

# THE ESSENTIAL FUNCTIONS OF A JOB DESCRIPTION

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# What are we going to cover today?

- ▶ Job Descriptions - Why they are important
  - ▶ Practical and Legal Benefits
    - ▶ Practical
      - ▶ Foundation of documentation for an employee's file
      - ▶ Clarity as to what employees are expected to do in their jobs
      - ▶ Eliminate confusion
      - ▶ Guide supervisors in evaluating employees
    - ▶ Legal
      - ▶ Can be a vital document in defense of a discrimination lawsuit
        - ▶ This will be our focus today

# Two Most Common Types of Discrimination Claims

- ▶ Claims arising under the Americans with Disabilities Act
- ▶ Claims arising under Title VII
- ▶ Discrimination claims are also commonly brought under the North Dakota Human Rights Act, but the analysis is largely the same for today's purposes at least.

# Americans with Disabilities Act - Generally

- ▶ In broad terms, the ADA is a federal law that prohibits discrimination against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
  - ▶ Authority: 42 U.S.C. § 12112

# Definitions are Important Here

- ▶ “Disability”
  - ▶ (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
  - ▶ (B) a record of such an impairment; or
  - ▶ (C) being regarded as having such an impairment.
    - ▶ The definition of disability shall be construed in favor of broad coverage of individuals to the maximum extent permitted by law.

Authority: 42 U.S.C. § 12102

NOTE: It is very easy to satisfy this definition.

# Definitions (Cont.)

## ▶ “Qualified Individual”

- ▶ “The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given 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.” Authority: 42 U.S.C. § 12111 (8) (emphasis added).

# Essential Functions of a Job

- ▶ The “Essential Functions” of a job are going to vary widely from job to job
  - ▶ Identification of these functions in the job description is evidence as to what functions are essential in a given job.
- ▶ So what?
  - ▶ Well, let’s do a quick review of what we just talked about, because it was a lot.
    - ▶ The ADA prohibits discrimination against “qualified individuals”
    - ▶ A “qualified individual” is one who can perform the “essential functions” of a job with or without a reasonable accommodation.
  - ▶ Wait, what is a reasonable accommodation?

# “Reasonable Accommodation”

- ▶ “There is no precise test for what constitutes a reasonable accommodation.”

Authority: E.E.O.C. v. Convergys Customer Management Group, Inc., 491 F.3d 790, 797 (8<sup>th</sup> Cir. 2007).

- ▶ A reasonable accommodation may include

- ▶ (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- ▶ (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Authority: 42 U.S.C. § 12111.



# “Reasonable Accommodation” (Cont.)

- ▶ “An accommodation is not reasonable if it requires the employer to reallocate or eliminate the essential functions of a job.”

Authority: Higgins v. Union Pacific Railroad Co., 931 F.3d 664, 671 (8<sup>th</sup> Cir. 2019) (emphasis added).

- ▶ The ADA does not require an employer to “create a new position, or transform a temporary position...into a permanent position, as an accommodation.”

Authority: Fjellestad v. Pizza Hut, 188 F.3d 944, 950 (8<sup>th</sup> Cir. 1999); see also Cover v. J.C. Penny Corp. Inc., 187 F.Supp.3d 1079, 1090-91 (D. Minn. 2016).

- ▶ Federal courts have held an “accommodation is ‘reasonable’ - and, therefore, required under the ADA - only if it enables the employee to perform the essential functions of the job.”

LaChance v. Duffy’s Draft House, Inc., 146 F.3d 832, 835 (11<sup>th</sup> Cir. 1998) (emphasis added).

- ▶ But Note: Reassignment to a vacant position is a reasonable accommodation under the ADA. A position is “vacant” if it would be available for a similarly-situated non-disabled employee to apply and obtain.”

Authority: Perdue v. Sanofi -Aventis U.S., LLC, 999 F.3d 954, 960 (4<sup>th</sup> Cir. 2021)

# Let's Get to the Point

- ▶ The ADA provides protection to a “qualified individual”
- ▶ A “qualified individual” is one who can perform the “essential functions” of a job with or without a “reasonable accommodation.”
  - ▶ If a request for an accommodation does not impose an undue hardship and enables an individual to perform the “essential functions” of a job, it is likely a “reasonable accommodation” and must be granted.
- ▶ What is evidence as to the “essential functions” of a job?
  - ▶ A JOB DESCRIPTION!

# How can a clear job description aid employers to not violate the ADA?

- ▶ From an employer's standpoint, you may receive a request for a reasonable accommodation.
- ▶ "To determine whether an accommodation for the employee is necessary, and if so, what that accommodation might be, it is necessary for the employer and employee to engage in an interactive process." Schaffhauser v. United Parcel Service, Inc., 794 F.3d 899, 906 (8<sup>th</sup> Cir. 2015) (emphasis added).
- ▶ The "Interactive Process"
  - ▶ The employee must alert the employer to the need for an accommodation and provide the relevant details of his or her disability
  - ▶ The employer must make a reasonable effort to determine the appropriate accommodation
    - ▶ First, the employer should analyze the relevant job and the specific limitations imposed by the disability
    - ▶ Second, consult with the employee and identify potential effective accommodations

Authority: E.E.O.C. v. Convergys Customer Management Group, Inc., 491 F.3d 790, 795 (8<sup>th</sup> Cir. 2007)

# This is where a job description is important

- ▶ A clear job description can be used during the interactive process as a valuable tool to determine whether the requested accommodation will allow the employee to perform an “essential function” of their job.
  - ▶ If yes, and the request does not impose an undue hardship, then it should be granted as a reasonable accommodation.
  - ▶ If no, then you better be sure you are correct before you deny the request
    - ▶ It is always a good idea to consult an attorney before denying a request for a reasonable accommodation.

# How a clear job description is used in the legal defense of an ADA claim

- ▶ An ADA plaintiff in a discrimination claim must establish he or she:
  - ▶ (1) Is disabled within the meaning of the ADA;
  - ▶ (2) Is a qualified individual under the ADA; and
  - ▶ (3) Has suffered an adverse employment action because of the disability.

Authority: Moses v. Dassault Falcon Jet-Wilmington Corp., 894 F.3d 911, 923 (8<sup>th</sup> Cir. 2018) (emphasis added).

- ▶ The job description is used for the second element
  - ▶ Remember, to be a “qualified individual” a plaintiff has to show they can perform the “essential functions” of the job they hold or desire with or without a “reasonable accommodation.”
    - ▶ If they cannot perform the “essential functions,” they cannot satisfy the second element.
      - ▶ The job description is evidence as to what functions of a job are essential.

# Job Descriptions Serve Other Functions Too!

- ▶ There is more to this than just the ADA!
- ▶ A clear job description can serve as the foundational document for an employee's file.
  - ▶ Clearly sets forth employer's expectations of employee
  - ▶ Can be a useful tool in annual evaluations
  - ▶ While this can serve practical benefits, it can have legal significance too because...

# Discrimination claims arising under Title VII

- ▶ Discrimination under Title VII
  - ▶ Plaintiff must show the following:
    - ▶ He/she is a member of a protected class
    - ▶ He/she was meeting her employer's legitimate job expectations
    - ▶ He/she suffered an adverse employment action
    - ▶ Similarly situated employees outside the protected class were treated differently

Authorities: Fields v. Shelter Mut. Ins. Co., 520 F.3d 859 (8<sup>th</sup> Cir. 2008)

- ▶ What does this have to do with a job description?

# Second Element

- ▶ A Title VII plaintiff must show she met her employer's legitimate job expectations in order to establish the second element of a prima facie case. Wimbley v. Cashion, 588 F.3d at 962 (8th Cir. 2009).
  - ▶ Unfavorable evaluations and repeated performance deficiencies are fatal to a plaintiff's Title VII claim. See Shanklin v. Fitzgerald, 397 F.3d 596, 602 (8th Cir. 2005).
- ▶ TERMINATED EMPLOYEES WHO FILE DISCRIMINATION CLAIMS WILL ARGUE THEY MET YOUR LEGITIMATE EXPECTATIONS!!!
  - ▶ Documentation is your best defense. This starts with a clear job description and documentation that logically follows it!



# Fourth Element

- ▶ Similarly situated employees outside the protected class were treated differently.
  - ▶ A plaintiff must “identify and relate specific instances where persons situated similarly *in all relevant aspects* were treated differently.” Anderson v. Meyer Broadcasting Co., 2001 ND 125, ¶ 22, 630 N.W.2d 46.
  - ▶ “The test for whether employees are similarly situated is rigorous and requires that the other employees be similarly situated in all relevant aspects before the plaintiff can introduce evidence comparing [himself] to the other employees. The individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and [have] engaged in the same conduct without any mitigating or distinguishing circumstances.” Davis v. Jefferson Hosp. Ass’n., 685 F.3d 675, 681 (8th Cir. 2012)
- ▶ How do you establish a difference in employees?
  - ▶ Clearly identifying their job duties and responsibilities
  - ▶ This starts with the job description

# A clear job description is helpful in justifying your employment decisions

- ▶ Even if a plaintiff is able to establish the first four elements of a discrimination claim, the burden then shifts to the employer to establish a legitimate non-discriminatory reason for an adverse employment action. If the employer does so:
  - ▶ Under Title VII, the burden shifts back to the employee to show a discriminatory reason more likely motivated the employer; or
  - ▶ Indirectly show the employer's explanation is unworthy of credence.
    - ▶ In other words, the employee can show the reason you provided for the adverse employment action is fabricated after the fact.
- ▶ So how does an employer combat this?
  - ▶ **DOCUMENTATION!!!!!!** It starts with the job description.

# How a clear job description can save you in a Title VII discrimination claim.

- ▶ The Second Element - Employee must show they are meeting employer's legitimate expectations
  - ▶ If those expectations are clearly conveyed to the employee, and you have documentation that logically follows, you will make it very difficult for the employee to establish this element.
- ▶ The Fourth Element - Employee must show he/she was treated differently than a similarly situated employee outside the protected class
  - ▶ If the job duties are clearly defined, it is much easier to show other individuals are not "similarly situated."
- ▶ Burden Shifting Stage (Next Slide)

# Job Description - Burden Shifting

- ▶ First, the employer has to establish a legitimate non-discriminatory reason for an adverse employment action.
- ▶ Second, the employee can show the reason was not legitimate.
- ▶ If the employer has a clear job description and documentation that logically follows, this can be a huge benefit.
  - ▶ What if there is no job description or it is vague
    - ▶ This opens things up to interpretation and numerous factual disputes
    - ▶ Is the employer unfairly criticizing the employee?
    - ▶ Opens up the employee's classic "That's not in my job description" argument

# Let's Apply What We Have Learned

- ▶ Example 1: Office Manager - No job description
  - ▶ You hire an office manager but have no job description for the position
    - ▶ The office manager is diagnosed with a condition that precludes him/her from speaking to strangers.
    - ▶ The office manager requests his/her desk be moved to the back of the office and a lock put on the door to prevent any chance of interaction with unknown individuals.
    - ▶ You have nobody to work the front desk or answer phones if the request is granted.
    - ▶ The office manager tells you that front desk work and answering phones is not an essential function of the job because it is only a secondary task to other general interoffice management tasks (i.e. bookkeeping, coordinating work schedules, emails...)
    - ▶ You disagree and believe interaction with the public is an essential function of the job even though it only encompasses 15% of the office manager's work.
    - ▶ You deny the request for a reasonable accommodation and terminate the office manager's employment.
    - ▶ You get sued for discrimination under the ADA

# Example 1 (Cont.)

- ▶ The office manager is able to satisfy the definition of “disability” under the ADA.
- ▶ The office manager was clearly subjected to an adverse employment action.
- ▶ The office manager is going to be able to show an accommodation request was denied.
- ▶ What are you left with for your defense?
  - ▶ Was the office manager a “qualified individual?” Could the office manager perform the “essential functions” of the job with or without a reasonable accommodation?
  - ▶ Was answering phones and interacting with unknown people an “essential function” of the office manager’s position?
    - ▶ The entire case will likely turn on this singular issue
    - ▶ But you have no job description identifying the essential functions
      - ▶ The office manager says speaking to unknown individuals was a small part of the job and not essential in the grand scheme of things.
      - ▶ You disagree...a jury will likely decide your fate.

# Example 1 – But Better for You

- ▶ You post a job advertisement for an office manager that provides:
  - ▶ Essential Functions:
    - ▶ Display competency with Microsoft Word and Excel
    - ▶ Must be able to interact with the public (including answering phones and interacting with members of the public in the office)
    - ▶ Must be able to perform bookkeeping and other data entry duties
- ▶ Remember, this is evidence as to the “essential functions” of the job. You are likely covered.

# Example 2

- ▶ You hire an Office Manager who is a member of a protected class, but there is no job description.
- ▶ The previous Office Manager was not a member of the same protected class. However, the previous Office Manager was elderly and unable to ensure all office supplies were stocked at all times. You dealt with it because you liked the old Office Manager.
- ▶ The new Office Manager is requested to ensure all office supplies are stocked at all times.
- ▶ The new Office Manager fails to do so.
- ▶ You issue a written reprimand to the new Office Manager.
- ▶ The following week, there was no paper in the printer, and none available in the office. You are furious and fire the new Office Manager despite the fact other job duties were satisfactorily performed.
- ▶ The new Office Manager sues you for discrimination.



## Example 2 (Cont.)

- ▶ The new Office Manager will be able to show he/she:
  - ▶ Belonged to a protected class;
  - ▶ Suffered an adverse employment action; and
  - ▶ Likely be able to show he/she was treated differently than similarly situated employees outside of the protected class.
- ▶ What are you left to argue?
  - ▶ The new Office Manager did not meet your legitimate job expectations by failing to ensure there was paper in the printer and office supplies were available at all times.
    - ▶ Is this legitimate if there was no job description?
  - ▶ You had a legitimate non-discriminatory reason for terminating the new Office Manager.
    - ▶ You will argue the new Office Manager was insubordinate.
    - ▶ The new Office Manager will argue this task was only expected due to his/her membership of a protected class. The previous Office Manager was not required to perform this task.
- ▶ This is not an ideal situation.

## Example 2 - But Better for You

- ▶ Your trusted Office Manager of 50 years decides to retire at age 80. Due to the previous Office Manager's age, you assumed the duties related to stocking the office with supplies because you were more capable and really liked the Office Manager.
- ▶ You were tired of stocking the office supplies because it detracted from your other duties.
- ▶ When it became time to post an advertisement to fill the vacancy left by your previous Office Manager, you prepare a new job description.
- ▶ The new job description includes:
  - ▶ "Is responsible to ensure office supplies are adequately stocked at all times to ensure efficient operation of the office."

## Example 2 - But Better for You (Cont.)

- ▶ Now you have a much better argument that the new Office Manager did not meet your legitimate job expectations.
  - ▶ You can point to written documentation and establish the new Office Manager did not satisfy the requirements.
- ▶ You have a much better argument that the new Office Manager was not treated differently than similarly situated employees outside of the protected class.
  - ▶ Jobs change over time and the duties of the previous Office Manager were not the same for the new Office Manager.
- ▶ Your personnel file will be supported by the job description.
- ▶ Your reason for terminating the new Office Manager will be much more believable to a judge/jury.
  - ▶ The legitimacy of your position is bolstered by the job description.

# A Recap

- ▶ Identifying the “essential functions” of a position in a job description is important under the ADA
  - ▶ It is evidence as to whether someone is or is not a “qualified individual” subject to ADA protection
  - ▶ It can be used to determine what accommodations are or are not “reasonable accommodations” under the ADA
- ▶ A clear job description can be the foundational document in defense of a Title VII discrimination claim
  - ▶ Can help establish legitimate expectations of employer;
  - ▶ Can be the foundation of employee evaluations;
  - ▶ Can legitimize your rationale for adverse employment decisions.

Questions?

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the right side of the frame, creating a modern, layered effect. The rest of the background is plain white.