ADA LEGAL WEBINAR SERIES

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ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

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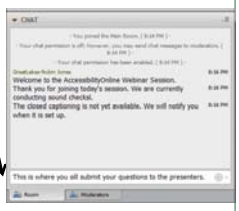

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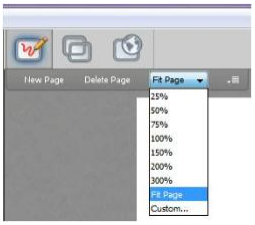

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ADA LEGAL WEBINAR SERIES

Qualified Under the ADA: The New Legal Battleground After the ADA Amendments Act

Presented by:
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May 21, 2014

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

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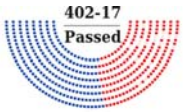
Post-ADA Amendments Act Cases



- ADA Amendments Act: The definition of disability should be construed "in favor of broad coverage . . . to the maximum extent permitted by the terms of th[e] Act." 42 U.S.C. § 12102(4)(A).
  - Result = Courts are now spending less time analyzing whether a plaintiff has a disability as defined by the ADA
  - New legal battleground in ADA cases is whether a plaintiff is "qualified."

See Legal Brief: The Litigation Landscape Five Years After the Passage of the ADA Amendments Act

www.ada-audio.org/Archives/ADALegal/Materials/FY2013/2013-09-18%5ELegal_Brief_ADAAA_Five_Years_Later_(9%2012%2013).pdf

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Post-ADA Amendments Act Cases

Example of stark difference

- Post-ADAAA cases: Some employers have not challenged whether the plaintiff has a disability, focusing instead on whether the individual is qualified.
  - *Anderson v. Georgia-Pacific Wood Products, LLC*, 942 F.Supp.2d 1195 (M.D. Ala. 2013) (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)

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Goals for Today's Webinar

Important to understand definition, regulations, and case law surrounding "qualified"

- ADA Statute
- EEOC Regulations and Guidance
- Case Law
  - How to Determine Which Functions are Essential
  - Specific Essential Functions
  - Qualified and Reasonable Accommodation
  - Qualified and Regarded As
  - Qualified and Direct Threat
  - Qualified and Disability Benefits

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ADA: Definition of "Qualified"

A "qualified" individual is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

42 U.S.C. § 12111(8)

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EEOC Regulations: Definition of Qualified

Two prong inquiry

- (1) An individual must "satisf[y] the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires."
- (2) Whether the individual "with or without reasonable accommodation, can perform the essential functions of such position."
  - Identify which functions are essential
  - Determine whether the individual can perform those functions with or without a reasonable accommodation

29 C.F.R. 1630.2(m)

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ADA Definition of Essential Function

- **Statute:** When determining which functions are essential, consideration shall be given to:
  - Employer's judgment
  - Written job description, so long as it was prepared before advertising or interviewing applicants for the job

42 U.S.C. § 12111(8)

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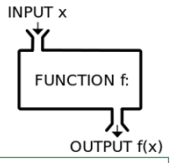
EEOC Regulations re Essential Function



- **EEOC regulations:** "Essential functions" are "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."
- **Other factors:** 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
  - The function is highly specialized so the individual is hired for his expertise or ability to perform the function

29 C.F.R. 1630.2(n)(1)

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EEOC Regulations re Essential Function

Additional EEOC factors:

- Employer's judgment
- Written job descriptions prepared before advertising or interviewing applicants for the job
- Amount of time spent on the job performing the function
- Consequences of not requiring the incumbent to perform the function
- Terms of a collective bargaining agreement
- Work experience of past incumbents in the job
- Current work experience of incumbents in similar jobs

29 C.F.R. 1630.2(n)(3)

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Step 1: Skill, Experience, Education, Job-Related Requirements

Courts spend little time on this step or skip it completely

Wirey v. Richland Community College
913 F.Supp.2d 633 (C.D. Ill. 2012)

- Court easily found that plaintiff had the skills and experience, because of her employment tenure – she worked for 15 years for the employer, 5 years in last position

Torres v. House of Rep. of the Commonwealth of P.R
858 F.Supp.2d 172 (D.P.R. 2012)

- Plaintiff satisfied this test due to her Master's degree in social work, license in social work, history of meeting performance expectations, and specific employment initiatives

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Blending of Steps 1 and 2

Using facts about Step 1 to support conclusions about Step 2

Keith v. County of Oakland
703 F.3d 918 (6th Cir. 2013)

- **Issue:** Whether a deaf individual was qualified to work as a lifeguard - can he effectively communicate.
- **6th Cir:** Genuine issue of fact
  - 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.

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

Most cases are about Step 2, sometimes a two-step process

Demyanovich v. Cadon Plating & Coatings
--- F.3d ---, 2014 WL 1259603 (6th Cir. March 28, 2014)

- **(1) What are Essential Functions?**
  - Lifting was not necessarily an EF of a line operator, as job description listed many duties, but not a lifting requirement.
- **(2) Can plaintiff perform Essential Functions?**
  - Fact issue. No evidence that employee could not perform the EF at the time of his termination (although there was evidence about his inability at the time of his deposition)

Note: Consider qualifications at time of adverse action

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Essential Functions

Most summary judgment cases focus on which functions are essential

EEOC v. Heartland Automotive Services
2013 WL 6065928 (W.D. Tenn. Nov. 18, 2013)

- Deaf applicant not hired for tech position at Jiffy Lube
- Due to conflicting info about EF (call-and-response system & standing) – no consideration of Step 2
- Court: Without a clear understanding of which functions were essential, it would be "impossible . . . to determine whether" the applicant was able to perform them.

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Essential Functions: Cases Involving Mix of EEOC Factors

Bambrick v. Sam's West, Inc.

2013 WL 427399 (N.D. Iowa Feb. 4, 2013)

- Issue = Was lifting 50 pounds an EF of a Photo Lab manager?
- Court = Issue of fact as to whether lifting was essential
  - Pro-employer: Employer judgment, job description
  - Pro-employee: Absence of adverse consequences for failing to perform the function, absence of a collective bargaining agreement, work experience of other employees, discredited much of the job description*

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Factor: Employer Judgment

Employers' opinions are "entitled to deference" but are just <u>one</u> factor to be considered.

Henschel v. Clare County Road Commission

737 F.3d 1017 (6th Cir. 2013)

- Issue = Whether hauling equipment to a job site is essential
- Employer considered hauling to be an essential function
- Court: Employer judgment "carries weight" but is "only one factor to be considered." Issue of fact.
  - Other factors: Job description, excavator stayed at the job site 90% of the time, minimal consequences to the employer's operations if the excavator did not haul equipment, and experiences of past incumbents.

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Factor: Job Descriptions

Using omissions in job descriptions to show that a task is not necessarily essential

Henschel v. Clare County Road Commission

737 F.3d 1017 (6th Cir. 2013)

- Plaintiff's job description did not include hauling equipment; other descriptions (truck/tractor driver) included hauling equipment
- Job description included "other duties assigned"
- **Court:** Tasks in "other duties assigned" aren't necessarily EF; to find otherwise would render the job description meaningless.

EEOC v. Heartland Automotive Services

2013 WL 6065928 (W.D. Tenn. Nov. 18, 2013)

- Duty of operating a "call and response system" was not included in the job description for a lube technician – case could proceed

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Factor: Job Descriptions

Challenging accuracy by comparing it actual experience

Bambrick v. Sam's West, Inc.

2013 WL 427399 (N.D. Iowa Feb. 4, 2013)

- Employer argued: 50lb lifting requirement is an EF of the position per job description
- **Court:** Discredited much of job description – it was developed years after the manager started working with no apparent changes to her job duties
- 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 . . . of the position*."

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Factor: Job Descriptions

Tip: Closely review words in actual job description

Bisker v. GGS Information Services, Inc.

2010 WL 2265979 (M.D. Pa. June 2, 2010)

- **Issue:** Whether face-to-face interaction was an EF of the parts lister position
- **Employee's job description:**
  - Occasional interacting with engineers and technicians
  - Frequent contact with employees
- **Court:** Plaintiff may be qualified even if she needed telework
  - Description did not specify whether the interactions and contact needed to be in-person

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Job Descriptions: Tips

Other tips/EEOC guidance:

- ADA doesn't require employers to develop/maintain job descriptions.
- Employers that use written job descriptions should review them regularly to be sure they accurately reflect the actual functions of the current job.
- To use a job description as evidence of EF, the description must be prepared before advertising/interviewing for the job.
  - Job descriptions prepared after an alleged discriminatory action will not be considered as evidence.

http://askjan.org/links/adatam1.html

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Factor: Consequences of Removing Essential Function

The typical analysis considers the severity of the harm caused by removing an EF.

Brickers v. Cleveland Bd. Of Education
145 F.3d 846 (6th Dist. 1998)

- **Issue:** Whether lifting was an EF of a school bus attendant who transported students with disabilities.
- **Court: Yes**
  - Severe consequences if the attendant was unable to lift students during an accident or fire, even if attendant was "seldom" required to lift.

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Factor: Consequences of Removing Essential Function

Other consequences considered = requiring an employer to hire another employee.

Moore v. Jackson County Board of Education
--- F.Supp.2d ---, 2013 WL 5797844 (Oct. 28, 2013 N.D. Ala.)

- **Issue:** Whether cooking and cleaning were EF of the position of a cafeteria manager.
- **Court**: Yes
  - If plaintiff returned to work without cooking/cleaning, defendant would need to hire another person (only two other employees to supply food for 200 students on a daily basis).

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Legally Defined Functions

Proctor v. Northern Lakes Comm. Mental Health Auth.
2012 WL 3637604 (W.D. Mich. 2012)

- Certain lifting requirements were EF of a resident care assistant
- Employees required to meet State physical exertion requirements
- **Court:** If a function is required by state law, then those qualifications are essential functions by their very nature

***Brickers v. Cleveland Bd. Of Educ*.**
145 F.3d 846 (6th Cir. 1998)

- **Court:** Legislation required school bus attendants to have the "physical capability of appropriately lifting and managing" students with disabilities "when necessary."
  - Note: In addition to "adverse consequences" factor.

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Legally Defined Functions: Limitations

- If a state law or regulation conflicts with the ADA, the ADA trumps because it is a federal law.
- Employers cannot shield themselves from ADA liability by pointing to a federal regulation, if the standard is applied too broadly.

Samson v. Fed. Exp. Corp.
2014 WL 1226847 (11th Cir. Mar. 26, 2014)

- Employees' job was conditioned on his passing a DOT medical exam
- Federal Motor Carrier Safety Regulations required DOT medical exam for drivers who transport property or passengers in interstate commerce
- **Court:** The FMCSRs requirement did not apply to the employee's position, so this defendant could not use this as a defense

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Managerial Positions

Functions Typically Performed by Employees Can Still be Essential

Gober v. Frankel Family Trust

537 Fed.Appx. 518 (5th Cir. 2013)

- **Maintenance foreman:** Ability to be "on call" was not an EF because he was a supervisor position, and techs were the only ones responsible for responding to after-hours needs
- **Court:** Foreman were also expected to report to properties after hours when necessary, rendering this an EF

Knutson v. Schwan's Home Svc.

711 F.3d 911 (8th Cir. 2013)

- **General manager:** Driving was not an EF for a manager
- **Court:** Although rare, managers still, from time to time, had to drive, so driving was an EF

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Managerial Positions

Functions Typically Performed by Employees May Not be Essential

EEOC v. Denny's

2010 WL 2817109 (D. Md. July 16, 2010)

- **Denny's:** Managers needed to step in and perform the tasks of other positions, such as cleaning, cooking, stocking, and lifting
- **Court:** Genuine issue of material fact
  - Job description listed only supervisory/administrative tasks
  - Manager testified that she spent her time interacting with customers, handling paperwork, and instructing employees
  - Vocational counselor observed operations and never saw a manager performing a non-managerial task that could not have been deleted as managerial discretion

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Manner of Performing Function v. Function Itself

The manner in which a function is performed is typically not the EF

- Important because a reasonable accommodation may enable an individual to perform the task in a different way

Keith v. County of Oakland
703 F.3d 918 (6th Cir. 2013)

- Undisputed that communicating was essential for a lifeguard
- Disputed whether communication needed to be verbal
- Keith successfully completed lifeguard training and received an offer of employment, subject to a pre-employment physical
- During physical, doctor stated: "He's deaf; he can't be a lifeguard."
- **Court:** Keith presented evidence of his ability to communicate through non-verbal means

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Manner of Performing Function v. Function Itself

Methods of Communication:

- With swimmers: "10/20 standard of zone protection" - visual
- With lifeguards: Even if he could not hear another lifeguard's whistle, by looking at other lifeguards while scanning his zone.
- Re safety rules: Using physical gestures such as shaking his head, motioning his hand backward, or signaling the number one, all non-verbal strategies typically employed by lifeguards.

Note: Highlights the importance of looking beyond initial beliefs about how a specific function can be achieved.

See also Zombeck v. Friendship Ridge, 2011 WL 666200 (W.D. Pa. 2011) (nurse's aid was qualified because she could transfer residents by using a mechanical lift, even if she could not lift the residents herself).

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Manner of Performing Function v. Function Itself

Walter v. Wal-Mart Stores, Inc.
2011 WL 4537931 (N.D. Ind. Sept. 28, 2011)

- Greeter with limited fine motor skills couldn't use Telxon scanner
- **Argued:** EF was "processing returns" – Telxon was simply the method of doing so
  - He should be able to process returns in a different manner (placing stickers on returned merchandise)
- **Court:** Operating the Telxon machine was an EF
  - Explained that Wal-Mart had intentionally implemented the Telxon system in response to the legitimate problem of fraud and shrinkage, which the sticker-system did not prevent.

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Other Lessons from the *Walter* Case:
Employers may generally change EF, especially with good reason

- Greeters placed a pink sticker on returned merchandise and directed customers to customer service desk.
  - Procedure resulted in significant fraud/shrinkage
  - Wal-Mart started using Telxon, which printed merchandise-specific labels.
- **Court:** "An 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.'"

See also EEOC Technical Assistance Manual: ("The ADA does not limit an employer's ability to establish or *change* the content, nature, or functions of a job.") (Emphasis added). http://askjan.org/links/adatam1.html

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Effect of "Waiving" Essential Function

Generally, employers may waive an EF for a temporary period of time without conceding that it's not essential (policy considerations).

Hancock v. Washington Hosp. Ctr.
2014 WL 60288 (D.D.C. Jan. 7, 2014)

- Triage was an EF of a medical assistant even though her employer had permitted her to work without performing triage for some time

Minnihan v. Mediacom Communications Corp.
2013 WL 6680982 (S.D. Iowa Dec. 19, 2013)

- Driving was an EF of a technical operations supervisor position, despite the fact that the employer had accommodated the employee by removing driving for a temporary period of time

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"Waiving" Essential Functions

Courts note when an employee has worked w/o performing the EF without consequences when concluding the function is not essential

Zombeck v. Friendship Ridge
2011 WL 666200 (W.D. Pa. 2011)

- Court found persuasive that plaintiff did not lift for a 13-yr period, but maintained the title of "nurse aide" w/o receiving any unsatisfactory formal performance evaluations

Bambrick v. Sam's West, Inc.
2013 WL 427399 (N.D. Iowa Feb. 4, 2013)

- Court noted that plaintiff worked in the position without lifting for a number of years when finding a genuine issue of material fact

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Consequences of Medical Documentation

- **Tip:** Employees should be careful that their own medical documentation does not suggest that they are unqualified
- Some doctors overemphasize limitations to ensure that the person is covered under the ADA, undercutting qualified argument

Lane v. Prince George's County Public Schools,
2013 WL 4541642 (D. Md. Aug. 26, 2013)

- Court found the teacher not qualified, in light of her doctor's instructions to take leave or to retire.
- "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.'"

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Consequences of Medical Documentation

Tjernagel v. Gates Corp.
533 F.3d 666 (8th Cir. 2008)

- Overtime was considered essential for employee's position.
- Employee provided a medical work capacity report, which required various restrictions, including no overtime, so was terminated
- Following termination, employee asked if she could return to her job if she had the overtime restriction removed. Doctor sent a second report removing the overtime restriction.
- **Court:** Not qualified. Second work capacity report was written as a self-report (employee "reported").

Employee Tip: Be careful with accommodation requests that arguably remove essential functions

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Specific Functions: Attendance/Punctuality

E.E.O.C. v. Ford Motor Company

--- F.3d ---, 2014 WL 1584674 (6th Cir. April 22, 2014)

- Q for jury whether physical presence at workplace was required
  - Even when employee was at work, the vast majority of communications were done via conference calls.
  - Technology has advanced; attendance is no longer assumed to mean attendance at the employer's physical location.
  - 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."

See also Walker v. NANA WorleyParsons, LLC, 2013 WL 357571 (D. Alaska, Jan. 28, 2013) (finding genuine issue of fact as to whether employee who needed to telework was qualified for position of project controls specialist).

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Specific Functions: Attendance/Punctuality

EEOC v. AT&T Corporation

2013 WL 6154563 (S.D. Ind. Nov. 20, 2013)

- Customer service specialist with Hepatitis C terminated after receiving written warning: "Attendance is an essential function of your job. Satisfactory attendance is a condition of your employment!"
- **EEOC argued:** AT&T has 22 formal leaves of absence plans & Plaintiff's job description was silent about whether attendance was an essential job function
- **AT&T argued:** Written warning and manager's testimony demonstrated that attendance is an essential job function
- **Court:** A jury could find that attendance is or is not an EF

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Specific Functions: Rotating Shifts

Boitnott v. Corning Inc.
2010 WL 2465490 (W.D. Va. June 15, 2010)

- Rotating shifts were an EF of the engineer's position.
- Employer made a legitimate business decision to allow for coverage of the 24-hour production process to repair any emergency situation.
- Court also credited the employer's explanation that mandatory shift rotating created consistent work teams and greater flexibility.

But see Russo v. Jefferson Parish Water Department, 1997 WL 695602 (E.D. La. Nov. 6, 1997) (whether working a rotating shift was an EF was a question of fact, especially in light of the evidence that various positions did not work rotating shifts).

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Specific Functions: Overtime

Davis v. Florida Power & Light Co.
205 F.3d 1301 (11th Cir. 2000)

- **Court:** Overtime was an EF for a utility provider employee
- **Balanced factors:**
  - Employee agreed to work overtime as an empl. condition
  - Other employees worked a substantial amount of overtime
  - Employee's formal job description did not require overtime
- **Court's focus:** Business model required overtime to succeed due to defendant's same-day connect and reconnect policy
  - Mandatory overtime was so important that the defendant bargained for it and the requirement was in the union's CBA

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Specific Functions: Overtime

Feldman v. Olin Corp.
692 F.3d 748 (7th Cir. 2012)

- Tractor operator requested a position with no mandatory overtime
- **7th Cir:** Question of fact as to whether overtime was essential
- Factors:
  - OT rarely worked by others in his position
  - OT not listed in the job descriptions (but included in descriptions for other positions)
  - 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

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Specific Function: Lifting

Majors v. General Electric Co.
714 F.3d 527 (7th Cir. 2013)

- Lifting 20 lbs was an EF of a purchased material auditor
  - Position's job description, which required "intermittent movement of heavy objects"
  - Testimony of another employee and manager
  - Testimony from HR mgr and ergonomic technical specialist who weighed objects required to be lifted by material auditors

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)

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Specific Function: Lifting

Zombeck v. Friendship Ridge
2011 WL 666200 (W.D. Pa. 2011)

- Lifting was not necessarily an EF for a nurse aide
- Reviewed EEOC factors, including:
  - Position did not exist so that nurse aides may lift
  - No effect on the other employees (plaintiff held the position for 13 years without lifting)
  - Lifting was not a highly specialized function
  - 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."

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Specific Function: Law Enforcement

Cefalu v. Holder
2013 WL 5315079 (N.D. Cal. Sept. 23, 2013)

- Special agent couldn't lift firearm due to elbow injury
- **Court:** Carrying/using a firearm was an essential function
  - Relied on the employer's job description
  - 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
  - Employees in similar law enforcement positions were required to lift and carry a gun

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"Qualified" and "Reasonable Accommodation"

Plaintiff has the burden of showing that she is qualified; generally includes burden to establish that an accommodation is reasonable.

Majors v. General Electric Co.
714 F.3d 527 (7th Cir. 2013)

- **Plaintiff:** Would be qualified if accommodated (having others lift heavy objects for her). Employer must show undue hardship.
- **Court:** Plaintiff must meet initial burden.
  - Plaintiff's requested accommodation was unreasonable (removing EF); failed to establish that she was "qualified."
  - Burden doesn't shift to employer to demonstrate undue hardship.

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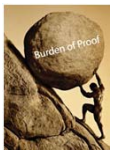
"Qualified" and "Reasonable Accommodation"



When considering whether an employee is qualified, courts often look at how they perform the EF with an accommodation.

Torres v. House of Representatives of the Commonwealth of P.R.
858 F.Supp.2d 172 (D.P.R. 2012)

- **Issue:** Whether individual with hemiplegia who used a motorized wheelchair was qualified to work as a legislative advisor
- **Court:** When accommodated, advisor could do EF
  - Could perform all functions with laptop computer
  - Before laptop, the legislative advisor performed her EF by dictating to a co-worker who transcribed her work

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"Qualified" and "Reasonable Accommodation"

Olsen v. Capital Region Medical Center
713 F.3d 1149 (8th Cir. 2013)

- Mammography tech with epilepsy had seizures at the workplace
- **EF:** Operating medical machinery, tending to patients' physical/emotional needs, ensuring patients' safety
- **8th Cir:** Employer provided various accommodations, but tech remained unable to perform the EF when she continued to experience seizures

See also Delon v. Eli Lilly & Co., 2013 WL 6887645 (S.D. Ind. Dec. 31, 2013) (employee testified that her disability prevented her from working anywhere; even if she had been granted the accommodation of telework, she would not have been able to perform her essential functions).

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Reasonable Accommodation: Removing Tasks

Relevant question: Is task is marginal or essential?

- Employers are not required to remove EF as an accommodation.
- 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."
  - http://www.eeoc.gov/policy/docs/accommodation.html

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).

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Reasonable Accommodation: Removing Tasks

EEOC v. Autozone

707 F.3d 824 (7th Cir. 2013)

- Parts Sales Manager requested removal of his mopping duties
- Accommodation was denied
- Employee experienced extreme back pain causing him to miss work and led to his termination
- Various trials/appeals
- **7th Cir upheld:**
  - $100,000 in compensatory damages, $200,000 in punitive damages, and $115,000 in back pay
  - Injunction on AutoZone's anti-discrimination practices

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"Qualified" and "Regarded As"

Walker v. Venetian Casino Resort, LLC

2012 WL 4794149 (D. Nev. Oct. 9, 2012)

- Employee acknowledged that she was not qualified without a reasonable accommodation but asserted that she would have been qualified under an accommodated reassignment
- **Court:** ADAAA doesn't require employers to accommodate individuals under the "regarded as" prong
  - Because employee was not qualified without a reasonable accommodation, she was not qualified

Tip: If a case involves reasonable accommodations, plaintiffs should plead that they have disabilities under the "actual disability" and "record of disability" prongs wherever possible.

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"Qualified" and "Direct Threat"

- **ADA's "qualification standards" include:**
  - "[R]equirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."
  - **Direct threat** = "[A] significant risk of substantial harm to the health or safety of the individual or others than cannot be eliminated or reduced by reasonable accommodation."
  - EEOC has a list of factors to consider
  - Determination must be individualized assessment based on reasonable medical judgment relying on the most current medical knowledge and/or the best objective evidence.

42 U.S.C. § 12113(a); 29 C.F.R. § 1630.2(r)

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"Qualified" and "Direct Threat" – Burden?

Which parties typically have the burden of proof:

- Plaintiffs must show that that they are qualified
- Defendants must show that plaintiffs pose a direct threat

Mixed case law when questions are "inextricably intertwined"

- Plaintiff: Even though as a practical matter that requires the plaintiff to show that he can perform the EF in a way that does not endanger others. See, e.g., *E.E.O.C. v. Amego, Inc*., 110 F.3d 135 (1st Cir. 1997).
- Defendant: Must show that plaintiff cannot perform the EF because he poses a direct threat. See, e.g., *Hutton v. Elf Atochem North America*, 273 F.3d 884 (9th Cir. 2001) (reasoning 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).

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"Qualified" and "Direct Threat"
Cases for employee

Nelson v. City of New York
2013 WL 4437224 (S.D.N.Y. Aug. 19, 2013)

- **Issue:** Whether police officer with history of Personality Disorder and PTSD could perform the EF of her job (tolerate stress of police work) or whether she was a direct threat
- **Court:** Didn't decide the burden question, finding neither party would demonstrate direct threat as a matter of law
  - Pl.'s expert (personal therapist), who had more familiarity with plaintiff, testified that she could perform the EF
  - Def. didn't rely on the most current medical knowledge available, as it focused on the plaintiff's history, not her current condition

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"Qualified" and "Direct Threat"
Cases for employer

Hutton v. Elf Atochem North America
273 F.3d 884 (9th Cir. 2001)

- Plaintiff had diabetic episodes during his employment (once he lost consciousness) as a chlorine finishing operator at a facility that manufactures chlorine/other chemicals
- **Court:** Def. met its burden of establishing direct threat.
  - Even if severity of risk is small, would be a significant risk under the direct threat analysis given the "catastrophic" consequences
  - If plaintiff lost consciousness, chlorine could spill from railcars, convert to gas and cause severe, potentially fatal, harm to workers and others

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"Qualified" and "Direct Threat"

Some Court's Distinction Between "Direct Threat" and "Making Threats"

Mayo v. PCC Structurals, Inc.

2013 WL 3333055 (D. Ore. July 1, 2013)

- Welder made repeated threats of workplace violence
- **Court:** Found employee not qualified; no direct threat analysis
  - Making violent threats disqualify an employee, even if the threats were related to the employee's disability.
  - Here, no reasonable jury could find plaintiff qualified, as he stated threat multiple times to multiple people; named specific supervisors and time, place and manner of threatened attack

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").

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"Qualified" and Statements on Applications for Disability Benefits

Cleveland v. Policy Management Systems Corp.

526 U.S. 795 (1999)

- Court considered whether pursuit/receipt of SSDI automatically estopped recipient from pursuing an ADA claim
- Despite "appearance of conflict," claims do not inherently conflict
  - SSA does not consider reasonable accommodations
  - SSA has rules for specific impairments, but individual may still be able to perform essential functions
  - The SSA grants SSDI benefits to individuals who can work and are working through the trial-work period
  - Individual's condition might change over time

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Cleveland Applied Beyond SSDI

Two questions:

1. Does benefit claim "inherently conflict" with ADA claim?
2. If not, but the plaintiff makes statements that appear to conflict with one another, can plaintiff explain the inconsistency?

- In recent years, *Cleveland* has been interpreted to apply to recipient of disability benefits (no inherent conflict):
  - Nevada Public Employees' Retirement Systems (PERS). *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950 (9th Cir. 2013)
  - The Federal Employee Retirement System benefits. *Solomon v. Vilsack*, 628 F.3d 555, 561 (D.C. Cir. 2010).
  - State-police pension benefits. *Butler v. Vill. of Round Lake Police Dep't*, 585 F.3d 1020, 1022 (7th Cir. 2009)

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Reconciling "Inconsistent" Statements:
Passage of Time: Successful

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

- Feb '09: Ryan terminated (earlier on-the-job injury)
- Dec. '11: SSDI application-couldn't hold any FT or PT job, couldn't do auto repair/rebuilding, could stay awake for 1-2 hrs and lift 4-5 lbs
- Feb. '12: SSA granted benefits, finding him "disabled" as of 10/31/08
- **Court:** Ryan successfully reconciled such statements
  - 3-year lapse of time b/w termination and SSDI application
  - SSDI responses were in present tense, suggesting they were about his abilities at the time he completed the application

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Reconciling "Inconsistent" Statements:
Passage of Time: Unsuccessful

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

- When applying for disability pension benefits, police officer stated that his pulmonary condition prevented him from doing required duties (chasing a suspect or wrestling with an unruly one).
- **Court:** Despite passage of time, officer provided no evidence that he could have performed the EF of police work during earlier time frames, especially b/c by the time that he stopped reporting to work, he could "barely walk a few blocks or climb stairs."

Tip: This case reminds litigants that they must be able to prove the underlying facts to explain the apparently inconsistent statements.

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Reconciling "Inconsistent" Statements:
Different Legal Standards: Successful

Smith v. Clark County School District
727 F.3d 950 (9th Cir. 2013)

- Employee also applied for FMLA leave
- Smith reconciled inconsistency: "FMLA applications required temporary disability leave and were not an admission of permanent inability to work"
- **Court:** Although argument is brief, it is sufficient to permit a reasonable juror to conclude that Smith could perform the EF of the job with or without accommodation.

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Reconciling "Inconsistent" Statements:
Reasonable Accommodation: Successful

Smith v. Clark County School District
727 F.3d 950 (9th Cir. 2013)

- Plaintiff applied for benefits under Nevada Public Employees' Retirement System (and FMLA and private disability benefits)
- **Court:** Plaintiff's PERS and ADA claims do not conflict
  - Plaintiff explained 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.
- Note: 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.

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Reconciling "Inconsistent" Statements:
Reasonable Accommodation: Unsuccessful

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

- Maintenance technician with COPD applied for SSDI
- **Plaintiff:** Statements are reconcilable because he could have worked with a respirator as an accommodation
  - Alternatively, in a different position
- **Court:** Rejected this argument b/c medical tests demonstrated that tech could not wear a respirator while at work
  - Alternatively, no evidence that he could have performed essential functions due to restrictions

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Conclusion

- New ADA litigation landscape = whether an individual is "qualified"
- Most cases regarding qualified turn on which functions are essential
- All parties should review:
  - Statute
  - EEOC's regulatory language
  - Recent case law

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