terminated due to her lifting restrictions. The court found that a reasonable juror could conclude that lifting was not an essential function of the plaintiff's position. Within its detailed analysis, the court reviewed the employee's job description, and emphasized that the list of "essential functions" lacked any explicit reference to lifting, but rather stated that a nurse aide "helps transfer" a resident. Citing the ADA's legislative history, the court emphasized that "the essential function requirement focuses on the desired result, rather than the means of accomplishing it."<sup>58</sup> In this case, the employer's desired result was transferring residents, which could have occurred through lifting or through another means, such as using a mechanical lift, as requested by the plaintiff. Thus, the plaintiff's claim could proceed.

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However, the function versus manner distinction will not save an employee's case if the manner is intrinsically intertwined with the function. In *Walter v. Wal-Mart Stores, Inc.*, the plaintiff, a greeter at Wal-Mart with a degenerative neurological condition and limited fine motor skills, was physically unable to use Wal-Mart's Telxon scanner, a handheld scanner which printed merchandise-specific labels.<sup>59</sup> The greeter argued that using the Telxon machine was simply the method of performing an essential function—processing returns—and argued that he should be able to process returns in a different manner, as an accommodation. Specifically, he asserted that he should be able to process returns by placing stickers on returned merchandise, as Wal-Mart used to do. The court disagreed, and explained that Wal-Mart had intentionally implemented the Telxon machine in response to the legitimate problem of fraud and shrinkage, which the sticker-system did not prevent. Consequently, the court found that operating the Telxon machine was, in fact, an essential function of the greeter position.

The *Walter* case teaches another lesson as well: courts generally permit employers to change the essential functions of a specific position, especially when there is a legitimate reason for doing so.<sup>60</sup> In *Walter*, before implementing the Telxon system, one of the greeter's jobs was to provide requested assistance with merchandise returns, which he did by placing a pink sticker on returned merchandise and directing customers to customer service desk. However, after determining that this procedure resulted in significant fraud and shrinkage, it implemented a new system, and replaced the pink stickers with Telxon, a hand-held scanner which printed merchandise-specific labels. According to the court: "[a]n employee's job description is permitted to evolve, and 'an employer is not required to maintain an existing position or structure that, for legitimate reasons, [the employer] no longer believes is appropriate.'" This principle is also articulated by the EEOC in its Technical Assistance Manual.<sup>61</sup>

Deciding Essential Functions: Impact of Temporarily Waiving Essential Functions  
Courts consistently hold that an employer's decision to "waive" an essential function for a temporary period of time does not mean that the function is not essential. The policy reason behind such doctrine is that courts do not want to punish employers for going above and beyond the ADA's requirements.<sup>62</sup> A number of recent ADA cases confirm this general concept.

For instance, in *Hancock v. Washington Hospital Center*, a medical assistant with a nerve condition had reached an arrangement with her employer where she was not required to perform triage duties.<sup>63</sup> In her subsequent ADA lawsuit, the medical assistant argued that she was qualified, despite her inability to perform triage duties, because her employer had "waived" the essential function of triage due to her disability. The court disagreed, explaining that the case law overwhelmingly holds that employers do not irrevocably waive essential functions by providing short-term accommodations. Explaining its rationale, the court stated that an accommodation that eliminates an essential function is unreasonable under the ADA, even if the employer

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voluntarily provided it in the past. Thus, the court upheld a jury verdict finding the medical assistant not qualified given her inability to perform triage duties.

Similarly, the court in *Minnihan v. Mediacom Communications Corporation* found driving to be an essential function of a technical operations supervisor position, rejecting the plaintiff's argument that because his employer had accommodated him for a temporary period of time, driving was not an essential function of his position.<sup>64</sup> See also *Rehrs v. Iams Co.*, 486 F.3d 353 (8th Cir. 2007) (holding that by temporarily accommodating an employee's request to work a straight shift schedule, an employer did not "concede" that a job function was not essential).

Perhaps the most extreme example is from a 2001 case, which also demonstrates the difference a change in management can make for employees with disabilities. In *Phelps v. Optima Health, Inc.*, after sustaining a back injury, a nurse left her position and became a "medication nurse" responsible for delivering medication and other tasks that did not involve lifting.<sup>65</sup> As a result of a nurse shortage, the nurse began to undertake some responsibilities for patient care, but because of her lifting restriction, shared a patient load with her sister, who was also a nurse. This job-sharing arrangement was never officially approved by human resources, but was unofficially approved by the nurse's manager. However, after a change in management, the nurse was terminated due to her lifting restriction. Here, the parties agreed that lifting was an essential function of a clinical nurse position, but the nurse argued that she was not a clinical nurse. Instead, she had a nursing position created for her in light of her physical restrictions. The court disagreed. It held that the evidence established that at the time of her termination, the nurse worked as a clinical nurse with unwritten job modifications. Consistent with the rationale in *Hancock* and *Minnihan*, the court held that even when an employer and employee make arrangements to accommodate an individual's limitations, courts evaluate the essential functions of the position without consideration of those arrangements.

However, there are cases where the court emphasizes that the employee has performed the position for some time without consequences, and as a result, the function may not be essential. For instance, in *Zombeck v. Friendship Ridge*, the case about the nurse aide with a lifting restriction, in addition to other factors, the court found persuasive the fact that the plaintiff did not lift for a thirteen-year period, but maintained the title of "nurse aide" without receiving any unsatisfactory formal performance evaluations.<sup>66</sup> As a result, it concluded that lifting was not an essential function. Similarly, in the *Bambrick v. Sam's West, Inc.*, case, in concluding that the plaintiff created a genuine issue of material fact as to whether lifting fifty pounds was an essential function of a manager of the photography lab, the court noted that the plaintiff had worked in the position without lifting for a number of years.<sup>67</sup>

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## Deciding Essential Functions: Consequences of Medical Documentation

One issue that sometimes catches employees off guard is when their own medical documentation is used to demonstrate that the employee is not qualified under the ADA. In some instances, the employee's doctor overemphasizes the person's limitations to ensure that the person is covered under the ADA, but that then undercuts the employee's qualified argument.

In one recent case, an employee was found to be unqualified because her doctor did not release her to return to work. In *Lane v. Prince George's County Public Schools*, a teacher sued her school district alleging that her principal did not grant her request for certain accommodations.<sup>68</sup> The court found the teacher not qualified, in light of her doctor's instructions to either take leave from work or to retire in light of her medical conditions. Said the court: "It is well-settled that an individual who has not been released to work by his or her doctor is not a 'qualified individual with a disability.'"<sup>69</sup>

In other cases, work capacity reports or requests for accommodation impose restrictions on employees that suggest the employee is unqualified. For example, in *Tjernagel v. Gates Corporation*, overtime was considered an essential function of the employee's position.<sup>70</sup> The employee provided a medical work capacity report, which required various restrictions, including no overtime. Because overtime was an essential function of the position, the employee was terminated. Following her termination, the employee asked if she could return to her job if she had the overtime restriction removed. Her doctor then sent a second report removing the overtime restriction, but this did not save her ADA claim. The court explained that the second work capacity report was written as a self-report, as it stated that the employee "reported to his office she needed no accommodations or restrictions to perform the essential functions of her former job at Gates."<sup>71</sup>

Although not specifically about reasonable accommodations, the *Tjernagel* case cautions employees not to provide medical support for accommodations that arguably remove essential functions. See also *Cefalu v. Holder*, 2013 WL 5315079 (N.D. Cal. Sept. 23, 2013) (concluding that the special agent was not qualified because his medical restrictions overlapped with the essential function of being able to lift a gun).

## Judicial Interpretation: Specific Essential Functions

Certain functions have seen significant action in the case law, requiring courts to determine whether they are essential in a variety of employment situations.

### Specific Essential Functions: Attendance and Punctuality

Whether attendance and punctuality are essential functions is a question that courts consider regularly, especially when deciding whether accommodations such as leave

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and telework are reasonable. While both are frequently considered essential, a number of recent court decisions demonstrate various situations where attendance and punctuality are not necessary essential.

In *E.E.O.C. v. Ford Motor Company*, a resale steel buyer with severe irritable bowel syndrome requested to telework as a reasonable accommodation because she could not be present in the office on a full-time basis.<sup>73</sup> The Sixth Circuit noted that while attendance may be an essential requirement of most jobs, technology has advanced such that attendance at the workplace no longer is assumed to mean attendance at the employer's physical location. The court said that the "law must respond to the advance of technology in the employment context . . . and recognize that the 'workplace' is anywhere that an employee can perform her job duties."<sup>74</sup> The employer's primary argument for physical presence was that teamwork was integral to the resale buyer position, which was best done through face-to-face interactions. The buyer rebutted that statement by arguing that in her experience, even when physically present at the facility, the vast majority of communications were done via conference calls. Due to that argument, and the fact that her position was not one that actually required face-to-face interactions, the buyer successfully established a genuine issue of whether face-to-face interactions and consequently, physical presence in the workplace, was essential for her position.

The increased reliance on technology has also allowed employees to work remotely on a regular basis, providing another reason for courts to determine that regular attendance may not be an essential function. In *Walker v. NANA WorleyParsons, LLC*, Walker was hired as a project controls specialist in 2003, and her offer letter stated that she would work remotely one to two days per week and in the office three to four days per week.<sup>75</sup> She was the only employee in her position permitted to work remotely. In 2004, Walker was diagnosed with fibromyalgia, and by 2007, was working approximately two days per week in the office and remotely the rest of the time due to her disability. In 2009, Walker's employer required her to work in the office full-time, and after various disputes on the subject, she was terminated. The employer argued that Walker was not qualified because she could not perform the essential functions of her job, namely attendance. The court disagreed, and found that Walker established a genuine issue of fact on this issue. Even though Walker was the only employee in her position allowed to telework, her job description did not require in-office attendance, and her position was not one that would necessarily require physical attendance in the workplace. See also *EEOC Fact Sheet: Work at Home/Telework as a Reasonable Accommodation*, available at <http://www.eeoc.gov/facts/telework.html> ("[A]llowing an employee to work at home may be a reasonable accommodation where the person's disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense").

Further, when a company provides leave for various non-disability related reasons,

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courts have questioned whether attendance is actually essential. For example, in *E.E.O.C. v. AT&T Corporation*, the court considered whether attendance was an essential function for a call center specialist.<sup>76</sup> The evidence offered by the employer was a final written warning given to the employee and the manager's testimony. In support of its decision, the court emphasized that the employer's job description "is silent as to whether attendance is an essential function" and noted that the company has 22 "formal" leave of absence plans.<sup>77</sup> As such, the court concluded that the plaintiff's claim could proceed past summary judgment.

## Specific Essential Functions: Rotating Shifts

Recent caselaw suggests that employers who consistently rely on rotating shifts can show that shift rotation is an essential function. For instance, in *Kallail v. Alliant Energy Corporate Services, Inc.*, the plaintiff worked for a company with a facility in Iowa, where the employees were placed in teams of two people, who worked a nine-week schedule rotating between twelve-hour shifts and eight-hour shifts.<sup>78</sup> Due to her diabetes, the plaintiff requested a permanent eight-hour shift as an accommodation. In her ADA suit, the plaintiff argued that rotating shifts were not an essential function, asserting that the company's facility in Wisconsin regularly used eight-hour shifts. Rejecting the plaintiff's argument, the court explained that the Iowa facility differed from the Wisconsin facility, as the Wisconsin facility operated under a collective bargaining agreement and had different duties. This case also highlights that rotating shifts are not always essential functions, depending on the employer's structure.

Other courts have come to similar conclusions. In *Boitnott v. Corning Inc.*, the plaintiff worked as a maintenance engineer, and after a heart attack, requested that he work only eight hours a day instead of his typical rotating shift schedule.<sup>79</sup> Just as it did in *Kallail*, the court concluded that the ability to work rotating shifts was an essential function of the engineer's position. It reasoned that the employer had made a legitimate business decision, as such shift rotation allowed for coverage of the 24-hour production process to repair any emergency situation. The court also credited the employer's explanation that mandatory shift rotating created consistent work teams and greater flexibility. See also *Rehrs v. Iams Co.*, 486 F.3d 353 (8th Cir. 2007) (finding rotating shifts to be an essential function, as there were no permanent exceptions to this rule, all subsidiaries of P&G worked under this system, and the employer showed that rotating increased productivity).

In *E.E.O.C. v. Union Carbide Chemicals & Plastics Co., Inc.*, however, the court held that whether or not rotating shifts was an essential function for the job of lab technician was at the plant or merely a convenient condition of employment was a fact specific issue, properly determined by the trier of fact after a trial on the merits, and not by a court on a motion for summary judgment.<sup>80</sup> See also *Szarawara v. Cnty. of Montgomery*, 2013 WL 3230691 (E.D. Pa. June 27, 2013) (finding summary judgment improper when the issue was whether working night shifts was an essential function of

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the plaintiff's job, as the defendant provided no authority to support its contention). Further, it is important to note that employers will have a more difficult time arguing that a rotating shift is essential if it does not consistently apply the shift requirements to all employees, and if shift rotation is excused for non-disability related reasons. For example, in *Russo v. Jefferson Parish Water Department*, the court found that working a rotating shift was a question of fact, especially in light of the evidence that various positions did not work rotating shifts.<sup>81</sup>

## Specific Essential Functions: Overtime

Whether mandatory overtime is an essential function is another issue that appears regularly in the caselaw. In *Tjernagel v. Gates Corp.*, the Eighth Circuit engaged in a relatively brief analysis before concluding that overtime was an essential function of a production employee's job.<sup>82</sup> It reasoned that the employee's job description stated that overtime was required and all other employees in the position worked mandatory overtime. Because the employee had a medical restriction barring her from working overtime, she was unqualified under the ADA as a matter of law.

In making a decision, other courts have examined the reason why overtime is required. For example, in *Davis v. Florida Power & Light Co.*, the Eleventh Circuit concluded that mandatory overtime was an essential function for an employee of a utility provider.<sup>83</sup> The court balanced the facts that the employee agreed to work overtime as a condition of employment, other employees worked a substantial amount of overtime, and the employee's formal job description did not require overtime. However, the court focused on the fact that the defendant's business model required overtime to succeed because the defendant had a same-day connect and reconnect policy, and implemented such policy through mandatory overtime. The court found it telling that overtime was so important to the defendant, that the defendant had bargained for mandatory overtime and the requirement was in the union's collective bargaining agreement.

Unlike in *Davis*, the absence of mandatory overtime in a job description helped the plaintiff establish a genuine issue of material fact in *Feldman v. Olin Corporation*.<sup>84</sup> In *Feldman*, the plaintiff worked as a tractor operator. Due to his fibromyalgia and sleep apnea, he requested a different position with no mandatory overtime (and a straight work schedule). The Seventh Circuit denied summary judgment, finding a genuine issue of material fact as to whether overtime was an essential function of the job. In so holding, the court found evidence supporting both parties' arguments. The employee argued that overtime was not listed as a requirement in the written job descriptions, although it was included as a mandatory requirement in job descriptions for other positions. The employee also provided data indicating that overtime was rarely worked by others in his position. Conversely, the employer asserted that the consequences of exempting employees would be dire, as fires sometimes break out that require all essential personnel to work until the fires are out, even if that requires overtime. In light of the conflicting evidence, the Seventh Circuit allowed the plaintiff's claim to proceed.

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## Specific Essential Functions: Lifting

Lifting is another function that has been the subject of much litigation. The case law does not draw any clear lines as to when lifting is, or is not, an essential function, reminding litigants of the inherent fact-specific nature of qualified cases. Lifting is included in many job descriptions as a perfunctory function without any connection to the particular job. Because it is so frequently listed as a job function, it often is an issue in ADA litigation.

In *Majors v. General Electric Co.*, the court found the ability to lift twenty pounds to be an essential function of a purchased material auditor position.<sup>85</sup> The plaintiff argued that she should have been promoted to the auditor position, and the employer argued that she was not because her permanent lifting restrictions rendered her unable to perform certain essential functions. In reaching its conclusion, the court considered the position's job description, which required "intermittent movement of heavy objects," the testimony of another employee and manager about the need to lift over twenty pounds, and testimony from the employer's labor resources manager and ergonomic technical specialist who weighed objects required to be lifted by material auditors and verified that the objects weighed over twenty pounds. *See also Brickers v. Cleveland Bd. of Educ.*, 145 F.3d 846 (6th Cir. 1998) (finding lifting to be an essential function of a school bus attendant position, due to the need to lift students with disabilities in emergencies); *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001) (concluding lifting was an essential function of clinical nurse position).

In other cases, however, employees have successfully shown that lifting is not necessarily essential, especially when the employees have worked in the position for a number of years without lifting. In *Zombeck v. Friendship Ridge*, a nurse aide with a lifting restriction worked at a long-term nursing home facility.<sup>86</sup> Concluding that lifting was not an essential function, the court conducted an extensive analysis, reviewing almost all of the factors noted as determinative by the EEOC. Specifically, the court stated that the nurse aide position did not exist so that nurse aides may lift; allowing or not allowing the plaintiff to lift appeared to have no effect on the number of employees required to lift since she had held the title of nurse aide for thirteen years without lifting; and lifting was not a highly specialized function nor was the plaintiff hired for her lifting ability. Further, the court reviewed the employer's job description, and emphasized that "helps transfer" was listed as an essential function, but lifting was not. While "lifting" was listed as a physical demand, the court explained that a "physical demand" is not tantamount to it being considered an essential function.<sup>87</sup> The court found persuasive the fact that the plaintiff did not lift for a thirteen-year period, but maintained the title of "nurse aide" without receiving any unsatisfactory formal performance evaluations, demonstrating that her inability to lift did not cause any adverse consequences for the defendant. *See also Bambrick v. Sam's West, Inc.*, 2013 WL 427399 (N.D. Iowa Feb. 4, 2013) (finding plaintiff created a genuine issue of material fact as to whether lifting fifty pounds was an essential function of a manager of the photography lab for reasons

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including the fact that the plaintiff worked in the position without lifting for a number of years, and the job description requiring lifting was drafted in the middle of her employment without any changes to her position); *Demyanovich v. Cadon Plating & Coatings*, --- F.3d ---, 2014 WL 1259603 (6th Cir. March 28, 2014) (finding lifting was not necessarily an essential function of a line operator job, as the employee's job description identified several essential duties, but did not include a lifting requirement).

## Specific Essential Functions: Law Enforcement Functions

Two recent cases evaluate functions as they relate to employees in law enforcement positions. In *Cefalu v. Holder*, the plaintiff had a permanent elbow injury, which the defendant argued prevented him from working as a special agent because he could not lift a firearm.<sup>88</sup> The court concluded that carrying and using a firearm was an essential function. In so finding, the court relied on the employer's job description and the employer's policies stating that special agents were to bear arms in furtherance of official law enforcement operations, and to be armed at all times. Further, the court noted that employees in similar law enforcement positions were also required to lift and carry a gun.

The ability to restrain and control inmates was found to be an essential function in a recent Fourth Circuit case. In *Atkins v. Holder*, a correctional counselor had certain physical restrictions due to polyarthropathy of the right knee and degenerative disc disease in his back, including curtailing the amount of time that he was permitted to walk and stand.<sup>89</sup> The court concluded that it was an essential function of a law enforcement position to physically restrain and control inmates, and emphasized that the counselor himself acknowledged that he was afraid for his safety.

## Judicial Interpretation: Interplay Between "Qualified" and "Reasonable Accommodation"

Often, the analysis of whether an individual is qualified requires a judicial inquiry into whether a particular accommodation is reasonable, as well as how the employee functions when accommodations are provided. For instance, in *Torres v. House of Representatives of the Commonwealth of Puerto Rico*, when determining that an individual with hemiplegia who used a motorized wheelchair was qualified to work as a legislative advisor, the court emphasized that when she was accommodated, she was able to perform the essential functions of her job.<sup>90</sup> Specifically, the court explained that when the legislative advisor had the use of a laptop computer, she could perform all of her work functions. Moreover, even before she received the laptop computer, the legislative advisor performed her essential functions by dictating to a co-worker who transcribed her work. Therefore, the employee's ADA claim could proceed, as she was deemed qualified.

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However, if the employer can show that the employee is not able to perform her essential functions, even with the requested accommodation, then the employee cannot establish her qualification under the ADA. In *Olsen v. Capital Region Medical Center*, a mammography technician with epilepsy experienced seizures at the workplace.<sup>91</sup> Her essential functions included operating medical machinery, tending to the physical and emotional needs of the patient, and ensuring the patient's safety. The employer provided various accommodations to eliminate the environmental triggers of the technician's seizures, such as removing mold, investigating cleaning agent ingredients, having other technicians handle patients who wore heavy perfumes, installing anti-glare filters on lights, eliminating scrolling from computers, covering x-ray films to reduce brightness, permitting the employee to wear sunglasses, and educating co-workers about epilepsy and how to respond/treat someone who is seizing. However, the technician continued to experience seizures, and the employer placed her on leave. After the technician started to take medications to control her seizures, the employer offered to reinstate her, but the employee declined and filed a lawsuit under the ADA. The Eighth Circuit affirmed the lower court's holding that the technician was not qualified under the ADA. It explained that even with the accommodations provided, the technician was not able to perform the essential functions when she continued to experience seizures. See also *Delon v. Eli Lilly & Co.*, 2013 WL 6887645 (S.D. Ind. Dec. 31, 2013) (granting summary judgment for the employer on the issue of qualified because the employee testified that her disability of Cushing's Syndrome prevented her from being able to work as a senior scientific communications associate anywhere, so even if she had been granted the accommodation of telework, she would not have been able to perform her essential functions).

Because the plaintiff has the burden of showing that she is a qualified, it is generally also considered the plaintiff's burden to establish that the accommodation is reasonable. This is consistent with the burden-shifting analyses when the case is solely about reasonable accommodations. In *Majors v. General Electric Co.*, the plaintiff asserted that she would be qualified to work with a lifting restriction, if she would have been accommodated.<sup>92</sup> The accommodation she sought was having others lift heavy objects for her. The plaintiff argued that her employer had the burden of proving that her proposed accommodation was an undue hardship. The court disagreed, emphasizing that the plaintiff had the initial burden of establishing that she was a qualified individual with a disability, and that she must establish that her proposed accommodation is reasonable on its face. To find otherwise, said the court, would "ignore[] that this record won't allow a finding that she is a qualified individual with a disability."<sup>93</sup> Because the plaintiff's requested accommodation was objectively unreasonable (requiring someone else to perform the employee's essential functions), the court concluded that she failed to meet the burden of establishing that she is qualified, and thus, the burden need not shift to the employer to show that the proposed accommodation would be an undue hardship.

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Courts are clear that employees only need to show that an effective accommodation that would render the employee qualified exists. While plaintiffs have the burden of demonstrating that they are qualified, they only have to identify the accommodation and show that facially, the cost does not clearly exceed the benefit.<sup>94</sup> At that point, the burden shifts back to the defendant to show that the accommodation is unreasonable or would create an undue hardship.

The interplay between “qualified” and “reasonable accommodation” also becomes apparent when an employee requests the removal of a specific task as an accommodation. Whether this type of request is a reasonable accommodation depends on whether the task is marginal or essential. It is clear that employers are not required to remove essential functions as an accommodation. According to the EEOC: “An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without reasonable accommodation, is not a “qualified” individual with a disability within the meaning of the ADA.”<sup>95</sup> See also *Gober v. Frankel Family Trust*, 537 Fed.Appx. 518 (5th Cir. 2013) (holding that it was not a reasonable accommodation to reassign a job task if the task is an essential function).

Unlike the request to reassign essential functions of position, however, it is generally considered a reasonable accommodation to reassign a position’s marginal functions. For instance, in *EEOC v. AutoZone*, 707 F.3d 824 (7th Cir. 2013), a parts sales manager requested reassignment of his mopping duties in light of his back injury. The manager was known as a good salesman who could “sell ice cubes to an Eskimo.” Customers specifically asked for his assistance, and as a result, he averaged the highest sales per customer amount the employees. While the store manager accommodated the manager’s request and did not require mopping, the district manager refused accommodation, and required the manager to mop. As a result, manager experienced extreme back pain causing him to miss work and led to his termination. After multiple trials and appeals, the Seventh Circuit affirmed a jury verdict awarding the manager \$100,000 in compensatory damages, \$200,000 in punitive damages, and \$115,000 in back pay. The Seventh Circuit also issued an injunction on AutoZone's anti-discrimination practices.

## Judicial Interpretation: Interplay Between “Qualified” and “Regarded as”

In the ADA Amendments Act, Congress answered a question that had previously split the circuit courts: it clarified that individuals who are “regarded as” disabled are not legally entitled to reasonable accommodations under the ADA.<sup>96</sup> One consequence, perhaps unintended, of this clarified statutory requirement, is that if a plaintiff cannot perform the essential functions of the job *without* an accommodation, even if he or she has been “regarded as” having a disability, he or she will not be found qualified for the

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job. This was the situation in one recent case, *Walker v. Venetian Casino Resort*, where a cocktail server at the Venetian Casino Restaurant was injured on the job and subsequently terminated.<sup>97</sup> She brought a claim alleging that she was regarded as disabled, and in response, her former employer argued that she was not qualified to do her job. The employee agreed that she was not qualified without a reasonable accommodation, but asserted that she would have been qualified under an accommodated reassignment. Because the ADA does not require employers to accommodate individuals under the “regarded as” prong, and because the plaintiff could not demonstrate that she was qualified absent a reasonable accommodation, the court found that the plaintiff failed to properly allege the elements of her ADA claim.

Given the limits of the reasonable accommodation requirement in “regarded as” cases, plaintiffs whose cases involve reasonable accommodations should plead that they have disabilities under the “actual disability” and “record of disability” prongs wherever possible.

## Interplay Between “Qualified” and “Direct Threat”

Included in the ADA’s “qualification standards” is the “requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”<sup>98</sup> Direct threat is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>99</sup> The EEOC has developed various factors used to consider whether an individual would pose a direct threat, and requires the determination to be an individualized assessment based on reasonable medical judgment relying on the most current medical knowledge and/or the best objective evidence.<sup>100</sup>

It is clear that plaintiffs have the burden of proving that they are qualified, and defendants have the burden of proving that plaintiffs are a direct threat. However, when the question of whether a plaintiff can perform the essential functions of a position blends into the related question of whether she poses a direct threat, the case law is mixed on which party has the burden of proof.<sup>101</sup> This occurs when the essential functions and direct threat analyses are “inextricably intertwined.”<sup>102</sup> Some courts have placed the burden on the plaintiff to show that he can perform the essential functions, even where as a practical matter that requires the plaintiff to show that the plaintiff can perform the essential functions in a way that does not endanger others.<sup>103</sup> Other courts, however, require defendants to show that the plaintiff cannot perform the essential functions because he poses a direct threat.<sup>104</sup> For instance, in *Hutton v. Elf Atochem North America*, the court reasoned that because the “direct threat” defense is set forth in the ADA’s “Defenses” section, it is an affirmative defenses, on which the employer bears the burden of proof.<sup>105</sup>

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In one recent case involving the interplay between qualified and direct threat, the court chose not to decide which party ultimately has the burden of proof, holding that regardless, neither party could demonstrate the direct threat defense as a matter of law. In *Nelson v. City of New York*, the issue was whether a police officer with a history of Personality Disorder with Histrionic Features and Post Traumatic Stress Disorder posed a direct threat to herself or others, and by extension, whether she could perform the essential functions of her job.<sup>106</sup> The parties agreed that the ability to tolerate the stress of police work was an essential function of the position, but disagreed on whether plaintiff could meet this requirement. The court, however, found that the plaintiff's evidence could surpass summary judgment. Presenting conflicting expert testimony, the court relied on the plaintiff's expert, who was also her personal therapist, given that she had more familiarity with the plaintiff's mental profile. Plaintiff's therapist testified that the plaintiff no longer met the full criteria of histrionic personality, no longer had PTSD, and opined that her past symptoms were attributable to a previously undiagnosed thyroid cancer and Hashimoto's autoimmune disorder. As courts and employers are supposed to do when assessing whether an individual poses a direct threat, the court held that a jury could find that the defendant did not rely on the most current medical knowledge available, given its focus on the plaintiff's history instead of her current condition.

The Ninth Circuit has held that the defendant has the burden to demonstrate that the plaintiff posed a direct threat, and in *Hutton v. Elf Atochem North America*, concluded that the defendant met its burden.<sup>107</sup> In *Hutton*, the plaintiff worked as a chlorine finishing operator at a facility that manufactures chlorine and related chemical products. He also had Type 1 diabetes and experienced various diabetic episodes during his employment. In response to his ADA lawsuit, defendant argued that he was not qualified, because he posed a direct threat to himself or others. Specifically, it asserted that during diabetic episodes, the plaintiff could lose consciousness, which was dangerous in light of his job to work with chemical products. The plaintiff disagreed, arguing that the risk of substantial harm was too small, asserting that he only lost consciousness one time while working. The court found that the defendant had met its burden. It explained that even if it was to agree that the severity of the risk was small, it would still be a significant risk under the direct threat analysis given the "catastrophic" consequences. Specifically, if the plaintiff lost consciousness, chlorine could spill from railcars, convert to gas and then cause severe, potentially fatal, harm to other workers and people near the facility. Further, in light of the long hours and rotating shifts required for the position, it was difficult for the plaintiff to control his diabetes and no one could rule out the occurrence of another event that would affect the plaintiff's ability to remain conscious, alert and communicative. The court further noted that the plaintiff sometimes worked his shifts alone.

There is another line of cases evaluating the interplay between "qualified" and "direct threat," which deal with employees who threaten workplace violence. Courts have

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distinguished between employees that pose a direct threat, and employees who are terminated because they “make[] threat[s].” In *Mayo v. PCC Structurals, Inc.*, a welder told several co-workers that he was going to bring a gun to work and shoot several supervisors.<sup>108</sup> When confronted by the police about these threats, the plaintiff reiterated his intention and could not rule out following through on the threats. He was ultimately hospitalized and was treated for major depressive disorder. His psychologists determined that such threats were expressions of ruminating negative thoughts and anger, a symptom of his disability, and did not believe that he was violent or would be a threat to the workplace. The plaintiff was ultimately terminated, and filed suit under the ADA.

Instead of engaging in a direct threat analysis, the court considered whether the employee was “qualified” and found that he was not. The court held that making violent threats disqualify an employee, even if the threats were related to the employee’s disability. In *Mayo*, because the employee stated the threat multiple times to multiple people, and also named specific supervisors and the time, place and manner of the threatened attack, the court found that no reasonable jury could find the plaintiff to be qualified. See *Sista v. CDC IXIS N. Am., Inc.*, 445 F.3d 161, 170–71 (2nd Cir. 2006) (explaining that the direct threat defense applies when an employee poses a threat, not when an employee actually makes a threat); *Bodenstab v. Cnty. of Cook*, 569 F.3d 651, 658–59 (7th Cir. 2009) (holding that the direct threat defense is not at issue because employer legitimately fired employee for the threats he had already made); *But see Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007) (holding that “conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination”).

## Interplay Between “Qualified” and Statements on Applications for Disability Benefits

A legal brief about the term “qualified” would not be complete without a discussion of the interplay between being qualified under the ADA and seeking benefits under disability insurance programs, such as Social Security Disability Insurance (SSDI).

The benchmark case on this issue is *Cleveland v. Policy Management Systems Corporation*, a Supreme Court case from 1999.<sup>109</sup> In *Cleveland*, the Supreme Court considered whether pursuit and receipt of SSDI automatically estopped a recipient from pursuing an ADA claim, and concluded that it did not. Despite the “appearance of conflict” between the SSDI program and the ADA, the Court held that these two claims do not inherently conflict, and “there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side.”<sup>110</sup>

The Court explained reasons why a recipient of SSDI could still be qualified under the

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ADA, including:

1. The Social Security Administration (SSA) does not take into account the possibility of reasonable accommodations in determining SSDI eligibility.
2. An individual might qualify for SSDI under SSA's administrative rules for specific impairments, but still be able to perform essential functions.
3. The SSA grants SSDI benefits to individuals who can work and are working through the trial-work period.
4. The individual's condition might have changed over time, so that a statement made at the time of his SSDI application is not an accurate representation at the time of the relevant employment decision.

Despite these explanations, and despite declining to apply any special legal presumptions for recipients of SSDI in ADA cases, plaintiffs who make statements in SSDI applications about their inability to work must reconcile the inconsistent statements. In other words, a plaintiff must explain how she is "unable to work" for SSDI purposes, but "qualified" under the ADA.

## Cleveland's Application to Disability Benefits Other Than SSDI

The Supreme Court's decision in *Cleveland* has been interpreted to apply to recipient of disability benefits other than SSDI. In recent years, *Cleveland* has been found applicable to applications under the Nevada Public Employees' Retirement Systems (PERS),<sup>111</sup> the Federal Employee Retirement System benefits,<sup>112</sup> and State-police pension benefits.<sup>113</sup> In deciding to extend *Cleveland's* holding outside of SSDI cases, courts have explained that the "reasoning and language of *Cleveland* supports a broader application,"<sup>114</sup> noting that the "principles are pretty much the same."<sup>115</sup>

The first question, according to *Cleveland*, is whether the claims for benefits "inherently conflict" with an ADA claim. If not, but the plaintiff makes statements that appear to conflict with one another, then the plaintiff must explain the inconsistency.

## Explaining Inconsistency: Passage of Time

As noted by the *Cleveland* decision, one way ADA litigants can explain the apparent inconsistency between their SSDI application and ADA lawsuit is to point to the passage of time between their statements. In *Ryan v. Pace Suburban Bus Division of Regional Transit Authority*, Ryan experienced an on-the-job injury.<sup>116</sup> After providing him with temporary assignments to light-duty positions, and various medical leaves, the employer ultimately terminated Ryan's employment in February 2009. After a prolonged period of unemployment, in December 2011, Ryan applied for SSDI, stating that he could not hold any full-time or part-time employment due to his disability, could not perform any auto repair and rebuilding, could only stay awake for one to two hours at a time, and could only lift up to four or five pounds. In February 2012, the SSA granted the plaintiff's SSDI benefits, and determined that Ryan was completely disabled as of October 31, 2008, months before his official termination.

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The employer argued that because Ryan stated that his injury occurred on October 31, 2008 on his SSDI application, before he was terminated, he was not qualified under the ADA. The court disagreed. Despite Ryan's apparent inconsistent statements, he successfully reconciled such statements by highlighting the three-year lapse of time between his discharge and the statements on his SSDI application. Further, Ryan's responses on his SSDI application were made in the present tense, suggesting that his statements assessed his ability to work at the time he completed the application (2011), and not the time of his termination (2009). This explanation was supported by Ryan's deposition testimony, where he testified that he did not become completely disabled until two years following his termination. Thus, the court found that Ryan satisfactorily explained the apparent inconsistency, and so his ADA claim would be not judicially estopped.

Compare this to a case where the court found that the employee's attempt to reconcile his apparently conflicting statements failed. In *Butler v. Village of Round Lake Police Department*, the defendant argued that the statements made in the police officer's application for disability pension prevented him from establishing that he was qualified under the ADA.<sup>117</sup> In support of his pension application, the police officer stated that his pulmonary condition made it impossible to do the required duties, such as chasing a suspect or wrestling with an unruly one. He also provided certificates of disability from three physicians, who noted that he was "permanently disabled from police service" with certain limited restrictions.<sup>118</sup> In an attempt to save his ADA claim, the police officer argued that the statements made at his pension hearing referred to his then-current abilities as opposed to the earlier time frame. Rejecting this argument, the court found that the police officer failed to provide any evidence that he could have performed the essential functions of police work during those earlier time frames, especially in light of the fact that by the time that he stopped reporting to work, he could "barely walk a few blocks or climb stairs."<sup>119</sup> This case reminds litigants that they must be able to prove the underlying facts to explain the apparently inconsistent statements.

In *Smith v. Clark County School District*, the Ninth Circuit also found that the employee sufficiently explained the apparent inconsistency between the employee's statements on applications for disability benefits and her ADA claim.<sup>120</sup> In *Smith*, an employee with a back injury worked as a literary specialist for the district. In April 2008, she requested FMLA leave. In May 2008, she applied for and began receiving private disability benefits through the American Fidelity Assurance Company, and in late August 2008, she applied for disability retirement benefits under the Nevada Public Employees' Retirement System (PERS). For PERS, Smith's doctor certified that Smith was "unable to work due to injury or mental or physical illness," and her application for "total and permanent disability" was approved in October 2008.<sup>121</sup> According to the court, there are circumstances where an employee honestly avers that he or she cannot work when they apply for benefits, and then recovers. It declared: "There is no inconsistency

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between being totally disabled at a particular point in time and in not being totally disabled at a later point in time.”<sup>122</sup> Here, the court explained that Smith could have been completely incapacitated in April—or even August—but still be able to work during the 2008-2009 school year, given that the nature of individual’s disabilities may change over time. Notably, the court emphasized that even if the Smith had not recovered by the start of the 2008-2009 school year, it may have been reasonable for the school district to accommodate her disability through an extended leave of absence.

Likewise, the temporary versus permanent nature of the disability benefits often provide a way to reconcile statements. In *Smith*, in addition to PERS, the employee applied for leave under the FMLA. Smith explained that her “FMLA applications required temporary disability leave and were not an admission of permanent inability to work,” an argument that the court characterized as “brief” but found sufficient to permit a reasonable juror to conclude that Smith could perform the essential functions of the job with or without accommodation.<sup>123</sup>

## Explaining Inconsistency: Considering Reasonable Accommodations

Courts have also generally followed the Supreme Court’s directive in *Cleveland*, and recognized that the SSA determines SSDI benefits without considering whether an individual needed a reasonable accommodation. In *Smith*, in addition to reconciling the employee’s statement due to the passage of time, the Ninth Circuit also emphasized the possibility of the employee working with an accommodation.<sup>124</sup> Here, the plaintiff reconciled her apparently inconsistent statements by explaining that she could have worked in the position of literary-specialist with the accommodation that she be able to sit down regularly or lie down when needed. Notably, this explanation is consistent with the underlying facts the employee stated on her application, which was that she could perform the “sitting” duties of the literary-specialist position.

However, some courts require the plaintiff to do more than just say that an accommodation would exist, but to actually explain the viability of accommodation. In *Anderson v. Georgia-Pacific Wood Products, LLC*, a maintenance technician had Chronic Obstructive Pulmonary Disease (“COPD”) due to his military service.<sup>125</sup> As a result, he was unable to work around dust. While out on short-term disability leave, he applied for SSDI and Veteran’s Disability Benefits from the Department of Veterans Affairs (“DVA”). The DVA concluded that he was 100% disabled. On his SSDI application, Anderson attested that he became short of breath with physical activity and exposure to high temperatures and that he used oxygen when sleeping, when going outside and otherwise as needed. In attempting to reconcile his inconsistent statements, Anderson stated that he could have worked had he been able to use a respirator. The court rejected this argument, however, explaining that Anderson provided no evidence that he was capable of wearing a respirator, and pointed to Anderson’s medical tests which demonstrated that he could not wear a respirator while

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at work. Anderson also attempted to argue that he could have worked in a different position, had he been reassigned to one. Rejecting this argument as well, the court explained that even if there were a vacant position, there was no evidence that Anderson could have performed the essential functions in light of his permanent restrictions. As a result, the court granted the employer's motion for summary judgment, finding Anderson not qualified under the ADA. Likewise, in the *Butler v. Village of Round Lake Police Department* case discussed above, the police officer also argued that his pension and ADA claims can coexist because the pension board did not consider reasonable accommodations. While the court admitted the veracity of this statement, it explained that it did not save the police officer's claim. Here, no accommodations could have rendered the police officer able to perform the essential functions of his job.

## Conclusion

As discussed in this Legal Brief, the ADA litigation landscape has shifted from whether an individual has a "disability" under the ADA to whether an individual is "qualified." While the majority of cases regarding qualified turn on which functions are essential, issues related to "qualified" intersect the ADA's other legal concepts as well, including "regarded as," "reasonable accommodation," and "direct threat." Applicants and employees with disabilities, as well as employers, should review the EEOC's regulatory language and recent case law to better understand when an individual is qualified under the ADA.

## Notes:

1. This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights and Rachel M. Weisberg, Staff Attorney, with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to thank Christopher Tourek, Equip for Equality Volunteer Attorney, for his assistance with this Legal Brief. Equip for Equality is providing this information under a subcontract with Great Lakes ADA Center.
2. 42 U.S.C. § 12102(4)(A).
3. For a detailed analysis on the impact of the ADA Amendments Act on judicial interpretations of the definition of disability, see *Legal Briefing: The Litigation Landscape Five Years After the Passage of the ADA Amendments Act*, B. Taylor and R. Weisberg. September 2013. Available at [www.ada-audio.org/Archives/](http://www.ada-audio.org/Archives/)

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4. See Stephen F. Befort, An Empirical Analysis of Case Outcomes Under the ADA Amendments Act, 70 Wash. & Lee L. Rev. 27, FN 130, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=231462](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=231462) (citing *Anderson v. Georgia-Pacific Wood Products, LLC*, 942 F.Supp.2d 1195, (M.D. Ala. 2013) (granting summary judgment to employer on qualified issue); *Bonnette v. Shinseki*, 907 F.Supp.2d 54 (D.D.C. 2012) (granting summary judgment to employer on qualified issue); *E.E.O.C. v. Creative Networks, LLC*, 912 F.Supp.2d 828 (D. Ariz. 2012) (denying employer's summary judgment motion on qualified issue)).
5. See *id.* at FN 8 (citing Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993 stating that "the new focus likely will center more on whether an individual is qualified to perform the job in question"); Carol J. Miller, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does "Substantially Limits" Mean?*, 76 MO. L. REV. 43, 74 (2011) (stating that "the issue of whether the individual's requested accommodation is reasonable will emerge more frequently").
6. See *id.*, generally.
7. 42 U.S.C. § 12111(8).
8. 29 C.F.R. 1630.2(m).
9. 29 C.F.R. Pt. 1630, App. 1630.2(m).
10. 29 C.F.R. 1630.2(m).
11. EEOC Technical Assistance Manual: Title I of the ADA. Available at <http://askjan.org/links/adatam1.html>.
12. *Id.*
13. 29 C.F.R. 1630.2(n)(1).
14. 29 C.F.R. 1630.2(n)(2).
15. 29 C.F.R. 1630.2(n)(3).
16. *Id.*
17. 29 C.F.R. Pt. 1630, App. 1630.2(m).
18. 29 C.F.R. 1630.2(m).
19. *Wirey v. Richland Community College*, 913 F.Supp.2d 633 (C.D. Ill. 2012) (finding that plaintiff had the skills and experience for the position, but ultimately concluding that she was not qualified and granted the employer's motion for summary judgment).

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20. *Torres v. House of Representatives of the Commonwealth of P.R.*, 858 F.Supp.2d 172 (D.P.R. 2012).
21. *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013).
22. *Id.* at 926.
23. See *Nelson v. City of New York*, 2013 WL 4437224 (S.D.N.Y. Aug. 19, 2013) (discussing the two-step process for determining whether an individual is qualified).
24. *Demyanovich v. Cadon Plating & Coatings*, --- F.3d ---, 2014 WL 1259603 (6th Cir. March 28, 2014).
25. *EEOC v. Heartland Automotive Services*, 2013 WL 6065928 (W.D. Tenn. Nov. 18, 2013).
26. *Id.* at \*3.
27. *Boitnott v. Corning Inc.*, 2010 WL 2465490, \*9 (W.D. Va. June 15, 2010); *Rehrs v. Iams Co.*, 486 F.3d 353, 356 (8th Cir. 2007).
28. *Abara v. Altec Indus., Inc.*, 838 F. Supp. 2d 995, 1001 (E.D. Cal. 2011) citing *Bates v. United Parcel Serv. Inc.*, 511 F.3d 974, 991 (9th Cir. 2007).
29. *Bambrick v. Sam's West, Inc.*, 2013 WL 427399 (N.D. Iowa Feb. 4, 2013).
30. *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013).
31. *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169 (9th Cir. 1998) (holding that employer's judgment "does not qualify as an undisputed statement of fact in the context of a motion for summary judgment").
32. *Henschel v. Clare County Road Commission*, 737 F.3d 1017 (6th Cir. 2013).
33. *Id.* at 1022.
34. *Lee v. Harrah's New Orleans*, 2013 WL 3899895 (E.D. La. July 29, 2013).
35. *EEOC v. Heartland Automotive Services*, 2013 WL 6065928 (W.D. Tenn. Nov. 18, 2013).
36. *Henschel v. Clare County Road Commission*, 737 F.3d 1017 (6th Cir. 2013).
37. *Bambrick v. Sam's West, Inc.*, 2013 WL 427399 (N.D. Iowa Feb. 4, 2013).
38. *Rorrer v. City of Stow*, 743 F.3d 1025, 1031 (6th Cir. 2014).
39. *Zimple v. Hancock Fabrics, Inc.* 2013 WL 4069553 (N.D. Iowa Aug. 12, 2013).
40. *Bisker v. GGS Information Services, Inc.*, 2010 WL 2265979 (M.D. Pa. June 2, 2010).
41. EEOC Technical Assistance Manual: Title I of the ADA. Available at <http://askjan.org/links/adatam1.html>.
42. *Brickers v. Cleveland Bd. Of Educ.*, 145 F.3d 846 (6th Dist. 1998).

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43. *Moore v. Jackson County Board of Education*, --- F.Supp.2d ---, 2013 WL 5797844 (Oct. 28, 2013 N.D. Ala.).
44. *Proctor v. Northern Lakes Community Mental Health Authority*, 2012 WL 3637604 (W.D. Mich. 2012).
45. *Brickers v. Cleveland Bd. Of Educ.*, 145 F.3d 846 (6th Dist. 1998).
46. See *O'Campo v. Chico Mall, LP*, 758 F.Supp.2d 976 (E.D.Cal. 2010) (finding a state law statute preempted to the extent it conflicts with the ADA).
47. *Samson v. Fed. Exp. Corp.*, 2014 WL 1226847, at \*1 (11th Cir. Mar. 26, 2014).
48. *Moore v. Jackson County Board of Education*, --- F.Supp.2d ---, 2013 WL 5797844 (N.D. Ala. Oct. 28, 2013).
49. *Gober v. Frankel Family Trust*, 537 Fed.Appx. 518 (5th Cir. 2013).
50. *Knutson v. Schwan's Home Service, Inc.*, 711 F.3d 911 (8th Cir. 2013).
51. *Equal Employment Opportunity Commission v. Denny's, Inc.*, 2010 WL 2817109 (D. Md. July 16, 2010).
52. *Id.* at \*2.
53. *Burnett v. Pizza Hut of Am., Inc.*, 92 F.Supp.2d 1142, 1146 (D. Kan. 2000).
54. EEOC Technical Assistance Manual: Title I of the ADA. Available at <http://askjan.org/links/adatam1.html>.
55. *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013).
56. *Id.* at 920.
57. *Zombeck v. Friendship Ridge*, 2011 WL 666200 (W.D. Pa. 2011).
58. *Id.* at \*8 (quoting 136 Cong. Rec. 11,451 (1990)).
59. *Walter v. Wal-Mart Stores, Inc.*, 2011 WL 4537931, at \*9 (N.D. Ind. Sept. 28, 2011).
60. *Walter v. Wal-Mart Stores, Inc.*, 2011 WL 4537931, at \*9 (N.D. Ind. Sept. 28, 2011).
61. EEOC Technical Assistance Manual: Title I of the ADA. Available at <http://askjan.org/links/adatam1.html> ("The ADA does not limit an employer's ability to establish or *change* the content, nature, or functions of a job.") (Emphasis added).
62. *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001) (explaining judicial desire not to "punish" employers from doing more than the ADA requires).
63. *Hancock v. Washington Hosp. Ctr.*, --- F.Supp.2d --, 2014 WL 60288 (D.D.C. Jan. 7, 2014).
64. *Minnihan v. Mediacom Communications Corp.*, --- F.Supp.2d---, 2013 WL 6680982 (S.D. Iowa Dec. 19, 2013).
65. *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001) (explaining judicial desire

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- not to “punish” employers from doing more than the ADA requires).
66. *Zombeck v. Friendship Ridge*, 2011 WL 666200 (W.D. Pa. 2011).
  67. *Bambrick v. Sam’s West, Inc.*, 2013 WL 427399 (N.D. Iowa Feb. 4, 2013).
  68. *Lane v. Prince George’s County Public Schools*, 2013 WL 4541642 (D. Md. Aug. 26, 2013).
  69. *Id.* at \*4.
  70. *Tjernagel v. Gates Corp.*, 533 F.3d 666 (8th Cir. 2008).
  71. *Id.* at 670.
  72. See e.g., *Murphy v. Samson Resources Co.*, 525 Fed.Appx. 703 (10th Cir. 2013) (holding that regular and punctual attendance is an essential function for an accounting assistant based on the job description and employer judgment, and because indefinite leave is not a reasonable accommodation, the employee was not qualified).
  73. *E.E.O.C. v. Ford Motor Company*, --- F.3d ---, 2014 WL 1584674 (6th Cir. April 22, 2014).
  74. *Id.* at \*6.
  75. *Walker v. NANA WorleyParsons, LLC*, 2013 WL 357571 (D. Alaska, Jan. 28, 2013).
  76. *E.E.O.C. v. AT&T Corp.*, 2013 WL 6154563 (S.D. Ind. Nov. 20, 2013).
  77. *Id.* at \*4.
  78. *Kallail v. Alliant Energy Corporate Services, Inc.*, 2011 WL 1833347 (N.D. Iowa, May 13, 2011).
  79. *Boitnott v. Corning Inc.*, 2010 WL 2465490 (W.D. Va. June 15, 2010).
  80. *E.E.O.C. v. Union Carbide Chemicals & Plastics Co., Inc.*, 1995 WL 495910 (E.D. La. Aug. 18, 1995).
  81. *Russo v. Jefferson Parish Water Department*, 1997 WL 695602 (E.D. La. Nov. 6, 1997).
  82. *Tjernagel v. Gates Corp.*, 533 F.3d 666 (8th Cir. 2008).
  83. *Davis v. Florida Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000).
  84. *Feldman v. Olin Corp.*, 692 F.3d 748 (7th Cir. 2012).
  85. *Majors v. General Electric Co.*, 714 F.3d 527 (7th Cir. 2013).
  86. *Zombeck v. Friendship Ridge*, 2011 WL 666200 (W.D. Pa. 2011).
  87. *Id.* at \*7.
  88. *Cefalu v. Holder*, 2013 WL 5315079 (N.D. Cal. Sept. 23, 2013).

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89. *Atkins v. Holder*, 529 Fed. Appx. 318 (4th Cir. 2013).
90. *Torres v. House of Representatives of the Commonwealth of P.R.*, 858 F.Supp.2d 172 (D.P.R. 2012).
91. *Olsen v. Capital Region Medical Center*, 713 F.3d 1149 (8th Cir. 2013).
92. *Majors v. General Electric Co.*, 714 F.3d 527 (7th Cir. 2013).
93. *Id.* at 535.
94. See, e.g., *Bisker v. GGS Information Services, Inc.*, 2010 WL 2265979 (M.D. Pa. June 2, 2010).
95. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act. Available at: <http://www.eeoc.gov/policy/docs/accommodation.html>.
96. 42 U.S.C. § 12201(h).
97. *Walker v. Venetian Casino Resort, LLC*, 2012 WL 4794149, at \*14-15 (D. Nev. Oct. 9, 2012).
98. 42 U.S.C. § 12113(a).
99. 29 C.F.R. § 1630.2(r).
100. 29 C.F.R. § 1630.2(r) (relevant factors include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm).
101. *Nelson v. City of New York*, 2013 WL 4437224 (S.D.N.Y. Aug. 19, 2013).
102. *Id.* at \*9.
103. *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, as 144 (1st Cir. 1997).
104. *E.E.O.C. v. Browning-Ferris, Inc.*, 262 F.Supp.2d 577, 586 (D. Md. 2002).
105. *Hutton v. Elf Atochem North America*, 273 F.3d 884 (9th Cir. 2001).
106. *Nelson v. City of New York*, 2013 WL 4437224 (S.D.N.Y. Aug. 19, 2013).
107. *Hutton v. Elf Atochem North America*, 273 F.3d 884 (9th Cir. 2001).
108. *Mayo v. PCC Structural, Inc.*, 2013 WL 3333055 (D. Ore. July 1, 2013).
109. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).
110. *Id.* at 802-803.
111. *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950 (9th Cir. 2013).
112. *Solomon v. Vilsack*, 628 F.3d 555, 561 (D.C. Cir. 2010).
113. *Butler v. Vill. of Round Lake Police Dep't*, 585 F.3d 1020, 1022 (7th Cir. 2009) (noting that the estoppel principles apply more readily than in SSDI claims because

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the Illinois Pension Code has no equivalent to SSDI's list of specified conditions where benefits are extended automatically).

114. *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 956 (9th Cir. 2013).

115. *Butler v. Vill. of Round Lake Police Dep't*, 585 F.3d 1020, 1023 (7th Cir. 2009).

116. *Ryan v. Pace Suburban Bus Div. of Reg'l Transp. Auth.*, 2012 WL 5077725 (N.D. Ill. Oct. 18, 2012).

117. *Butler v. Village of Round Lake Police Department*, 585 F.3d 1020 (7th Cir. 2009).

118. *Id.* at 1022.

119. *Id.* at 1023.

120. *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950 (9th Cir. 2013).

121. *Id.* at 953.

122. *Id.* at 957.

123. *Id.*

124. *Id.*, generally.

125. *Anderson v. Georgia-Pacific Wood Products, LLC*, 942 F.Supp.2d 1195 (M.D. Ala. 2013).

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