

Clearly Defining the Essential Functions of the Job Can Make or Break An ADA Case

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As a recent federal appellate decision confirmed, the Americans with Disabilities Act does not require employers to always accommodate a disabled employee. Instead, it is the employee's burden to first show that he or she can perform the essential functions of the job with said accommodation. Alternatively, if the employee cannot perform the essential functions of the job, he or she may seek, as a reasonable accommodation, a reassignment to a vacant position as long as the employee is qualified for that position. In both cases, the employer is relieved of the accommodation requirement if it can show an undue hardship would result. It was these essential function and vacancy issues that were the focus of the First Circuit's opinion in [*Lang v. Wal-Mart Stores*](#).

Background

In *Lang*, the plaintiff, a female employee, did not dispute that one of the essential functions of her job was to *manually lift* 60 pounds of merchandise or supplies. After becoming pregnant, the plaintiff's doctor advised her not to lift anything over 25 pounds, but she did not provide Wal-Mart with a doctor's note or request any accommodation. She later asked to use a forklift for unloading or for a transfer to a less-demanding position – two requests that Wal-Mart denied without engaging in the ADA-required “interactive process,” because the pregnancy was not by itself a disability that required an accommodation and that if they did it for her, they'd have to do it for everyone else. Wal-Mart did, however, permit the plaintiff to take a leave of absence through the end of her pregnancy. After she gave birth and her maternity leave ended, she returned to work, but her employment eventually ended after a series of ongoing disputes regarding additional leave and accommodation requests.

The First Circuit Affirms the Dismissal of Plaintiff's Claims

The plaintiff claimed among other things, that Wal-Mart failed to reasonably accommodate her disability in violation of the ADA. She lost at the district court level and asked the First Circuit Court of Appeals to reverse, but it bluntly affirmed for three reasons.

First, the plaintiff could not perform an essential function of her job (manual lifting of 60 pounds) with or without a reasonable accommodation (a fact she plainly and repeatedly admitted). A reasonable accommodation is not one that *excuses* you from an essential function; it is one that *allows* you to perform that function. And that was the problem here for plaintiff: the requested accommodation – the forklift – would have excused her from performing an essential function – *manual* lifting.

Second, while the ADA identifies transfer to a vacant position as a possible reasonable accommodation, the plaintiff never provided sufficient evidence that any such vacancy existed.

Third, whether or not Wal-Mart failed to engage in the “interactive process,” was irrelevant, because there was nothing in the factual record showing that plaintiff could perform the essential functions of her job with or without a reasonable accommodation. In other words, this simple failure, by itself, did not result in a violation of the ADA under these particular circumstances here.

Takeaways

- Some of our readers paying close attention to the Background section above may have asked themselves how the plaintiff got this far when she never showed she was “disabled” in the first place. And they'd be right. While the factual record was not 100% clear on this point, it appears that plaintiff pointed to the pregnancy by itself as the impairment needing the accommodation, but as many of our readers also know, a pregnancy by itself is not considered a disability. The First Circuit sidestepped this issue by assuming without deciding that plaintiff's pregnancy was an ADA-protected disability. We are not necessarily comfortable making that assumption at this point, but we will use this as an

opportunity to point out three things.

- Pregnancy-*related* impairments (like hypertension or gestational diabetes), even temporary ones, typically now qualify as disabilities under the ADA, and therefore will require employers to make an appropriate accommodation.
 - Separately, but importantly, while nothing of the sort happened here, employers may also risk a violation of the Pregnancy Discrimination Act by failing to accommodate pregnant workers where they accommodate others similar in their inability to work. The EEOC explains this argument in further detail in [its guidance](#), which it updated in light of the Supreme Court's *Young v. UPS* decision. (The Second Circuit also opined on this issue recently and we'll have more on that to come soon.)
 - Further, state and local governments (like in NYC) with increasing frequency have started to explicitly require employers to accommodate pregnant workers.
- While Wal-Mart may not have engaged in any interactive process with the plaintiff because she did not disclose a disability, most employers will not face circumstances as employer-friendly. Given the recent amendments to ADA, most impairments, even temporary ones, will typically now qualify as a "disability," and therefore, employers are well advised to engage in the interactive process to determine whether a reasonable accommodation exists. In fact, it's this very process that often reveals whether a reasonable accommodation does in fact exist, and employers take on real risk when they fail to engage the employee.
 - If this case confirms one thing for employers, it is the importance of spending the time and resources necessary to craft job descriptions that accurately and clearly define the position's essential functions. Doing so, and doing it well, can as the title of this post suggests, make or break your case.

Authors