9.2.2 ADA Definitions — Qualified Individual

Model

Under the ADA, [plaintiff] must establish that [he/she] was a "qualified individual." This means that [plaintiff] must show that [he/she] had the skill, experience, education, and other requirements for the [describe job] and could do the job's "essential functions", either with or without [describe requested accommodation]. If [plaintiff] cannot establish that [he/she] is qualified to perform the essential functions of [describe job] even with a [describe accommodation], then [plaintiff] is not a qualified individual under the ADA. If [plaintiff] is not a qualified individual within the meaning of the ADA, you must return a verdict for [defendant], even if the reason [plaintiff] is not qualified is solely as a result of [his/her] disability. The ADA does not require an employer to hire or retain an individual who cannot perform the job with or without an accommodation.

In this case, [plaintiff] claims that [he/she] was able to perform the essential functions of [describe job] [with [describe accommodation]]. [Defendant] contends that [plaintiff] was unable to perform [describe function(s)] and that [this/these] function(s) were essential to the [describe job]. It is [plaintiff's] burden to prove by a preponderance of the evidence that [he/she] was able to perform the essential functions of [describe job]. If [plaintiff] could not perform [describe function] then it is [plaintiff's] burden to show that [describe function], that this was not essential to the [describe job].

In determining whether [plaintiff] could perform the essential functions of [describe job], you should keep in mind that not all job functions are "essential." The term "essential functions" does not include the marginal functions of the position. Essential functions are a job's fundamental duties. In deciding whether [describe function] is essential to [describe job], some factors you may consider include the following:

1) whether the performance of the [describe function] is the reason that the [describe job] exists;

2) the amount of time spent on the job performing [describe function];

3) whether there are a limited number of employees available to do the [describe function];

4) whether [describe function] is highly specialized;

5) whether an employee in the [describe job] is hired for his or her expertise or ability to [describe function];

6) [defendant's] judgment about what functions are essential to the [describe job];

7) written job descriptions for the [describe job] ;

8) the consequences of not requiring an employee to [describe function] in a satisfactory manner;

9) whether others who held the position of [describe job] performed [describe function];

10) the terms of a collective bargaining agreement;

11) [list any other factors supported by the evidence.]

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether [describe function] is essential to [describe job].

[In addition to specific job requirements, an employer may have general requirements for all employees. For example, an employer may expect employees to refrain from abusive or threatening conduct toward others, or may require a regular level of attendance. These may be considered essential functions of any job.]

In assessing whether [plaintiff] was qualified to perform the essential functions of [describe job] you should consider [plaintiff's] abilities as they existed at the time when [describe challenged employment action].

Comment

Under the ADA, only a "qualified individual" is entitled to recover for disparate treatment or failure to provide a reasonable accommodation. 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).

The Third Circuit set forth the basic approach to determining whether a plaintiff is a "qualified individual" in *Deane v. Pocono Medical Center,* 142 F.3d 138, 145-146 (3d Cir. 1998) (en banc):

> [T]he ADA requires [plaintiff] to demonstrate that she is a "qualified individual". The ADA defines this term as an individual "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). The Interpretive Guidance to the EEOC Regulations divides this inquiry into two prongs. First, a court must determine whether the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires. See 29 C.F.R. pt. 1630, app. § 1630.2(m). Second, it must determine whether the individual, with or without reasonable accommodation, can perform the essential functions of the position held or sought. . . .
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> Determining whether an individual can, with or without reasonable accommodation, perform the essential functions of the position held or sought, also a two step process, is relatively straightforward. First, a court must consider whether the individual can perform the essential functions of the job without accommodation. If so, the individual is qualified (and, a fortiori, is not entitled to accommodation). If not, then a court must look to whether the individual can perform the essential functions of the job with a reasonable accommodation. If so, the individual is qualified. If not, the individual has failed to set out a necessary element of the prima facie case.

The court in *Deane* emphasized that the plaintiff need not prove the ability to perform *all* the functions of the job requested:

> Section 12111(8) is plain and unambiguous. The first sentence of that section, makes it clear that the phrase "with or without reasonable accommodation" refers directly to "essential functions". Indeed, there is nothing in the sentence, other than "essential functions", to which "with or without reasonable accommodation" could refer. Moreover, nowhere else in the Act does it state that, to be a "qualified individual", an individual must prove his or her ability to perform all of the functions of the job, and nowhere in the Act does it distinguish between actual or perceived disabilities in terms of the threshold showing of qualifications. Therefore, if an individual can perform the essential functions of the job without accommodation as to those functions, regardless of whether the individual can perform the other functions of the job (with or without accommodation), that individual is qualified under the ADA.

142 F.3d at 146-47.

"Essential Functions" of a Job

In *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 278 (3d Cir. 2001), the court provided an extensive analysis of the meaning of the term "essential functions" of a job. The plaintiff in *Skerski* was a cable installer technician, and he developed a fear of heights. One of the defendant's arguments was that he was no longer qualified for the position because climbing was one of the "essential functions" of the job of cable installer technician. The trial court agreed with the defendant, finding as a matter of law that climbing was an essential job function, and therefore that plaintiff could not recover because he could not perform that function even with an accommodation. The Third Circuit began its analysis by looking at the relevant agency regulations:

> A job's "essential functions" are defined in 29 C.F.R. § 1630.2(n)(1) as those that are "fundamental," not "marginal." The regulations list several factors for consideration in distinguishing the fundamental job functions from the marginal job functions, including: (1) whether the performance of the function is "the reason the position exists;" (2) whether there are a "limited number of employees available among whom the performance of that job function can be distributed;" and (3) whether the function is "highly specialized so that the incumbent in the position is hired for his or her expertise." 29 C.F.R. § 1630.2(n)(2). The regulations further set forth a non-exhaustive list of seven examples of evidence that are designed to assist a court in identifying the "essential functions" of a job. They include:
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> > (i) The employer's judgment as to which functions are essential;
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> > (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
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> > (iii) The amount of time spent on the job performing the function;
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> > (iv) The consequences of not requiring the incumbent to perform the function;
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> > (v) The terms of a collective bargaining agreement;
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> > (vi) The work experience of past incumbents in the jobs; and/or
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> > (vii) The current work experience of incumbents in similar jobs.
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> 29 C.F.R. § 1630.2(n)(3).

> As is apparent, "whether a particular function is essential is a factual determination that must be made on a case by case basis." EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, App. 1630.2(n) (2000) [hereafter "EEOC Interpretive Guidance"]. It follows that none of the factors nor any of the evidentiary examples alone are necessarily dispositive.

Applying these standards to the facts, the court found that the district court erred in concluding as a matter of law that climbing was not an essential function for the position of cable installer technician:

> Looking to the three factors included in § 1630.2(n)(2), it is evident that two are not present in this case as installer technicians are not hired solely to climb or even because of their climbing expertise. On the other hand, [there] is evidence to suggest that Time Warner employs a limited number of installer technicians in Skerski's work area-- only 7 or 8, according to Skerski -- and that this small number hampers Time Warner's ability to allow certain technicians to avoid climbing. The significance of this factor is pointed out in the Interpretive Guidance to § 1630.2(n), which explains, "if an employer has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited." EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(n).
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> But this is only one of the three factors. Moreover, consideration of the seven evidentiary examples included in § 1630.2(n)(3) suggests caution against any premature determination on essential functions as at least some of them lean in Skerski's favor. Of course, as required by § 1630.2(n)(3)(i), we owe some deference to Time Warner and its own judgment that climbing is essential to the installer technician position. And the written job descriptions, as the District Court noted, "clearly identify climbing as a job requirement." However, describing climbing as a requirement is not necessarily the same as denominating climbing as an essential function. In fact, the job descriptions prepared by both New Channels and Time Warner list various duties and responsibilities under the heading "Essential Functions," but neither identifies climbing as "essential." . . ..
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> Among the facts and circumstances relevant to each case is, of course, the employee's actual experience as well as that of other employees. See 29 C.F.R. § 1630.2(n)(3)(iv), (vi) and (vii). It is undisputed that from the time Skerski began as an installer technician in 1982 until the time he was diagnosed with his panic disorder in 1993, a significant portion of his job responsibilities required climbing.

> . . . . However, for the three and a half years after his diagnosis in which he continued to work as an installer technician, Skerski performed virtually no overhead work at all. . . . Skerski testified at his deposition that there always was enough underground work to do, that he always worked 40-hour weeks and even worked enough to earn a couple thousand dollars per year in overtime, and that he had never experienced problems at work because of his panic disorder until Hanning became his supervisor in the fall of 1996. . . .
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> Skerski argues that his own experience exemplifies that no negative consequences resulted from his failure to perform the climbing function of his job, which is another of the illustrations listed in the regulations. See 29 C.F.R. § 1630.2(n)(3)(iv). However, there is support in the record for Time Warner's contention that Skerski's inability to climb caused it considerable administrative difficulties. . . . . Hanning testified that Skerski's inability to climb "made the routing process extremely cumbersome," because the assignment process had to be done by hand instead of computer. He also claimed that Skerski's inability to climb necessitated the hiring of outside contract labor to meet demand, and that Skerski was not always as busy as he should have been due to his restricted work schedule.

The *Skerski* court found that the relevant factors cut both ways, so that the question of whether climbing was an essential function of the cable installer technician position was a question for the jury:

> We do not suggest that the District Court here had no basis for its conclusion that climbing is an essential function of Skerski's position as installer technician or even that, if we were the triers of fact, we would not so hold. But upon reviewing the three factors listed in 29 C.F.R. § 1630.2(n)(2) and the seven evidentiary examples provided by 29 C.F.R. § 1630.2(n)(3), it is apparent that a genuine issue of material fact exists as to whether climbing is an essential function of the job of installer technician at Time Warner. Although the employer's judgment and the written job descriptions may warrant some deference, Skerski has put forth considerable evidence that contradicts Time Warner's assertions, particularly the uncontradicted fact that following his 1993 diagnosis he worked for more than three years as an installer technician for Time Warner without ever having to perform over head work.

See also Walton v. Mental Health Assoc. of Southeastern Pennsylvania, 168 F.3d 661, 666 (3d Cir. 1999) (employee's inability to appear in a promotional video because she was obese was not a substantial limitation on essential function of a job; any such appearance would have been only a minor aspect of her job); *Conneen v. MBNA America Bank, N.A.,* 334 F.3d 318, 327 (3d Cir. 2003) (promptness was not an essential function

merely because the employer thought it necessary for the employee to set an example for lower-level employees).