

# Sixth Circuit Determines Essential Functions Under ADA and Reinstates Lawsuit

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After a judge in the U.S. District Court for the Eastern District of Michigan dismissed claims under the Americans with Disabilities Act (ADA), the Sixth Circuit Court of Appeals found fault with the lower court's analysis of "essential functions" of the position and reinstated the case.

In 2007, the plaintiff in *Henschel v Clare County Road Commission* became employed by the road commission and, shortly thereafter, he became an excavator operator. An excavator is a heavy piece of equipment used to dig trenches. Approximately 70 percent of the time, the excavator is responsible for driving a semi-truck and hauling the equipment to the worksite. The other 30 percent of the time, a semi-truck driver hauls the equipment. The terms of the plaintiff's employment were governed by a collective bargaining agreement.

In 2009, the plaintiff was involved in a motorcycle accident that resulted in the loss of a leg from the knee down and the need for him to be fitted with a prosthetic. While he was out, the road commission hired a temporary worker to fill in. When the plaintiff returned to work, he was granted a medical waiver by the Michigan Traffic Safety Division, which allowed him to maintain his commercial driver's license but restricted him to operating automatic transmission vehicles. When none of the drivers assigned to the automatic transmission semi-trucks agreed to give up their truck for the plaintiff, his employment was terminated.

The plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission which found cause. He then filed a civil lawsuit which was dismissed by the granting of the defendant's motion. The district court found, in relevant part, that transporting the excavator was an essential function of the position and, since the plaintiff was unable to perform this task, he was not qualified for the position. The Sixth Circuit Court of Appeals disagreed and reinstated and remanded the case.

The 6<sup>th</sup> Circuit first noted that the issue of essential functions is typically a question of fact and, therefore, not suitable for resolution by motion. In determining what is an essential function, courts should consider several factors, including: "(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 spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.” 29 CFR §1630.2(n)(3)

“Essential functions are those that are fundamental to a particular position, not marginal functions.” The road commission’s opinion that this duty is essential is only one factor to consider. Here, the job description of the semi-drivers included hauling heavy equipment whereas this job is only assigned to the excavators under the catch all of “other duties assigned.” While the excavators actually haul the equipment themselves approximately 70 percent of the time, this function actually takes up only a small amount of the excavators’ time since the equipment is sometimes at the same job site for weeks.

In addition, evidence supported the inference that there would only be “minimal consequences to [the road commissions operations] if the excavator operator no longer hauled the excavator.” There was also testimony that the semi-truck driver could haul the excavator for Henschel without any problem and a number of other employees could do so when the semi-driver was not available. Hauling the excavator “entailed a marginal time investment” and other road commission “employees were qualified and capable of doing the hauling.” Therefore, the 6<sup>th</sup> Circuit found an issue of fact existed concerning whether the hauling of the excavator was an essential function and remanded the case.

This case not only underscores the importance of well drafted job descriptions, but also of legal advice at the time decisions are being made under the ADA.