

## **Legal Webinar: Qualified – The New Legal Battleground After the ADA Amendments Act**

### **Answers to Unanswered Questions**

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**Question 1:** What are your thoughts about office staff who is filing, copying, etc.. who is not able to lift, stoop, bend, twist, limited mobility, push, and pull? This sounds very restrictive. The manager is willing to accommodate by making changes in how she does her job. Her position description doesn't indicate she needs to be able to bend, stoop, twist, sit, stand etc.. basic movements. Does this need to be in the PD? How detailed does the physical requirements need to be especially for general office type of work?

**Answer 1:** Under the ADA, employers are not required to have job descriptions, so there is no rule for how detailed the job description needs to be. If an employer includes physical descriptions in a job description, they should align with the actual requirements of the job. Either way, while courts consider job descriptions as one factor in determine whether a particular function is essential, this consideration is not determinative. We encourage you to review the Qualified Legal Brief, as we have a section specifically on job descriptions.

It sounds like the real issue here is whether the employee responsible for filing and copying is able to accomplish such tasks. The focus should be less on *how* she does so. For instance, suppose an office typically requires its employees to file while sitting on the ground next to the filing cabinets. The essential function here is filing – not where or how the filing is done. In that case, it is likely a reasonable accommodation to permit the employee to organize her files standing up, or sitting on a chair. It may also be a reasonable accommodation to move the filing cabinet. Instead of focusing on the employee's restrictions, the focus should be on whether the employee can accomplish her essential functions, and whether she needs a reasonable accommodation to do so. If she can, then her restrictions are largely irrelevant.

**Question 2:** Question about essential functions- here is a specific example of a job description that seems to be too strict and not apply to actual duties of the job. It is for a American Sign Language teacher of which there are MANY Deaf individuals across the nation doing this job. However, this job description seems to highly discriminate against individuals with hearing loss. Is this an appropriate description or discrimination? "Able to conduct verbal conversation in English

▪ Able to speak, and hear normal range verbal conversation (approximately 60 decibels)" the link to job description for currently open position <http://aslta.org/node/2119>

**Answer 2:** This job description appears to impose a qualification standard that screens out or tends to screen out a person with a disability. Under the ADA, it is "unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity." 29 C.F.R. § 1630.10(a). In other words, if challenged, the employer would need to show that the ability to "speak, and

hear normal range verbal conversation” is job-related and consistent with business necessity. If the employer can demonstrate that, then the qualification standard may be permissible; if it cannot, then the standard may violate the ADA.

**Question 3:** Can you talk about job reassignment in relation to when someone is not qualified even with accommodations for their current position

**Answer 3:** Sure. Reassignment is a reasonable accommodation under the ADA, but it is regularly considered an accommodation of last resort. In other words, it is something that should be requested – and provided – only when the employee is no longer able to perform the essential functions of his current position with or without an accommodation. There are a few general rules about reassignment. First, an employer only needs to reassign an employee to a vacant position for which he is qualified. Employers are not required to bump employees or create new employees for reassignment purposes. Also, employers are not required to provide training under reassignment any greater than they would have to provide for anyone else starting in the position. Finally, the majority of courts say that reassignment should be given without competition; an employee should not have to “compete” for the vacant position. The most recent case on this issue comes from the Seventh Circuit, *EEOC v. United Airlines*, 693 F.3d 760 (7<sup>th</sup> Cir. 2012).

**Question 4:** hypothetically, suppose than an employer has a collective bargaining agreement which stipulates the workload that all employees are expected to maintain. However, all employees have been subject to an increased caseload beyond the amount stipulated in the collective bargaining agreement for a number of years. When an employee requests as an accommodation that they be allowed to return to the lower, collectively-bargained workload -- how would the essential function be determined? Would the courts be more likely to look at the caseload listed in the collective bargaining agreement or the common practice currently required of all employees?

**Answer 4:** That is a really thoughtful question, and unfortunately, it is difficult to predict exactly what a court would do. Both of your suggestions are reasonable possibilities. Courts look to a CBA as evidence of an employee’s essential functions, and evidence of the job tasks of others is also evidence. The court may need to look to other factors as well to determine whether a particular function is essential, and it may conclude in light of the conflicting evidence that there is a genuine issue of material fact and that a jury should make the decision.

**Question 5:** Q. Is there any case law addressing disabled/accommodations for people with ADHD or learning disabilities?

**Answer 5:** Yes. Before the ADA Amendments Act, many people with ADHD and/or learning disabilities were found to lack ADA-qualifying disabilities because they used mitigating measures, or because of the severity of their limitations. Advocates are more hopeful that after the ADA Amendments Act, courts will find people with ADHD and learning disabilities covered by the law. One case that shows the stark difference between the pre- and post-ADA Amendments Act cases is one about ADHD. It is *Wolfe v. Postmaster Gen.*, 488 F. App'x 465, 467 (11<sup>th</sup> Cir. 2012).

Although not case law, the EEOC Title I regulations provide some language that will likely help individuals with ADHD and learning disabilities establish coverage under the

law. See 29 C.F.R. § 1630.2(j)(4)(iii) (“In determining whether an individual has a disability . . . , the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.”); 29 C.F.R. § 1630.2(j)(1)(v) Appendix A (“Individuals diagnosed with . . . learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications . . . studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act.”).

The Job Accommodation Network also has fact sheets about how best to accommodate employees with various disabilities, including ADHD and learning disabilities. See <http://askjan.org/media/lear.htm>.

**Question 6:** What do you think are the five most important employment discrimination cases in the past year?

**Answer 6:** Tough question – here are five that we think are important.

1. *Gogos v. AMS Mechanical Systems*, --- F.3d ---, 2013 WL 6571712 (7th Cir. Dec. 16, 2013). This is one of the first cases that substantively applied the ADA Amendments Act in an employment discrimination case. This ADA case was brought by an individual with high blood pressure who was terminated from his position. The Seventh Circuit reversed and remanded the district court’s grant of summary judgment, and followed various aspects of EEOC regulatory language, including episodic conditions, mitigating measures, and short-term conditions.
2. *EEOC v. Ford Motor Company*, --- F.3d ---, 2014 WL 1584674 (6th Cir. April 22, 2014). This is one of the cases that we talked about during the Qualified webinar. In this case, a resale steel buyer with severe irritable bowel syndrome requested to telework as a reasonable accommodation. In defending the ADA claim, the employer argued that the employee was not qualified because she was not able to be physically present on the jobsite. The Sixth Circuit emphasized 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.” The Sixth Circuit said 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.
3. *Feist v. Louisiana, Department of Justice*, 730 F.3d 450 (5th Cir. 2013). This case is an important reminder that the duty to accommodate extends beyond accommodations that enable an employee to perform an essential function. Here, an attorney with osteoarthritis of the knee requested a free on-site parking space to accommodate her disability. The district court granted summary judgment for the employer, saying that the plaintiff failed to demonstrate a need for an accommodation to perform her essential functions. In reversing and remanding the decision, the Fifth Circuit said that both the ADA statute

and interpretive authority indicate that Plaintiff is correct; there is no need to link to essential job function.

4. *EEOC v. United Airlines Inc.*, 693 F.3d 760 (7th Cir. 2012). Although this is a 2012 case, it is a very important employment discrimination case. The EEOC brought a lawsuit challenging United's Reasonable Accommodation Guidelines, which said that transfer to an "equivalent or lower-level vacant position" may be a reasonable accommodation but specified that the reassignment/transfer process was competitive. Under existing Seventh Circuit precedent, the district court granted summary judgment for United, saying that reassignment without competition to a vacant position was not required by the ADA, and this decision was affirmed by a three-judge panel. However, the full Seventh Circuit reversed itself, and held that absent undue hardship or a consistently-applied seniority system, reassignment to vacant position without competition was a reasonable accommodation under the ADA. It stated that a "best-qualified policy" is not the same as a seniority system and does not always represent an undue hardship. United petitioned the Supreme Court for review, but this request was denied on May 28, 2013.
5. *Owusu-Ansah v. Coca-Cola Company*, 715 F.3d 1306 (11th Cir. 2013). In this case, the Eleventh Circuit joined other circuits to conclude the ADA's restrictions on medical examinations and inquiries protect employees who are not disabled. It also clarified when threats permit employers to send an employee to a fitness for duty exam. Here, during a meeting with management, an employee banged his hand on the table and said that someone was "going to pay for this." His employer referred him to a psychiatric fitness-for-duty, where he was given the Minnesota Multiphasic Personality Inventory. When challenged, the court found this medical examination was job-related and consistent with business necessity. It explained that the employee's ability to handle stress and work reasonably well were essential functions.

**Question 7:** How is the church affected by these laws?

**Answer 7:** Title I of the ADA applies to religious entities, including churches, so long as the church has fifteen or more employees. However, the Supreme Court has recognized a doctrine called the "ministerial exemption" which exempts "ministers" from the ADA's employment protections. The Supreme Court decision on this issue is *Hosanna-Tabor v. EEOC*, 132 S.Ct. 694 (2012). It is important to note that Title I of the ADA still applies to church employees who do not act as ministers, such as a church receptionist or maintenance worker. Title III of the ADA prohibits places of public accommodation from discriminating against people with disabilities, and Title III exempts religious entities, including churches, from coverage. However, if the church receives any federal funding, it may be subject to the Rehabilitation Act. Further, there are various state and local anti-discrimination laws that do not exempt religious entities.