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JOB FUNCTIONS

Texas tales of the ADA: It's hot. Really hot. Crazy hot.

by Michael P. Maslanka,
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As I write this, we are in the midst of what seems like a never-ending heat wave. It's the worst summer in my nearly 40 years in the Lone Star State. How does the Americans with Disabilities Act (ADA) come into play? Some of us must work outdoors in the heat. To see how this reality interacts with the ADA, read on.

Forget disability—embrace 'qualified'

Once upon a time, the main defense to an ADA lawsuit was that an individual wasn't disabled within the meaning of the law. Simple. Cases got mowed down all the time thanks to three U.S. Supreme Court decisions that required courts to give a cramped interpretation to the idea of "disability." Congress changed the ADA back in 2008, overruled the three cases, and required courts to give an expansive interpretation to the meaning of "disabled." It is now very easy for an individual to meet the disability threshold.

But wars are fought on different fronts, and the new front is that the individual—despite being covered by the ADA—isn't qualified for the job. How do you determine whether an employee or job applicant is qualified? You figure out the job's "essential functions." If the individual can meet them, with or without a reasonable accommodation, he is protected from suffering an adverse employment action because of the disability. If not, the claim gets tossed.

Meet Mr. Jiles

Quentin Jiles was a delivery driver for Wright Medical Technology in Houston. He suffers from uncontrolled hypertension. His doctor said he couldn't work overtime or in heat exceeding 90 degrees ("[I don't want him unloading] a bunch of stuff in the heat").

Jiles was fired because he ran out of leave and the company didn't think it could place him in any other position. He sued for wrongful termination under the ADA. The company asked for pretrial dismissal of the claim.

Who decides what is essential function?

To determine whether to grant the dismissal request, the court had to figure out the essential functions for Jiles' delivery job. The court deadpanned: "It appears that everyone agrees that it is hot in Houston in August." But it then had to figure out whether working in the heat was an essential job function.

On the one hand, courts are required to give deference to the employer's

judgment on which functions are essential. But that isn't the end of the story. What do the documents say?

Jiles' job description didn't list working in the heat as an essential function. In addition, the attached "work capacity profile" stated that the job didn't require "exposure to marked changes in temperature and humidity."

Wright Medical argued that delivering items in Houston in August does *not* require marked changes in temperature. As a company rep testified: "It is hot and it stays hot." But Jiles testified that his delivery truck was air-conditioned. And his doctor testified as follows:

> Q: Did you discuss the restrictions that you presented to Wright Medical with Mr. Jiles?
>
> A: Yes. As I—as I recall, we told him that he could get back to work with his—the uh, profile that they had on the form, that he should be able to handle that easily, but I recommended against the overtime . . . because we didn't want him in excessive heat, but really felt like this was not an issue with his operating in an air-conditioned cab and in the buildings and things where there'd be very little heat exposure.

And the winner is . . .

I think the judge was prepared to say there was a legitimate disagreement over whether working in the heat was an essential job function. And that is why we have juries to make those types of decisions.

Unfortunately for Jiles, the inability to perform any single essential function meant he was unqualified for the delivery job. Both the job description and a follow-up letter to the employee stated that working overtime was an essential function. The evidence also showed that other drivers had to work overtime and that doing so was not an isolated occurrence.

What about accommodation for working overtime?

The court held it was Jiles' duty to come up with an accommodation suggestion. The judge laid it on the line:

> It is the employee's responsibility to notify the employer of the limitations (arising from the disability) and suggest a reasonable accommodation. . . . [W]hile reassignment to a different job may be a reasonable accommodation, [it is the employee's burden to show an available position exists].

The court went on to note that making other employees work the overtime that would have been assigned to Jiles isn't a reasonable accommodation under the Equal Employment Opportunity Commission's (EEOC) regulations. Therefore, the only accommodation would have been to relieve him of the overtime duties, which is no accommodation at all. *Jiles v. Wright Medical Technology Inc.* (S.D. Tex. 2018).

On-time delivery

My mother used to say, "The more something goes without saying, the more it needs to be said." True in life, true in writing job descriptions. If you have employees who work outside, consider adding language to your job descriptions making working in the heat an essential function.

Be careful, though: Don't cram every job task into the essential function box. If everything is an essential function, then nothing is one. Make sure, as Wright Medical did in listing overtime as an essential function, that the facts back up your assertions.

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LITIGATION

San Antonio court reminds HR pros, lawyers of new discovery rules

by Michael P. Maslanka
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It's important for HR professionals and their attorneys to keep in mind that the federal court rules for discovery (pretrial fact-finding) changed a few years ago. The goal was to limit the amount of discovery. For a case study on how the changes are working (or not working, as we will see), read on.

Employee loses job, gets another

Abel Mesa was terminated by CPS Energy, which is owned by the city of San Antonio. He sued, claiming he was fired because of his association with a disabled person. He later got a job with Aldez Contractors.

Before trial, CPS sent a document called "Deposition by Written Questions" to Aldez, which required the company to fork over copies of all personnel records involving Mesa, including payroll, medical, and employee benefits information. In response, the employee's lawyers objected on grounds that the request was overly broad.

That was then, this is now

The dispute landed on the desk of a judge who took both sides to task for failing to follow the discovery rules promulgated in 2015:

Tough talk for employer. CPA said the information was needed because it could lead to other matters that may have a bearing on Mesa's case. The judge disagreed. Under the revised federal rules, information is discoverable only "if it is relevant to any party's claim or defense and is proportional to the needs of the case." The language the employer used to argue its case—that the sought-after information was "reasonably calculated to lead to the discovery of admissible evidence"—had been deleted in 2015.

Tough talk for employee. The rule for objections also changed in 2015. As a result, Mesa's lawyers couldn't simply state that CPS's request was overly broad. They had to object with specificity, which they did not do.

The judge understandably stated: "Counsel should delete their old form files."

That's all, folks

Applying the 2015 rules, the court stated that only the following records were relevant to CPS's case and obtainable through discovery:

- Documents referencing any statements Mesa made to Aldez about why he left CPS;
- Documents containing any statements he made about disabilities; and
- Wage and benefits information.

That's all, folks. *Mesa v. City of San Antonio* (W.D. Tex. 2018).

Bottom line

In litigation, it's always a good idea to find out what your former employee said to his new employer about your company and learn about his new wages and benefits (after all, he has a duty to mitigate damages). But here is an idea: See if he will sign an authorization directing his new employer to turn over the stuff. (The *Mesa* opinion doesn't say whether

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WORKPLACE TRENDS

Research finds people of color less likely to get requested pay raises. Research from compensation data and software provider PayScale, Inc., shows that people of color were less likely than white men to have received a raise when they asked for one. The research, announced in June, found women of color were 19% less likely to have received a raise and men of color were 25% less likely. The research also notes that no single gender or racial/ethnic group was more likely to have asked for a raise than any other group. The most common justification for denying a raise was budgetary constraints (49%). Just 22% of employees who heard that rationale actually believed it. Of those who said they didn't ask for a raise, 30% reported their reason for not asking was that they received a raise before they felt the need to ask for one.

Promotions without pay raises found to be common. New research from staffing firm OfficeTeam finds that 39% of HR managers said their company commonly offers employees promotions without salary increases. That's a 17-point jump from a similar survey in 2011. The new research also determined that 64% of workers reported they would be willing to accept an advanced title that doesn't include a raise, up from 55% in 2011. The study found that more male employees (72%) are open to accepting a promotion without a salary increase than women (55%). Workers ages 18 to 34 are most willing to take a new title that doesn't include a raise.

Report explores strain on caregivers. A report from employee benefits provider Unum details how caregiving responsibilities can take emotional, physical, and financial tolls on caregivers and result in lower productivity and engagement at work. The report, "Adult Caregiving: Generational considerations for America's workforce," details findings from research fielded among caregivers of adult family members among Baby Boomers, Gen Xers, and Millennials. The report notes that what caregivers want most from their employers is flexible schedules, employer-paid family leave, and the ability to work from home.

Study finds organizations' confidence exceeds preparedness. Deloitte Global's 2018 crisis management survey finds that nearly 60% of organizations surveyed believe they face more crises today than they did 10 years ago, but many overestimate their ability to respond. An announcement from Deloitte says the study uncovered gaps between a company's confidence that it can respond to crises and its level of preparedness. The gap is even more evident when evaluating whether organizations have conducted simulation exercises to test their preparedness. ✤

JUST ASK JACOB

Don't ask about prescription meds without reasonable belief, objective evidence

by Jacob M. Monty
Monty & Ramirez, LLP

Q *Is it legal to ask employees what prescription medications they use and whether the medications may affect their behavior or cause a safety issue?*

A In general, no. It could be deemed a disability-related inquiry and therefore discriminatory under the Americans with Disabilities Act Amendments Act (ADAAA). However, employers can make "disability-related inquiries" when they have a reasonable belief—based on objective evidence—that (1) the employee's ability to perform her essential job functions is being impaired by her consumption of the medication or (2) she will pose a direct threat because of a medical condition. For example, airlines can ask pilots if they are taking any prescription medications that will impair their ability to fly. The objective evidence can include observing symptoms or receiving reliable information by a credible third party. If you have the objective evidence (with or without information from the employee), it's possible that you have a duty under the ADAAA to engage in the interactive process to determine whether a reasonable accommodation is necessary for the employee. ADAAA-related issues are very fact-intensive and nuanced, so it would be best to consult an attorney with expertise in this area.

Q *We are reducing staff because of a decrease in annual revenue. A total of 10 positions will be eliminated. For one of those employees, however, we are considering reducing her salary instead of terminating her. Are we legally allowed to do that?*

A It would be possible to reduce the employee's salary, but take care to consider the implications on overtime. If your employee is currently exempt from overtime, a reduction in her salary may result in a loss of that exemption. Provided she never drops below $455 per week and her duties otherwise continue to qualify for an overtime exemption, you can reduce her salary and retain the exemption so long as the reduction is due to a long-term business need and not related to the quantity or quality of her work. It's also important to be sure that retention of this particular employee (versus the nine others you are terminating) is based on legitimate nondiscriminatory purposes.

Q *We have an employee who is about to turn 65. He has been with the company about 10 years. He is very negative about the organization and has created the same negativity in his two direct reports. In all honesty, we would like for him to retire because of the toxic attitude. May we ask him about his retirement plans?*

A The short answer is no. Asking someone over the age of 40 about their retirement plans could be evidence of discrimination under the Age Discrimination in Employment Act (ADEA). If his negativity and toxic attitude hinder his work performance or violate company policies, the solution is to put him through the normal disciplinary/counseling process identified in your handbook and used with everyone else. If his conduct rises to a level to warrant termination, you are free to offer him the opportunity to resign (likely meaning retire) in lieu of termination so long as that is consistent with what you would do in similar circumstances with other employees.

Q *We currently have two employees who are breastfeeding. Do we have to provide two separate lactation rooms?*

A Each employee must be provided with a private place, shielded from view and free from any intrusion from others, for expressing breast milk until the child's first birthday. The space cannot be a bathroom. It doesn't have to be dedicated only to the mother's use, but it has to be available when she needs it. This likely means that if you have only one room for this purpose, it would need to be partitioned off in some way to allow both to use it, in private, at the same time if necessary. Note that these requirements don't apply to employers with fewer than 50 employees if the requirements would impose an undue hardship by causing significant difficulty or expense. That is a high bar to meet, and it would be best for you to consult with an attorney with expertise in this area if you have any questions about the specific nature of the space you have available.

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that was done.) The last thing you want is to get your former employee (now plaintiff) fired from his new job. And the new bosses can get all twisted up when they receive some legal-looking documents. A simple authorization doesn't have the same impact.

Also, think about deposing your former employee before requesting the documents. If the individual is now employed, I often start the deposition by focusing on his new employment: "How do you like it at the new company? Who is you manager? Do you believe you have a future with the company?" He'll be reluctant to say anything negative. Oftentimes, the new job is actually a good fit, and the future is rosy. If so, damages for my client are minimized.

Finally, get used to obtaining less information in discovery, not more.

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DATA SECURITY

Protecting data from departing employees (or why I love auditing and access restrictions)

by William E. Hammel
Constangy, Brooks, Smith & Prophete, LLP

Countless formal and informal studies show that most employees retain at least some company data when they leave a job. The reasons vary from the benign (such as when an employee inadvertently keeps a work flash drive) to the more malicious (such as in the case of an employee's deliberate theft of company trade secrets for use at a new job). Motivation matters only so much, though, because even the innocent retention of data can have far-reaching consequences.

Threats from all sides

Much like a seal swimming through shark-infested waters, threats can come from any direction. There are the obvious ones, such as those involved when a new competitor hires your company's best employees and encourages them to bring "their work with them." The threats can also be more indirect. For example, an employee who copies large swaths of data for use as evidence to support a good-faith wrongful termination claim against the company can still, under the right circumstances, trigger a reportable data breach or a breach of the company's contractual obligations to a third party.

The threats can even arise from third parties that come into contact with your data. A departing employee may back up her work computer to a personal cloud storage account and accidently change the parent folder's permissions to "public." Not only can this lead to the loss of valuable intellectual property—in the unfortunate event the publicly shared folder included protected data—a state or federal agency may also use the company's inability to detect or prevent the exfiltration (removal) of sensitive data as a basis to issue fines.

The threats can also be opportunistic. An employee with access to payroll and benefits databases who is working out the final weeks of a reduction-in-force notice period may decide to save her coworkers' personal information for later use in the event she fails to find subsequent employment, becomes financially desperate, and determines that "borrowing" her former coworkers' tax refunds is a financial cure-all. Perhaps this employee also works in IT and knows where to go on the Internet to sell her coworkers' identities. Whether arising in the context of a private lawsuit filed by the affected persons, a government investigation, or a shareholder derivative lawsuit, a fact finder may determine that the offending employee shouldn't have had access to the data in the first place.

The threats can even come from inaction. For example, when reviewing the computer of a technical employee recently terminated for performance, a company may discover that the employee often backed up data to a flash drive to work on weekends. In the event he doesn't respond to requests to return or delete data retained in that fashion, it may reasonably determine that he doesn't pose a significant enough "threat" to justify the costs of litigation. While certainly understandable from a cost-benefit perspective, failing to act could undermine the protected trade-secret status of an entire category of data in other scenarios and, in the right context, even undermine the enforceability of other employees' noncompete agreements.

Striking a balance

Regardless of how robust your security program is, there are always employees who will find vulnerabilities and exploit them. Clearly, employees must be able

to collect, access, and use company data in the ordinary course of business. Convenience is the enemy of security, however, and that is especially true in the digital domain. You must therefore implement policies, procedures, and safeguards that strike an appropriate balance between security and convenience and, more important, reflect a companywide commitment to security. Here are a few suggestions.

Know your company's data flow, and identify potential sources of data leakage. You cannot defend your digital castle without knowing where to place your guards. Thus, you must determine:

- What kinds of data you maintain;
- How data are collected, stored, used, and destroyed;
- Where data are stored, copied, and backed up;
- Who can access the data, how access is decided, and how it is policed; and,
- The potential avenues through which data can be exfiltrated to a location beyond the company's control.

The good news is that many companies have already thoroughly mapped their data flow and performed a vulnerability analysis. The bad news is that those that have not probably have more significant concerns than departing employees because they likely are not in compliance with some U.S. and foreign cyber security and data privacy laws (the EU's General Data Protection Regulation being the most notable example).

Nevertheless, no matter how secure an environment a company believes it maintains, it's certainly not uncommon for companies to discover unanticipated vulnerabilities after significant or embarrassing damage is done. It could even be something as simple as a forgotten legacy database available to a large set of employees that copies information from a more restricted database. A company cannot hope to reasonably anticipate potential sources of data leaks unless it can track the complete life cycle of its data from creation to disposal.

When it comes to access rights, follow the principle of least privilege. Many employees test the limits of their access at some point, typically by simple "data snooping." Employees should be granted as few privileges as possible, preferably only those necessary to perform their job. This applies to data access privileges, computer and device privileges, application privileges, network privileges, and Internet privileges. As clear-cut examples, only the appropriate level of management should be granted access to "big picture" financial data, and very few employees should ever be given administrator-level rights to their computer. At the end of the day, it's significantly more difficult to exfiltrate data if employees don't have access to it in the first place.

Completely deactivate access on an employee's last day. To avoid cutting off access too quickly or too late, this step requires close coordination between the employee's managers, HR, and IT. Ideally, create a written protocol for departing employees using your data flow map as a guide to help ensure that all potential avenues of access are accounted for, including e-mail, network and remote login credentials, and mobile device access. Don't disable the employee's e-mail account, however. Instead, make sure her e-mails are forwarded to a manager's account so they can be monitored. Also, change the passwords of all client, vendor, or third-party accounts linked to the departing employee (Salesforce, ADP, etc.). Finally, remotely wipe all company data from her mobile devices.

Always conduct an exit interview. The exit interview is probably the most effective way to prevent data retention. While it can be a valuable tool for soliciting employee feedback, ensuring that coworkers know where data has been stored, and recovering company property, it's also your first opportunity to assess any threat the employee may pose.

If the employee executed a nondisclosure or noncompete agreement, give her a copy and review it with her. Even if she didn't sign any formal agreements, remind her that she is prohibited from using or disclosing your company's confidential information. Also, formally request that she return all company property, including mobile devices and credit cards, and agree to a process for returning them. Finally, if she is subject to a restrictive covenant, ask her where she will be working next and what her new job's roles and responsibilities will be. Although employees aren't always honest during exit interviews, a misrepresentation about their next job is certainly relevant in any subsequent litigation. Take notes of what she tells you, or better yet, prepare a written exit interview questionnaire for her to complete. Make sure you confirm her contact information, including a mobile phone number and e-mail address.

Trust but verify—audit departing employees' activities and preserve evidence. Following separation, review the employee's computer to determine if she recently deleted any data, connected any storage devices, or ran any unauthorized programs that didn't require installation (such as encrypting or erasing applications that can load from a flash drive). Additionally, most network servers and content archiving systems have logging capabilities that allow a company's IT department to create various levels of alerts triggered by suspicious activity. Although exactly what constitutes a "suspicious activity" is highly fact-specific, common examples include:

- Multiple attempts to access unauthorized data or certain classes of unauthorized data;
- Bulk file copying of any kind;
- Attempted installation of unapproved software;
- A new mobile device;
- The use of a noncompany virtual private network; and
- Remote access that is inconsistent with the employee's historical usage.

If you're confident with the rules you set up to trigger alerts, then review all alerts associated with the employee for at least the last 90 days. If you are less confident that your alert rules will identify suspicious activities, then manually review her activities for the last 90 days. If any behavioral anomalies warrant further investigation, turn off her computer and arrange to have it forensically imaged and analyzed. If your IT department has the capabilities to conduct a forensic review, then make sure to image the hard drive first because continued operation of the computer can overwrite evidence of recent suspicious activity.

Bottom line

While the threat of data leakage can never be eliminated, it can be minimized and mitigated with proper security practices that anticipate how a company's data can leave its control. Departing employees present a particularly vulnerable attack vector because they typically know what data they have access to, where it is located, and how it can be copied. Companies must therefore make sure to take this risk seriously by incorporating strategies for dealing with departing employees into their security program. Your company's survival may very well be at stake.

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FITNESS FOR DUTY

FMLA quiz: Test your knowledge on medical exams, return to work

by Michael P. Maslanka
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It all seemed so clear and straightforward back in 1993. The Family and Medical Leave Act (FMLA) would make life simple: 12 weeks of unpaid leave for certain limited circumstances. But, alas, while it was "pretty to think so" (an Ernest Hemingway line), it was not to be. Read on to see how you would deal with the following medical leave challenges.

Operative facts

Kenneth Bouchard worked for the city of Warren, Michigan, and allegedly had personal problems with coworkers. When he took FMLA leave, the city's HR director sent him a series of letters:

- **June 20.** Telling Bouchard that he had to "attend an evaluative session with Dr. Daniel Altier [a doctor engaged by the city] . . . before you return to work."
- **July 3.** Stating that Bouchard had "to undergo a 'fitness for duty' evaluation prior to [his] return to work."
- **July 9.** Informing Bouchard that "after your physician has released you for work, you will be reinstated to employment, but due to concerns which I previously stated about your workplace behavior, it will be necessary for you to undergo a 'fitness for duty' evaluation prior to your actual return to duty."

Stop here and ask: Is there a problem with that scenario?

Where's Waldo?

Yes, there is a problem, according to the FMLA regulations:

> An employer may not require that an employee submit to a medical exam by the employer's

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> health care provider as a condition of returning to work. A medical examination at the employer's expense by an employer's heath care provider may be required only after the employee has returned from FMLA leave and must be job-related and consistent with business necessity as required by the [Americans with Disabilities Act or ADA]. Thus, if an employer is concerned about the health care provider's fitness-for-duty certification, the employer may, consistent with the ADA, require a medical exam at the employer's expense after the employee has returned from FMLA leave. . . . The employer cannot, however, delay the employee's return to work while arranging for and having the employee undergo a medical examination.

In Bouchard's case, the first two letters from the HR director violated the law. The third letter was OK, however, because the employee will have returned to work already and be back on the payroll, though not yet having resumed his duties. Had only the third letter been sent, the city would have been fine. Because the first two were sent, though, there must be a trial. *Bouchard v. City of Warren* (E.D. Mich. 2018).

Bottom line

Look, the FMLA regulations are complex. They are sometimes counterintuitive. They often perplex. When in doubt, run the scenario by colleagues or your lawyer. Doing so will always get you an A-plus.

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