

ADA CLAIMANTS MUST BE QUALIFIED FOR SWIM PROGRAMS

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To establish a claim for discrimination on the basis of disability under the Americans with Disabilities Act (ADA), an individual must establish that he/she is still otherwise qualified to perform the essential functions of a position or program, with or without reasonable accommodations. Under the ADA, requested accommodations would not be considered reasonable if requested modifications would effect a fundamental change in the essential functions of a position or program. As illustrated by the cases described herein, a certain level of swimming proficiency might be considered essential qualifications for an aquatics instructor or a competitive swimmer. As a result, disqualification from an aquatics position or a swim program due to the lack of a required level of swimming proficiency would not constitute prohibited discrimination "on the basis of disability" under the ADA.

ESSENTIAL SWIM TEST

In the case of *Thompson v. Chicago Park District* (N.D. Ill. 4/8/2011), plaintiff Joe Thompson, Sr., sued his former employer, the Chicago Park District, alleging the Park District violated his rights under the Americans with Disabilities Act (ADA).

Thompson began working for the Park District in 1979 as a seasonal lifeguard. The Park District promoted Thompson to a year-round lifeguard in 1989, an hourly natatorium instructor in 1997, and, finally, a monthly natatorium instructor in 2001. In the late 1980s or early 1990s, Thompson was diagnosed as having diabetes. Due to the illness, Thompson at times experienced blurred vision, difficulty reading, joint pain, dizziness, and fatigue.

As a monthly natatorium instructor, Thompson's primary responsibilities were to plan, organize and conduct aquatics programs at Park District beaches and pools and supervise a staff of lifeguards performing beach and pool safety activities. The Park District administered swim tests to monthly natatorium instructors and other aquatics employees. To pass the test, an employee had to swim two hundred yards in three and a half minutes or less.

Between 1979 and 2005, Thompson took and passed the swim test every year, though he sometimes required more than one attempt. In February 2006, he failed the test. Thompson then advised Park District Manager of Beaches and Pools Janet McDonough and human resources manager Mary Saieva that he could not pass the test due to joint pain.

In May 2006, the Park District received a note from Thompson's physician, requesting that Thompson be "[e]xcused from swimming test" on May 13, 2006 and expressing uncertainty "as to when he will be ready in the future." Based on the note, the Park District excused Thompson from any further swim tests in 2006.

According to Thompson, he and other monthly natatorium instructors repeatedly requested permission from the Park District to swim an untimed quarter-mile in lieu of passing the swim test. The Park District refused all such requests.

SEPTEMBER 2012 LAW REVIEW

In June 2006, the Park District received a letter from Thompson's physician restricting Thompson from "certain activities of the left arm including heavy lifting, swimming or other activities requiring forced extension of the elbow" pending an orthopedic consultation.

In early 2007, Thompson suffered an injury when he fell on some ice. After the accident, the Park District received two notes from Thompson's physicians: one indicating that Thompson "may return to work" on February 13, 2007 and the other requesting that he be "excused from [the] swim test" scheduled for that date. On February 16, the Park District received a letter from Thompson's physician stating:

Mr. Thompson has been a patient in our offices for the last eighteen years and currently is suffering from multiple musculoskeletal complaints which make swimming activities very painful. Please excuse him from such activities for the foreseeable future.

The Park District did not allow Thompson to work after receiving the letter.

In April 2007, Thompson submitted a medical certification for leave pursuant to the Family and Medical Leave Act. The certification affirmed that Thompson was unable "to perform the functions of his position." The Park District granted Thompson twelve weeks of leave from April 7, 2007 to June 28, 2007. Near the end of the leave period, Thompson's physician sent the Park District a letter stating:

Mr. Thompson has been a patient in our offices for the last eighteen years and currently is suffering from multiple musculoskeletal complaints with recent MRI of his left shoulder demonstrating supraspinatus tendinopathy with a probable partial tear, with possible degenerative tear of the anterior-inferior glenoid rim and degenerative changes of the AC joint... I am recommending a leave of absence for Mr. Thompson for further medical evaluation and treatment. At this time I expect this leave to last one year.

Thompson also requested in writing from the Park District "a leave of absence for further evaluation and treatment" that he expected "to last for one year." The Park District granted Thompson a leave of absence from June 29, 2007 through October 1, 2007 in accordance with its leave policy.

The letter granting the leave informed Thompson: "In order to return to work you must bring evidence from your physician of your fitness to return to full duty. Please submit this evidence to Human Resources prior to returning." The letter also cautioned Thompson that he would need to request a longer leave if he was "unable to return to full duties on October 1, 2007."

In September 2007, Thompson's physician sent the Park District a letter indicating that Thompson "continue[d] to suffer from multiple musculoskeletal complaints," "a mixed polyneuropathy of the left upper extremity," "a left cubital tunnel syndrome," and "a motor neuropathy affecting his right leg." Thompson's physician "continue[d] to recommend a leave of absence for Mr. Thompson," which he expected "to last until the spring of 2008."

The Park District granted Thompson another leave of absence from October 2, 2007 through April 6, 2008. The Park District again reminded Thompson that, to return to work, he would need evidence from his physician of his ability to return to full duty. The Park District also cautioned Thompson that failure to return from the leave on April 7 could render him "subject to disciplinary action, including discharge."

While on leave, Thompson informed the Park District's human resources manager (Saieva) on several occasions that he wanted to return to work. According to Thompson, Saieva instructed him that he could return as a monthly natatorium instructor only if he obtained a release to full duty from his physician and passed the swim test. Thompson testified that he also contacted human resources manager Mary Ann Rowland to seek an accommodation, but that Rowland did not return his calls. On April 3, 2008, Rowland sent Thompson a letter that stated:

This is a letter to remind you that your Leave of Absence will expire on April 7, 2008. . . . If you fail to return from your leave by April 7, 2008, your employment rights will be terminated.

In order to return to work, you need to successfully pass the swim skills test and the American Red Cross Lifeguard Challenge requirements; a release to full duty from your doctor is also required (or our doctor). Please submit this documentation to Human Resources prior to returning.

By April 7, 2008, Thompson did not submit any documentation from his doctor indicating that he could return to work in any capacity. He also did not pass, or attempt to pass, the swim test. On April 7, 2008, the Park District terminated his employment. In response, Thompson sued the Park District in federal district court alleging the Park District had discharged him in violation of the ADA.

INABILITY TO PERFORM

As described by the federal district court, "[t]he version of the ADA that was in effect at the time of Thompson's termination prohibited covered employers from "discriminating against a qualified individual with a disability because of the disability of such individual." Further, the court noted that the plaintiff "bears the burden of proof on the issue of whether he is a 'qualified individual'." As cited by the court, the ADA "defined a qualified individual with a disability as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

In determining whether a person can perform the essential functions of the position, courts give consideration to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. 42 U.S.C. § 12111(8) (2008).

According to the federal district court, Thompson was required to allege the following to establish the basic elements his discrimination claim (i.e., prima facie case) that he was discharged in violation of the ADA:

(1) he is disabled under the ADA, (2) he was meeting his employer's legitimate employment expectations, (3) he suffered an adverse employment action, and (4) similarly situated employees without a disability were treated more favorably.

If Thompson alleged facts establishing a prima facie case, the court acknowledged that “the burden shifts to the Park District to articulate a legitimate, nondiscriminatory reason for the discharge.” Further, to avoid having his claim effectively dismissed on a motion of summary judgment, Thompson would have to allege sufficient facts which, if proven at trial, would establish a claim for discrimination in violation of the ADA.

In this particular instance, the Park District conceded that Thompson might have had a disability within the context of the ADA. The Park District, however, claimed Thompson could not perform “the essential functions of his position” as required by the ADA. Moreover, the Park District contended that Thompson had not “satisfied the Park District's legitimate employment expectations at the time of his discharge.” The federal district court agreed with the Park District. In so doing, the court noted that Thompson had conceded “swimming is an essential function of the monthly natatorium instructor position.”

Accordingly, in the opinion of the federal district court, “Thompson has not provided evidence from which a reasonable jury could find that, at the relevant time, he could perform all the essential functions of the monthly natatorium instructor position with or without accommodation”:

Beginning in February 2007, Dr. Stannard [Thompson's physician] restricted Thompson from all swimming activities. Dr. Stannard subsequently prohibited Thompson from working at all due to various medical conditions. As of April 7, 2008, when Thompson's leave expired, Dr. Stannard had not released him to work in any capacity. Thompson offers no evidence suggesting that he could swim or return to work at the time of his discharge, with or without an accommodation. "Not working is not a means to perform the job's essential functions."

Similarly, the federal district court found Thompson had failed to “provide evidence from which a reasonable jury could find that he was able to meet the Park District's legitimate employment expectations at the time of his discharge.”

Thompson had challenged “the Park District's requirement that he complete the swim test without modification.” The federal district court, however, noted that Thompson had the burden of demonstrating that “he was a ‘qualified individual’ within the meaning of the ADA and was able to meet the Park District's legitimate employment expectations at the time of his discharge.” However, under the circumstances of this particular case, the federal district court noted: “Evidence that an employee cannot work contradicts any claim that he was performing to his employer's legitimate expectations.”

In light of his inability to work, let alone perform the essential functions of his position, the federal district court concluded no reasonable jury could find that Thompson was an otherwise qualified individual with a disability who was discharged on the basis of his disability in violation of the ADA. The federal district court, therefore, granted the Park District's motion for summary judgment and entered judgment in favor of the Park District.

HIGH ANXIETY

In the case of *S.S. v. Whitesboro Central School District*, 2012 U.S. Dist. LEXIS 11727 (N.D. N.Y. 1/31/2012), plaintiffs claimed the defendant school district had “violated her rights under the Americans with Disabilities Act of 1990 (ADA) by failing, during high school swim team practices, to make proper accommodations for her mental disability, which caused her to experience severe unannounced anxiety attacks in public places.”

S.S., who was born in January of 1995, was diagnosed in 2005 with a mental disorder, which causes her to suffer severe anxiety attacks in public. S.S. has been treated by a psychologist and psychiatrist for this anxiety. When S.S. enrolled at Whitesboro Senior High School for the 2009-2010 school year, her parents informed the school of S.S.'s condition and gave the school instructions regarding what to do when she suffered an anxiety attack. S.S. "enrolled" in, and "did join and/or make," the school's swim team for the 2009-2010 school year.

During practice, Heather Cole (the swim team coach) would require the athletes to stay in the swimming pool for "extended periods of time." However, severe onsets of anxiety would trigger in S.S. thoughts of drowning, which prevented her from being able to stay in the pool for such periods of time. As a result, she would need to exit the pool during practice to ease her anxiety.

According to S.S., on "numerous occasions," the school district and the swim coach were "put on verbal notice" that S.S. needed to exit the pool during practices in order to ease her anxiety. However, when S.S. exited the pool during practice, she alleged she was "verbally attacked" by Cole who told her on numerous occasions that, if she did not get back in the pool, she would be kicked off the swim team. S.S. claimed one or more other swim team members with disabilities were able to exit the pool during practice, without being reprimanded and/or threatened of being kicked off the swim team.

In addition to experiencing anxiety attacks during swim practice, S.S. experienced severe anxiety attacks at swimming events. In particular, she experienced a severe anxiety attack at a time trial on or about September 10, 2009, which caused her to get out of the pool and run to the restroom to ease her anxiety. In response, Cole allegedly told S.S.'s guardians that "she did not get paid to baby-sit," and that S.S. was in jeopardy of being cut from the swimming team if she kept getting out of the water.

S.S. also experienced a severe anxiety attack at a swim meet on or about October 8, 2009, which caused her to lose her self-composure. In response, allegedly Cole told S.S., "[i]f you cannot compose yourself, go out with your Dad." On numerous occasions, Cole said she could tell when S.S. was “faking anxiety, as opposed to having real attack.”

REASONABLE ACCOMMODATIONS

In her complaint, S.S. alleged that Cole did not attempt to accommodate S.S.'s mental disorder. As a result of Cole's actions, S.S. claimed her "disability was exacerbated to such an extent that she was unable to attend school for the rest of the school's fall semester." Moreover, S.S. claimed school district officials did "virtually nothing" to ensure S.S.'s mental disorder was accommodated properly, despite "repeated notice" about the "marked toll" the situation had taken on S.S.'s academic success and emotional state. Accordingly, S.S. requested the court to issue "[a]n order enjoining defendants from engaging in the wrongful practices alleged herein and to provide plaintiff with a reasonable accommodation."

In response, defendants Cole and the school district argued S.S.'s ADA claim should be dismissed because S.S. had failed to demonstrate that "it was possible to make reasonable accommodations for Plaintiff S.S.'s disability."

As noted by the court, to assert a claim under the ADA, S.S. had to allege and ultimately demonstrate that (1) she has a disability for purposes of the ADA; (2) she is otherwise qualified for a benefit that she was denied; and (3) she was denied that benefit because of her disability. Further, the court noted that such "otherwise-qualified individuals must be given reasonable accommodations." Moreover, as cited by the court, an "accommodation will be deemed unreasonable if it would (1) fundamentally alter the nature of the service, program, or activity, or (2) impose an undue hardship on the operation of the program." 28 C.F.R. § § 35.130(b)(7), 41.53.

Under the circumstances of this case, the federal appeals court found S.S. had failed to allege sufficient facts to suggest that "Defendants could have made reasonable accommodation for Plaintiff S.S.'s disability." Specifically, the court found S.S. could not show that "she was otherwise qualified to meet all of the swim team program's requirements." In so doing, the court acknowledged that "[a]n essential requirement of a swim team participation is that the swimmer must be able to swim when called upon to do so." In this particular instance, although S.S. was able to swim, the federal district court found S.S. was "unable to remain in the pool or enter the pool when called upon by the swim team coach":

S.S. needed to exit the pool multiple times during swim practices... Plaintiff S.S. needed to exit the pool during two swim team events, a time trial and a swim meet. These incidents substantially interfered with Plaintiff S.S.'s ability to swim when called upon to do so.

Further, the court found S.S. had not alleged any facts which would suggest that defendants "could have made reasonable accommodations for Plaintiff S.S.'s disability." On the contrary, under the circumstances of this case, the court found "[t]here is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions."

Plaintiffs allege that the anxiety attacks that Plaintiff S.S. experienced in swimming pools induced in her a fear of drowning. Plaintiffs further allege that, due to this fear, they requested the accommodation of permitting Plaintiff S.S. to exit the pool for indeterminate periods of time—on unannounced occasions

during practices and swim competitions—to calm her nerves, without being kicked off of the team.

Because “one of the essential requirements of swim team members is the ability to enter, and remain in, the pool when required by the coach during practices and competitions,” the court found “[t]o require otherwise would fundamentally change the nature of the swim team and thus be unreasonable.” In so doing, the court noted that there were no facts suggesting that “there was anything about Whitesboro High School Girls' Swim Team practices and competitions that differs from typical such practices and competitions.” On the contrary, the court found swim teams and coaches typically require swimmers to:

(1) remain in the pool for extended periods of time during practice to gain stamina and endurance, and (2) enter, and remain in, the pool at the command of a starter during competitions, subjecting themselves to disqualification if they fail to do so.

Moreover, in this particular instance, the court found the following accommodations requested by S.S. had already been provided by defendants:

Plaintiffs allege that the accommodation they requested of Defendants was that Plaintiff S.S. be permitted to exit the pool for indeterminate periods of time—on unannounced occasions during practices and swim competitions—to calm her nerves, without being kicked off of the team. Similarly, Plaintiffs argue in their opposition papers that the accommodation sought was simply to allow Plaintiff S.S. to get out of the pool in the event of an anxiety episode.

In so doing, the court noted that there were no alleged facts “suggesting that there was any occasion when Plaintiff S.S. was not allowed to get out of the pool” when she experienced an anxiety attack. Further, despite S.S.’s claims that she “experienced criticism and threats of being kicked off the team” whenever she got out of the pool, the court found S.S. had never been “kicked off the team.” On the contrary, the court found S.S. had “quit the team when she left school at some point during the semester.”

Having found that S.S. had been provided requested accommodations and/or she was not otherwise qualified to perform the essential functions of a swim team member (i.e., staying in the pool), the federal district court concluded that S.S. had failed allege sufficient facts to support a claim of discrimination under the ADA. As a result, the federal district court dismissed S.S.’s lawsuit.

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