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# 60-Second Memo

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Julie T. Bittner, Esq.

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### Operating Without Written Job Descriptions? Proceed at Your Own Peril

By Julie T. Bittner, Esq.

Many, if not most, human resources personnel and in-house counsel, along with supervisors and managers who deal with employee requests for accommodations or work restrictions, have long realized the value and importance of written job descriptions. When determining whether an employee can perform the essential functions of a particular job, having a written job description does not just make for a compelling exhibit at a hearing or trial - it can make the difference between winning and losing a lawsuit. Written job descriptions are likely to become even more important in defending against a disability claim in light of the ADA Amendments Act of 2008, effective January 1, 2009, which expanded the class of individuals entitled to protection under the Americans with Disabilities Act (ADA).

Because plaintiffs can more readily establish the existence of a disability under the amended ADA, more cases will likely hinge on whether the plaintiff was qualified to perform the essential functions of his or her job. To show that he or she was qualified to perform a particular job, an employee or applicant must be able to demonstrate that he or she had the requisite skill, experience, education, and other job-related requirements for the position and would have been able to perform the essential functions of the position with or without reasonable accommodation.

This is where a written job description comes into play. Take, for example, the case *Richardson v. Friendly Ice Cream*, 594 F.3d 69 (1st Cir. 2010). Katharine Richardson held the position of assistant manager at a Friendly's location in Ellsworth, Maine. Several years

into her employment, she developed shoulder impingement syndrome, which caused her pain when she operated the grill or scooped ice cream. At first, her job duties were modified, and later Richardson went out on leave to undergo surgery.

After her FMLA leave was exhausted, Richardson attempted to return to work. Her doctor issued her a work release that prohibited her from performing repetitive activity with her right arm and lifting objects weighing more than five pounds. Friendly's, however, did not allow her to return to work and terminated her employment.

In her subsequent lawsuit, Richardson claimed that her sole essential job function was to oversee the operation of the restaurant and ensure that it ran smoothly. Friendly's disagreed, arguing that the essential functions of her assistant manager position required her to be able to perform manual tasks, such as assisting in food preparation, delivering food to customers, and performing general housekeeping duties. In doing so, it relied heavily on a six-page job description.

The job description was divided into multiple sections. Under a section titled "Essential Functions," thirteen general categories of job duties were listed, among which were that an assistant manager must be able to run shifts and direct and assist in the kitchen. Under a section labeled "Task Analysis," duties included physically assisting and performing kitchen, dining, and take-out operations; cooking food items on a grill; delivering prepared meals, beverages, and dessert items to customers; cleaning and resetting tables; loading and operating the dishwasher; and performing general housekeeping duties.

The district court agreed with Friendly's that the assistant manager position had a substantial physical component and granted summary judgment in favor of Friendly's. The First Circuit (covering Massachusetts, Maine, New Hampshire, Puerto Rico, and Rhode Island) affirmed. Had Friendly's not had a detailed and accurate job description, the case may have come out differently.

Unfortunately, if a company does not have any job descriptions for the position at issue, it may be more difficult to establish the essential functions of the plaintiff's job. Even though the plaintiff always has the ultimate burden of proving that he or she is a qualified individual, it is the employer's burden to come forward with some evidence that a particular function is essential.

When drafting the essential function portion of the job description, companies may want to keep the following in mind:

- Include the approximate amount of time the employee will spend on the job performing certain functions. An employee will have a much harder time establishing that a task is a minor one or could be passed off to other employees if it requires a significant portion of the employee's work day.
- If a position requires repetitive motions, use the word

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"repetitive."

- Be specific regarding lifting and other physical requirements. A general statement like "must be capable of some heavy lifting" will not resonate as convincingly as a description that specifies the exact amount of weight that an employee must be able to lift. In *Anderson v. Embarq/Sprint*, 379 F. App'x 924, 928 (11th Cir. 2010), an employer prevailed on summary judgment, in part, because the job description specifically required that employees in the distribution center (where the plaintiff worked) had to be able to frequently and continuously carry boxes that weighed up to 70 pounds.
- Human resources should work with front-line supervisors to ensure that the job description accurately reflects the actual tasks being performed. An inaccurate job description may be worse than having no job description at all.
- As always, update, update, update. Job duties can naturally evolve over time, as business needs change, production increases or decreases, and new technology is implemented. The job description should accurately reflect the duties being performed now, not those performed several years ago.

Having complete and thorough job descriptions may be the key to defending against disability litigation. Employers are encouraged to make this task a priority, because the relatively small investment of time and resources now could pay dividends in the form of avoided liability in the long run.

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