

## USING RESTRAINT IN YOUR JOB - VERY RARE BUT STILL ESSENTIAL

Sometimes the important things that an employee may be required to do in a job almost never happen. Take for example a worker at a juvenile detention center who might one day have to physically restrain a violent youth who might be causing trouble at the facility. It doesn't happen often, but it certainly could. Does the employer have to accommodate a worker who is physically unable to perform a rare job function? A recent court [decision](#) answers that question.

### DOES A JOB FUNCTION THAT IS RARELY PERFORMED MAKE IT A NON-ESSENTIAL JOB FUNCTION?

In the case of the juvenile detention center worker, the court said, "No." The case involved a worker who, after injuring his neck, had been placed in a temporary light duty position until his doctor determined that his condition was permanent. The doctor determined that the employee's neck condition prevented him from ever restraining a violent juvenile. The employee was then placed on a year-long unpaid leave of absence. He was ultimately terminated because, at the expiration of the leave, he still was not physically able to restrain a violent juvenile.

### THE ADA LAWSUIT - WHAT IS "ESSENTIAL"?

After the employee was discharged, he filed a lawsuit for disability discrimination under the ADA claiming that: 1) restraining violent juveniles was so rare that it could not be considered an essential function; 2) other employees could be called upon to help; 3) he could have been permanently placed in the light duty job that he had held previously; and 4) the employer failed to engage in the good faith interactive process in an attempt to find an accommodation.

The district court didn't buy any of the arguments, and the Sixth Circuit Court of Appeals agreed. The appeals court observed that in the instances where there is the *potential* for physical confrontation on a daily basis, then rarity alone will not support denial of summary judgment. What matters according to the court is the *seriousness of failing to perform the low-probability job function*. In this case, the employer had listed the ability to restrain juveniles as an essential job function and actually required three months of training and follow-up on restraint procedures. In view of that fact, the court held that the inability to properly restrain juveniles could have serious consequences for the *safety* of staff and juveniles at the facility. Furthermore, the court reasoned, if the employer had not mandated or required safe-physical-management skills for its staff, it might subject itself to *liability* from injured employees and juveniles.

### THE ADA LAWSUIT - WHAT IS "UNREASONABLE"?

The court went on to conclude that calling on others to assist was not a reasonable accommodation – even when that assistance was often offered by co-workers – because that would have meant shifting essential functions to other employees. Also seen as unreasonable was the employee's request for a permanent assignment to a light duty position – even the one that he had held for a long time – because that would have required the employer to create a permanent position when only temporary positions were needed. Finally, the employee's claim that the employer failed to engage in the good faith interactive process was rejected because there is no independent legal mandate under the ADA to engage in that process. Instead, the court observed that the engaging in the good faith interactive process is merely one factor in considering whether a particular accommodation was reasonable.

### INSIGHTS FOR EMPLOYERS ON RARE JOB FUNCTIONS

This case highlights an important concept for employers to consider in determining the essential functions of the job. It is crucial to understand that it is the *potential* for harm (including liability) of not performing the function – not how often a particular function is performed – that is the key. Often job descriptions will include lifting or other physical requirements that are described as being performed "regularly," "frequently," "occasionally" or "rarely." What may be missing from these job descriptions (or at least in the process of establishing them) is some analysis or statement of the *potential for harm* if the function is not performed.

Here are some insights for employers to consider:

- Make sure job descriptions list as essential all functions involving safety and liability no matter how rarely they might be performed;
- Consider the potential for harm and liability to others if the rare functions are not performed;

- Document the analysis used in determining the potential for harm;
- Understand that an employee's request for the assistance of other employees in performing an essential job function would likely be unreasonable;
- Understand that you need not make a temporary position permanent as an accommodation;
- Understand that engaging in the good faith interactive process is always a good idea, but failure to do so won't, by itself, result in a violation of the ADA; and
- Understand that you can always be more generous and accommodating than the law requires.

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