

Don't Let ADA stand for
"Another Dumb Assessment"
Avoiding the Cookie Cutter Approach to Vocational
Assessment and Getting Great Tasting Results in
ADA/Employment Law Cases

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Defense Vocational Strategy
ADA/Wrongful Termination Case

William N. Bates, Esq.

Case Background

- Represented a City in Middle Tennessee that terminated a 58 year old employee that had not been medically released to return to work after a 9 month leave.
- The original injury was to the back after falling off a stage while setting up equipment. This was originally a Workers' Compensation claim with an injury date of June 2008.
- The employee was the Parks Director and worked for the City for over 20 years.

Case Background

- The employee attempted to return to work with permanent medical restrictions that consisted of no lifting over 25-pounds, no climbing ladders, and no stooping or crawling.
- The City discussed accommodations with the employee and the employee said he needed medical restrictions and would let the City know what other restrictions he needed after he returned to work.
- The City required the employee to take a functional capacity evaluation to access his ability to do his job and the employee agreed.

Case Background

- The employee's Doctor recommended against a functional capacity evaluation because the Doctor believed the employee was injured in a prior functional capacity evaluation in September 2009 when he was first released to return to work.
- The City attempted to schedule the functional capacity evaluation, but the employee, without notice to the City, scheduled an additional surgery to reduce his pain.
- Several weeks later, the City learned of the surgery.
- The City Manager met with the employee in March 2010 and terminated his employment because the City needed someone to perform the job after the employee's long absence.

Case Background

- The employee did not inform the City Manager that he needed additional time to return to work.
- The employee told the City Manager all he could do was lie on a sofa, watch TV, and read the Bible.
- After his termination, the employee filed charges of Discrimination with the E.E.O.C. alleging a violation of the ADA.

Case Background

- Later, the employee sued the City under the ADA. The employee claimed the City violated the ADA by:
 - 1) Requiring the employee to submit to a functional capacity evaluation;
 - 2) The functional capacity evaluation administered exceeded the scope of a permissible medical evaluation;
 - 3) Not permitting the employee to return to work a second time in January 2010 without taking another functional capacity evaluation;
 - 4) Terminating his employment.

Case Background

➤ By a show of hands, how many of you believe the City could fire the employee when he was unable to return to work and did not request an accommodation of more time?

ADA Provisions

- It is unlawful for an employer to “discriminate against a qualified individual on the basis of disability.” 42 U.S.C. § 12112(a).
- “Discriminate” includes the failure to provide a reasonable accommodation to an otherwise qualified individual with a disability unless it would impose an undue hardship on the employer’s business. *Id.* § 12112(c)(5).
- There is no dispute the employee was disabled when he was terminated on March 26, 2010 because he was not able to perform his duties for the City due to his back injury.

ADA Provisions

- The only issue was whether the employee was qualified to perform his job with reasonable accommodations and was his disability a determining factor in the City's decision to fire him.
- The employee has a duty to request accommodations and a reasonable accommodation is allowing an employee a reasonable time to return to work.
- The City claims the employee could not return to work with any accommodations because he was not medically released and did not request more time as an accommodation.

The City Prepares Its Expert Vocational Case

- A vocational expert in Tennessee is located from an economist consultant in Chicago.
- The City was looking for a vocational consultant with ADA experience in determining essential job functions, reasonable accommodations, and transferable skills.
- Vocational expert, Michelle Weiss, was located.

The City Prepares Its Vocational Case

- The City filed a Motion for Summary Judgment asking that the case be dismissed because the employee was not a qualified person with a disability as he could not return to work with or without an accommodation and never asked for the accommodation of more time to return to work.

Why Vocational Issues Were Important

Essential Functions

- It had to be determined what the employee's essential job functions were in order to answer whether he could return to work and do the essential functions of his job while under medical restrictions. There was a dispute as to his job description in effect at the City.
- Discovery was needed from the employee on what percent of his job involved manual labor (lifting weight, how often, etc.) and administrative and/or supervisory responsibilities.

Why Vocational Issues Were Important

Transferable Skills

- The employee claims he tried to find jobs, but was unsuccessful. The City initially believed the employee failed to mitigate his damages by not looking for work.
- There was a need to know the employee's transferable skills and what jobs were available in the relevant market area he could have applied for.

Vocational Analysis

Michelle McBroom Weiss, MA, CRC, CCM, NCC, MSCC, ABVE/D

Vocational Analysis

Initial Referral Request (May 2011)

- To determine if the individual could perform the essential functions of his previous job.

EEOC Definition of Essential Functions

- The EEOC outlines that essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. The position exists is to perform that function;
- The number of other employees available to perform the function or among whom the performance of the function can be distributed;
- The degree of expertise or skill required to perform the function;

EEOC Definition of Essential Functions

- The actual work experience of present or past employees in the job;
- The time spent performing a function;
- The consequences of not requiring that an employee perform a function;
- The terms of a collective bargaining agreement;
- Job Descriptions that outline the essential functions.
- Reference <http://www.eeoc.gov/facts/ada17.html>

Steps to Evaluate the Essential Functions and Initial Request

1) File Review:

- medical records/restrictions;
- Interrogatory Responses;
- Depositions of the Employee
 - October 2010
 - April 2012 (taken after initial referral);
 - July 2012 (taken after initial referral);

Steps to Evaluate the Essential Functions and Initial Request

File Review (Continued)

- Deposition of City Officials
 - City Human Resources Director;
 - Assistant Parks Director.
- Job Descriptions of Parks Director dated 2007/2008 and July 2010;
- Daily Log Journal of current Parks Director (March 2012 to July 2012).

Steps to Evaluate the Essential Functions and the Initial Request

2) Comparison of the job as it is typically performed.
Resources: *Dictionary of Occupational Titles*, *Transitional Classification of Jobs*, *Revised Handbook for Analyzing Jobs*, *Occupational Outlook Handbook* and Computerized programs.

Steps to Evaluate the Essential Functions and the Initial Request

3) Meetings with the City to complete a job analysis/confirm job duties.

- City Attorney
- Human Resources D
- Director
- City Administrator
- Current Parks Director
- Assistant Parks Director
- Athletic Director
- Several Parks Department Employees.

Steps to Evaluate the Essential Functions and the Initial Request

4) An in-person evaluation was not granted. Questions were developed for Mr. Bates to ask at the deposition. The deposition outlined in detail the Employee's perception of his job duties for the job in question and his past relevant work history.

Job Description 2007/2008

- Job Description 2007/2008 (1.5 pages)

Essential Functions

- An undated Job Description from 2007/2008 gave a summary of general duties. A section denoted "Essential Job Functions" documented tasks but did not address physical demands.

Job Description 2007-2008

There were numerous essential functions listed in paragraph form and were all administrative duties, examples are below:

- Oversees budgetary operations and prepares budget;
- Promulgates formal and on the job training programs;
- Keeps records and prepares reports;
- Ability to deal effectively with citizen complaints and concerns;
- Directs and supervises parks and recreation staff.

Job Description 2007/2008

"Other Job Functions" 2007/2008

- Operate light duty vehicles, recreational and parks maintenance equipment, mobile radios, recording devices, cameras, computers, calculators, fax and other modern office equipment;
- Work outside and inside;
- Exposure to smoke, fumes, chemicals, toxic substances, noise and machinery with moving parts;
- Lift objects weighing up to 75 pounds and more;
- Intermittently sitting, standing, stooping and walking.
- "Other duties as required or deemed appropriate"

Job Description 2007/2008

Required Education 2007/2008:

- High school diploma, preferably with a degree/coursework in recreation, facilities management or related field. At least 5 years experience in a similar field.

City Parks and Recreation Local Recreation Assessment Summer 2007

- Prepared by the Tennessee Department of Environment and Conservation, Recreation Services Division, Parks and Recreation Technical Advisory Service.
- From 1997-2006 the City had significant growth in population, housing and retail.
- One recommendation was that the organizational chart was confusing to staff, and needed further definition.
- Job descriptions were revised as part of the strategic plan to clearly identify the roles in the department as well as the hierarchy and who supervised which employees and functions.

Job Description 2010

- JOB DESCRIPTION 2010 (5 pages)
- The employee was involved in the revision but it was not complete at the time of his termination.
- Essential Functions 2010
- There were 17 outlined essential functions.
- Administrative duties outlined in 2007/2008 were included. In addition the more recent job description included operation of equipment and other tasks that were preciously outlined under "Other Job Functions."

Job Description 2010

The following are highlighted physical demands listed in the Essential Functions category:

- "This is a hands-on position. Must be able and willing to actively perform manual labor associated with the operations of the park system."
- "Must have the ability to lift and move objects weighing up to 75 pounds or more."
- "Capability of interment sitting, standing, stooping, climbing, crawling and walking."
*Intermittent is not defined.
- Also noted in the job description was the requirement of passing an "intensive" medical and physical examination and drug test.

Job Description 2010

Educational Requirements:

- Bachelor's degree from an accredited college or university with major coursework in recreation administration, business administration, public administration, facilities management or related field.
- Licenses/Certificates
- Possession of Certified Parks and Recreation Professional Certification, desired
- Valid Tennessee Driver's License

Contact with the City

Pre-meeting

- Review of Job Browser Pro computerized program to access information from the *Dictionary of Occupational Titles*, *Transitional Classification of Jobs* and *The Occupational Outlook Handbook* to establish information from the resources as to typical job demands for a Parks Director prior to meeting.
- Printed sample job descriptions from Job Browser Pro for review with the City.
- Use a standardized Job Analysis format.

Resources for Job Analysis and Determination of Essential Functions

*Resources Job Browser Pro and *Job Analysis and the ADA: A Step by Step Guide* by Terry L. Blackwell, A. Dennis Conrad, and Roger O. Weed.

City Meeting/Job Analysis

- Meetings with various City Employees
- Completed Job Analysis
- The duties outlined in the 2010 job description were confirmed as requirements at the time of termination.
- The City does not have a maintenance department, carpentry work, and general maintenance falls under the Parks Department. This included building pavilions, shelves, painting, etc.
- The City confirmed operation the Parks Director uses back hoes, tractors, zero turn lawn mowers, chain saws, weed eaters, dump trucks, bob cats, dragging equipment for the baseball fields and drives a "Gator" or small truck.

Job Log from Current Parks Director

- Review of the log from the current City Parks Director confirmed administrative duties manual labor, as expected.
- Physical tasks were outlined and to a significant timeframe. The manual tasks were on a daily and weekly basis and varied. The manual duties included:
 - Weed eating;
 - Installing water filters in the ceilings;
 - Mowing grass;
 - Operating various equipment to include back hoes;
 - Construction/carpentry work.

Information from the Employee

In the deposition the Employee testified:

- His manual labor duties were at least 20-25% of his job;
- He gave similar examples of physical demands and job duties that the City had outlined;
- He was helping build a pavilion at the time of his work injury.

Restrictions

- At the time the City terminated the Employee, he had reached maximum medical improvement and was assigned the following permanent work restrictions:
Dr. K. 1/12/10:
 - No lifting over 25 pounds;
 - No climbing ladders;
 - No stooping;
 - No crawling.

Restrictions

- The Employee contended that accommodations could be made and that physical labor was not an essential function of his job as Parks Director.

Conclusion regarding Essential Functions

- There was proof from the Employer and Employee that the manual or physical demands would meet the heavy range of work. The manual labor duties were completed at a minimum of 20-25% of the workweek. In addition, the DOT outlined the duties for the physical work, such as, Landscape Specialist/Park Worker, Carpenter, Building Maintenance Repairer, etc. which encompassed part of the work duties, at least a medium work level. This further confirmed that he could not perform the essential functions of the job at the time of termination.

Second Vocational Request

Transferable Skills Analysis

Vocational/Educational Facts

- GED
- U.S. Army from 1969 until 1971, SP4 Sergeant, honorable discharge;
- One semester Draughon's Business College, 1975;
- 1993-2010, City Parks Director (began part time moved to full time in 1999)
- Part time work as a Security Guard with a security company. Dates not given but in the later years while working for the City. Went on one assignment after his 2008 work injury;
- 1992-2002 Video Store as the Store Manager;

Vocational/Educational Facts

- 1988-1993, X. City Little League, field maintenance, stocked convenience stands
- 1983-1988 Marriott Hotel, Banquet Server;
- 1975-1988 Printing Company, Silk Screen, Embossing Machine Operator and Press Operator;
- 1975-1976, Local Factory as an Industrial Cleaner;

Transferable Skills

- Computerized program TSA to assist with determining appropriate transferable skills from his jobs in recent years.
- The employee lacked a college degree, additional research to determine the viability of the transferable skills;
- Developed a list of jobs with transferable skills that were reasonable in the local economy within his physical limitations and would be possible with his educational and work experience at the time of injury.

THIRD VOCATIONAL REQUEST

Wage Loss Analysis

Wage Loss/Earning Capacity Analysis

- Develop and work with the Economist regarding wage loss.
- This request was eliminated after determination that the Employee could not return to work during the time after his work injury/MMI date. He was taken off work shortly after his MMI date.
- The Employee never had more than 2-3 months in which he would have been released, even after MMI to work. He kept being placed off work by physicians.
- The Employee testified at a pain level of 9-10 he could not work. This was explored in his deposition and determined that his subjective complaints matched the medical opinions, he never had more than 2 months he could work after his termination.
- The Employee testified after his FCE and subsequent termination he went "downhill." He described severe subjective complaints and pain.

Conclusion regarding Wage Loss

- The Employee never had more than two months that a physician would have allowed him to work, this would not be enough time for an effective job search and employment.
- Therefore, there was no wage loss due to fault of the Employer. The wage loss was due to his medical condition. It was determined that a wage loss analysis or review of transferable skills further was not required. The defense had obtained an economist and the vocational expert had met with the economist. The ultimate need for the economist was eliminated.

Additional Twist

- The injured worker had additional medical care after his placement at MMI by Dr. K. in January 2010. He was then treated by Dr. F. This included a surgical fusion at L4-L5 and L5-S1 on 9/6/11.

Resultant Permanent Restrictions by Dr. F. on 9/10/12:

- No lifting more than 40 pounds;
- Limit continuous bending;
- Limit continuous stooping;
- Limit continuous lifting;
- Limit continuous twisting;
- Avoid bending to lift;
- Avoid lifting over 20 pounds from below waist

Vocational Conclusions

Report October 2012

Conclusions

1. The Employee's job required a minimum of twenty to twenty five percent manual labor per his testimony. Both the City and Employee reported that manual labor remained an essential part of his job duties as Parks Director.
2. The Employee could not perform the full essential functions of his job as Parks Director at the time of his termination as Dr. K. had not released him to return to work.
3. The Employee cannot perform the full essential functions of his job as Parks Director with his permanent restrictions assigned by Dr. F.

Conclusions

4. The Employee has transferable work skills that will transfer to other types of work when considering the permanent restrictions of Dr. K. and Dr. F. Example jobs are outlined in the transferable skills section of this report.
5. Given the Employee's continuing medical treatment and periodic changes in restrictions, he would have had difficulty consistently performing more than sedentary work until Dr. F. placed him at maximum medical improvement in September 2012. With his lack of advanced education or competitive computer skills he would be significantly limited at the sedentary range of work.

Conclusions

6. The Employee reported significant pain levels to his treating providers. He testified that it was uncertain if he could work at a pain level of eight, but he could not work at a level nine or ten. The high pain levels at eight and above reported and his testimony would also validate his inability to work until his treatment, placement at maximum medical improvement and assignment of permanent work restrictions by Dr. F. This also corresponds with the placement off work at various intervals by physicians.
7. Mr. Employee's job opportunities will increase due to his recent release from Dr. F. on 9/10/12. This will allow more opportunities to utilize his transferable work skills.

Vocational Turn

Following this consultant's report and prior to trial, a job was developed for the Employee. The vocational expert assisted with development of a job description and confirmation that the job was within the work restrictions. It was suggested that the Employee take computer courses to increase his effectiveness in his new position. This was recommended to be part of his initial job duties. Local resources and coursework was provided to the City.

Case Outcome

Case Outcome

- The City lost on its Summary Judgment in that there was a question of fact whether the City engaged in the "interactive process" in good faith under the ADA in determining whether reasonable accommodations existed for a disabled person. Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013).
- The duty to engage in the interactive process is mandatory and "requires communication and good-faith exploration of possible accommodations." Kleiber v. Honda of America Mfg., 485 F.3d 862, 871 (6th Cir. 2007) citing 29 C.F.R. 1630.2(o)(3).

Case Outcome

- The Court held that the employee did not propose any accommodations, objectively reasonable or otherwise, but this did not obviate the City's requirement to engage in the interactive process in "good faith."
- While the failure to engage in the interactive process in good faith is not an independent violation of the ADA beyond the reasonable-accommodation analysis, the employer cannot prevail at Summary Judgment if there is a factual dispute on this issue.

Case Outcome

- The Court also ruled there was an issue of fact as to whether the City fired the employee because of his disability.
- The vocational report was significant in lowering the value of the case and after the City lost on Summary Judgment, the case was mediated and the Plaintiff was allowed to return to work with the City paying some portion of his attorney's fees.

Questions?



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