

PARKS ADMINISTRATION BACK DISABILITY ADA CLAIMS

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To be entitled to protection under the Americans with Disabilities Act (ADA), an employee must establish that he is a "qualified individual" with a disability. 42 U.S.C. § 12112(a) 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). In pertinent part, the ADA defines "disability" as "a physical or mental impairment that substantially limits one of more major life activities." As described herein, the physical impairment at issue under the ADA involved back injuries to parks department personnel.

PARKS OPERATIONS SUPERVISOR

In the case of *Howard v. City and County of Denver*, plaintiff Vernon Howard was terminated from his position as an operations supervisor in the Denver Department of Parks and Recreation. After Howard had suffered a back injury, the issue was whether his back condition constituted a disability under the Americans with Disabilities Act (ADA). If so, the subsequent issue was whether Howard's disability could be reasonably accommodated by Denver.

In his report to Denver, Howard's doctor indicated he could return to work with certain restrictions. Specifically, Howard could not engage in "frequent lifting of more than 20 pounds" as well as "no repetitive lifting, bending, or stooping." Howard's doctor further opined that "a desk job would be significantly more in the interest of Mr. Howard's continued recovery."

Based on this report, Denver considered Howard "disabled" under the ADA. More significantly, however, Denver did not consider Howard "capable of performing the essential functions of his position as Operations Supervisor, due to his medical restrictions." Moreover, Denver had no vacant clerical positions, which did not require bending and stooping. As a result, Howard's employment with Denver was terminated .

Following his termination, Howard claimed he was "ready and able" to return to his position as operations supervisor. In so doing, Howard challenged Denver's conclusion that he could no longer perform the essential functions of his position. According to Howard, "the particular physically-taxing tasks that Denver deems 'essential' are not tasks that are actually performed by Operations Supervisors." As a result, Howard claimed his termination constituted disability discrimination in violation of the ADA.

ESSENTIAL JOB FUNCTIONS

In determining whether Howard was an otherwise qualified individual with a disability under the ADA, the federal district court had to determine the "essential functions of the position of Operations Supervisor." Specifically, the court had to consider "functions identified by Denver as being essential tasks of the position" which Howard admitted he could not perform. Denver claimed these essential functions included "manual labor tasks of lifting heavy objects, operating

machinery, picking up trash and debris, cleaning bathrooms, carrying bags of supplies weighing up to 50 pounds, digging, raking, shoveling, etc.”

The federal district court acknowledged that the ADA law itself does not define the term “essential functions.” However, implementing federal regulations for the ADA have interpreted “essential functions” to include “the fundamental job duties of the employment position the individual with a disability holds or desires,” as distinguished from “marginal functions.” 29 C.F.R. § 1630.2(n)(1).

According to the federal district court, courts generally conduct a case-by-case factual inquiry in determining whether a particular job function is “essential” to include the following:

- (i) the employer's judgment as to which functions are essential;
- (ii) written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) the amount of time actually spent by employees performing the job function;
- (iv) the consequences of not requiring the incumbent to perform the function;
- (v) the work experience of past and current incumbents in the job regarding the function. 29 C.F.R. § 1630.2(n)(3)

In this particular instance, the court found “a genuine dispute of fact as to whether manual labor tasks are ‘essential’ functions of the position of Operations Supervisor, such that a trial on that matter is required.” As a result, full trial proceedings would be required to resolve this issue.

According to Howard, the essential functions for Operations Supervisor included Denver’s civil service job description which were limited to the following “supervisory duties”:

supervises working supervisors and other staff members involved in the operation, construction, etc. of City facilities; plans, assigns, and evaluates the work of staff members; prepares work records and reports; reviews, develops, and/or modifies work plans, methods, and procedures; conducts interviews, documents causes for disciplinary actions, etc.

As a result, Howard claimed the listing of “essential functions does not specifically indicate that an Operations Supervisor personally engages in manual or heavy labor.” Similarly, Howard cited the testimony of other Operations Supervisors which indicated physical, manual labor was not an essential function of their jobs. In response, Howard’s supervisor testified that Operations Supervisors would necessarily be engaged in manual labor and physical tasks while supervising and assisting their personnel.

After Howard was terminated, Denver apparently revised the Operations Supervisor job description to include among the essential functions of the job that “the incumbent performs the duties of the positions supervised.”

As noted by the federal district court, “the ADA permits an employer the discretion to establish or change the content, nature, and functions of a job, and the courts give deference to an employer's judgment as to what functions are and are not essential.” However, under the

circumstances of this particular case, the court found there was “a genuine dispute as to whether Denver expected and required operations supervisors to regularly perform manual labor tasks.” Specifically, the court found that the job expectations of Howard’s supervisor as well as the Director of the Parks Department regarding manual labor tasks did not necessarily conform to “Denver’s written job descriptions and the actual performance of the jobs by incumbents.”

As a result, the federal district court found a jury trial was necessary to resolve “the question of whether manual labor tasks were essential functions of the Operations Supervisor.”

In so doing, the court noted that Denver’s “fundamental premise” was that “no reasonable accommodation could be achieved to permit Mr. Howard to return to work with the restrictions placed upon him by his doctor on April 27, 2010.” On the other hand, if a jury concluded “manual labor tasks were not ‘essential’ to the Operations Supervisor position,” the federal district court found the ADA would require Denver to “modify the job to omit such non-essential functions to permit Mr. Howard to resume working in that position.”

Accordingly, the federal district court denied Denver’s motion for summary judgment and allowed Howard’s ADA claim to proceed to trial on the “essential functions” issue for the Operations Supervisor position in the Denver Parks and Recreation Department.

#### PARKS DIRECTOR

In the case of *Buchanan v. City of Mt. Juliet*, 2013 U.S. Dist. LEXIS 22678 (M.D. Tenn. 2/20/2013), plaintiff Dennis Buchanan was the former Director of Parks and Recreation for the City of Mt. Juliet. In 2008, Buchanan injured his back while performing manual labor with one of his crews. Buchanan’s treating physicians permitted him to return to work with the following restrictions: “lifting not to exceed fifteen (15) pounds, no repetitive lifting, no bending or stooping, and no working higher than twelve (12) feet off the ground.” Buchanan worked in his Director’s position with these restrictions for nearly a year, taking time off when the pain was most severe.

Subsequently, Buchanan had two back surgeries. Before he would be allowed to return to work, the city manager and city director of human resources (HR) told Buchanan he would have to take a functional capacity evaluation (FCE). The results of the FCE, indicated Buchanan “could perform his job, that he could lift up to twenty (20) pounds, that he was ‘fine’ to walk and climb stairs, but that he should avoid working in a stooped position.”

Following a third back surgery, Buchanan missed another three months of work. He was again cleared to work by his treating physician with “permanent work restrictions” which included “lifting not to exceed twenty-five pounds, no climbing ladders, and no stooping or crawling.” Buchanan reported for work, but he was sent home. Several days later, the city manager and the HR director met with Buchanan and expressed their concerns about the medications he was taking. The city manager told Buchanan that he would have to take another FCE. In addition, the city manager urged Buchanan to “consider whether he should apply for disability benefits, or attempt to return to work.”

In a subsequent meeting with the HR director to discuss “accommodations” and the “permanent work restrictions” specified by his treating physician, Buchanan indicated he was “unsure at that time what accommodations he would require to return to work.” Buchanan did, however, request a copy of his job description from the HR director. The job description provided to Buchanan contained a section that, among other things, required lifting up to seventy-five pounds, intermittent sitting, standing and stooping.

During this time, Buchanan had not yet been permitted to work. Buchanan subsequently underwent further medical treatment and surgery to alleviate the concerns expressed earlier by the city manager and HR director about his reliance on medication. Less than two weeks following this latest surgery, the city manager met with Buchanan and terminated his employment.

Buchanan appealed this decision to the city’s board of commissioners. The board subsequently met and affirmed the city manager’s decision to fire Buchanan. Buchanan then filed a claim in federal district court against the city alleging discrimination under the ADA.

#### PROVING DISCRIMINATION

As cited by the federal district court, the ADA makes it unlawful for an employer to "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Further, the ADA defines "discriminate" to include the failure to provide reasonable accommodation to an otherwise qualified individual with a disability, unless doing so would impose an undue hardship on the employer's business.

In this particular instance, the issue before the federal district court was whether Buchanan was “qualified to perform for the position that he held prior to his termination with reasonable accommodations.” Moreover, the court would also consider “whether the circumstances of his discharge would raise a reasonable inference that the plaintiff's disability was a determining factor in the City's decision to fire him.”

Accordingly, to establish a claim of discrimination under the ADA, Buchanan had to allege and ultimately prove the following facts:

- 1) he is disabled;
- 2) he is otherwise qualified for the position, either with or without reasonable accommodation;
- 3) he suffered an adverse employment action;
- 4) the employer knew, or had reason to know, he had a disability, and
- 5) he was discharged under circumstances that raises a reasonable inference that the plaintiff's disability was a determining factor in the adverse action taken against him.

Further, the federal court noted it would analyze Buchanan’s ADA claim under a “burden-shifting framework.” Initially, Buchanan would have the burden of alleging sufficient facts to establish a claim of discrimination based upon disability. If Buchanan did so, the burden of proof would then shift to the City to “articulate legitimate, non-discriminatory reasons for the challenged action.” If the City succeeded, the burden would shift back to Buchanan to

demonstrate “the reasons offered by the employer were not the true reasons, but a mere pretext for discrimination.”

According to the court, Buchanan could establish “a mere pretext for discrimination” by showing the City’s reasons for firing him had (1) no basis in fact; 2) did not actually motivate his termination; or 3) was insufficient to warrant the his termination. In so doing, however, Buchanan would have to “produce sufficient evidence from which a jury may reasonably reject the employer's explanation and infer discrimination.”

#### REQUIRED INTERACTIVE PROCESS

In the opinion of the court there was “little doubt from the record that the plaintiff was not qualified to perform the work required of his former position without accommodation.” The specific issue was, therefore, whether Buchanan “could have been qualified to performed the work with reasonable accommodation.” According to the court, “an employer’s failure to offer a reasonable accommodation” would fall “within the ADA's definition of discrimination.” Further, the court noted the ADA “requires that an employer engage in the interactive process with a disabled person in determining whether reasonable accommodations exist.”

The duty to engage in the interactive process is mandatory and requires communication and good-faith exploration of possible accommodations. An employer acts in "good faith" when it readily meets with the employee, discusses any reasonable accommodations, and suggests other possible positions for the employee.

However, under the circumstances of this case, the federal district court found insufficient evidence of the required discussion of reasonable accommodations. Specifically, the court noted the absence of “any discussion of the ADA's mandatory requirement to engage in the interactive process in ‘good faith’.”

Buchanan had alleged “the City did not act in ‘good faith’ from January 14, 2010 when he reported for work but was sent home and March 26, 2010, when the City Manager fired him.” The federal district court agreed. Under the circumstances of this case, in the opinion of the court, “a reasonable person could conclude “the City did not engage in the interactive process with the plaintiff in ‘good faith’ as required under the ADA.”

[I]n the two-plus months from January 14, 2010, when the plaintiff reported to work but was sent home, until March 26, 2010, when the City Manager terminated the plaintiff's employment, the City engaged in the interactive process just once with the plaintiff, *i.e.*, on January 27, 2010.

However, in performing a reasonable-accommodation analysis under the ADA, the court noted that it was Buchanan’s “duty to propose an accommodation that is objectively reasonable to employers generally.” While Buchanan had not proposed any accommodations, the court found Buchanan’s “failure to do so did not obviate the City's requirement to engage in the interactive process in ‘good faith’.”

Accordingly, the court found the City could not have Buchanan's ADA discrimination claim effectively dismissed prior to trial on a motion for summary judgment because there was "a genuine dispute as to whether the employer engaged in 'good faith' in the interactive process."

#### ALTERED JOB DESCRIPTION

The federal district court also considered Buchanan's claim that "his job description was altered in September 2009 while he was out of work due to his injury, and that the changes included lifting and stooping requirements did not exist in the earlier 2008 version of his job description." According to the court, there was "some uncertainty as to which version of the job description actually was in effect during the time in question." Specifically, there was a question as to "when the version that the plaintiff claims was in effect was changed to reflect 'other job functions' of lifting 75 pounds or more, and intermittent sitting, standing, stooping and walking."

In addition, the court took note of the information in a letter from the city manager issued a week after Buchanan advising him of his right to appeal. As described by the court, the letter purportedly showed that the city manager had made the following statements to Buchanan:

- 1) that he had "been running the park for 9 or ten months and I can't continue doing that";
- 2) that he thought the plaintiff was "going the disability route 3 months ago";
- and 3) that he "had a lot of people with a lot of title under their names to give me instructions on this."

In light of such evidence, the federal district court found sufficient evidence on the pretrial record that a jury should be allowed to consider "whether the City fired the plaintiff because of his disability." As a result, the federal district court denied the City's motion for summary judgment to dismiss Buchanan's ADA claims without a trial.

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