

## THE EMPLOYER'S LEGAL RESOURCE: DOT MEDICAL EXAM DEEMED ESSENTIAL JOB FUNCTION DISQUALIFYING SCHWAN'S FACILITY SUPERVISOR

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David Hawkins worked for Schwan's Home Service, the company that delivers frozen foods to your home. While employed there since 1987, he became a Facility Supervisor in 2003. Schwan's had a written job description for the Facility Supervisor position. Among many other qualifications, the written job description stated that "'meet[ing] the Federal Department of Transportation eligibility requirements, including appropriate driver's license and corresponding medication certification,' [was] a 'condition of employment for this position'." During a period in 2007, there was a need for Mr. Hawkins to load and drive a truck on a regular basis, requiring he be DOT-qualified. Since that time, he had not been asked to drive on any regular basis.

In 2010, Mr. Hawkins began suffering from several medical conditions. Also during 2010, Schwan's again had a need for Mr. Hawkins to drive some routes. On June 21, 2010, Mr. Hawkins failed his routine DOT medical evaluation. The following day, he was placed on a 30 day unpaid leave due to his failure to pass. He was advised that he had 30 days to either pass the DOT medical evaluation or find a non-DOT position. Instead, on June 23, Mr. Hawkins signed the company's pre-printed resignation form, but hand-wrote "force [sic] to quit for medical reason."

Mr. Hawkins sued Schwan's for discrimination in violation of the Americans with Disabilities Act, claiming he was a "qualified individual with a disability" and that he was (constructively) discharged due to that fact. The Tenth Circuit Court of Appeals explained that to be a "qualified individual" under the Americans with Disabilities Act, Mr. Hawkins must be "a person 'who, with or without reasonable accommodation, can perform the essential functions of the employment position that [he] holds or desires.'"

Schwan's argued that passing the DOT medical evaluation was an essential function of Mr. Hawkins' position. Because Mr. Hawkins had not passed the exam, he was not a "qualified individual." As such, he could not go forward with his ADA claim.

So the question facing the Court was whether passing the exam was, in fact, an "essential function" or merely something the employer desired. The Court looked to the EEOC's factors on this question:

Evidence of whether a particular function is essential to a job includes (but is not necessarily limited to) (1) the employer's judgment as to which functions are essential, (2) written job descriptions prepared before advertising or interviewing applicants for the job, (3) the consequences of not requiring the incumbent to perform the function, and (4) the current work experience of incumbents in similar jobs.

In this case, Schwan presented evidence that, in its judgment, it was important for facility supervisors to be able to operate DOT vehicles "so they could pick up and deliver vehicles for service and repair and facilitate the fueling and the loading and unloading of goods from the vehicles. While a facility supervisor might not have to operate a commercial vehicle on a daily basis, [Schwan's] claims it was essential that [Mr. Hawkins] be able, as supervisor, to assume the task of his supervised employees, when needed to prevent the disruption of its business."

Schwan presented its written job description which included mention of DOT certification and credentialing, fleet management, and an "excellent driving record."

The Court conceded Mr. Hawkins might not have to use the DOT certification very often. However, it gave credence to Schwan's argument that it needed to have a supervisor with those credentials ready should the need arise. "As the [lower court] explicitly noted, [DOT hours of service rules, re-stocking difficulties [Schwan's] sometimes encountered, various mechanics' truck-driving policies, and the 'need to find someone else who could fill in at the last minute,' given the 'small number of employees' at the Alva depot, all increased the likelihood that he might have to drive a truck." The Court noted that Mr. Hawkins did not present sufficient evidence of the fourth factor.

Thus, the Court held that, under these facts, Schwan's proved that it was an essential function of the position of Facility Supervisor to pass the DOT medical evaluation. When Mr. Hawkins was unable to do so, he was no longer a qualified individual for that position.

The Court ruled in favor of Schwan's who was not required to face a jury. But, it was required to defend itself. What can you learn from its experience?

- Have written job descriptions
- It is best to have job descriptions written before jobs are posted
- Job descriptions written after problems arise with an employee may be questioned
- Job descriptions should accurately reflect the position
  - Do not pull one off the internet or have a consultant (or attorney) write it sight unseen
  - You might consider getting input from the people who do the job
- Do not shy away from tasks/duties/functions that are essential simply because they are performed infrequently (these are often safety related - you hope never to need function X, but it is critical)

Perhaps the most important thing we take from this case is the reminder of how fact-specific all ADA cases are. There is no formula for compliance. Employers must take a look at the specifics of each situation, with a reasoned eye, to determine if they are in compliance with the law. It is a challenge to be sure

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