**Americans With Disabilities Act: Employer Need Not Create Permanent Light Duty Position**

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In holding that an employer need not accommodate an employee, the U.S. Court of Appeals for the Tenth Circuit found that a doctor’s note that stated the operation of heavy equipment “may pose problems” meant that the employee could not perform essential functions of a position. Mathews v. Denver Post, (10th Cir. 263 F.3d 1164 2001). Therefore the employer properly terminated an epileptic employee where the employee’s doctor stated that performing some of the essential functions of the job “may pose problems.”

The Tenth Circuit further held that an employer is not required to create a new position that is basically a permanent “light duty” position.

The facts are as follows: John Mathews was working at the Denver Post as a journey-level mailer when he was diagnosed with epilepsy. The condition caused him to suffer grand mal seizures. After one such seizure, he required two days of hospitalization and was told by his doctor not to return to work for one month. The letter from his doctor stated that he should not operate heavy equipment for at least three months. A second letter stated “ideally, it would be best if he were not to drive or work around heavy machinery.”

Mathews then sought to return to work, proposing that the Post accommodate him by letting him do the part of the journey-level mailer that did not require working with machines. The Post terminated Mathews, however, claiming that his medical restrictions prevented him from performing the essential functions of his job. The Post based this decision on the fact that the job description for journey-level mailer includes five essential functions of the job, three of which involve operating heavy machinery.

After his termination, Mathews continued to ask about coming back to work. He met with the employee relations manager who wrote his doctor asking whether Mathews could perform the
journey-level mailer job safely. In her letter, the employee relations manager included a copy of the job description. The doctor wrote back that "if possible" Mathews should not work with heavy machinery. The doctor specifically added that working with the machines that were integral to three of the five listed essential functions of the job "may pose problems." Eventually, Mathews' doctor lifted the restrictions, stating that he should be able to drive or work with machinery. The Post then hired Mathews back at his old job.

Despite being hired back, Mathews sued the Post, claiming that he was discharged in violation of the ADA and that the Post had failed to provide a reasonable accommodation. On the Post's motion for summary judgment, the district court dismissed the case, holding that Mathews had not shown he was disabled and that he was not qualified to do his job. Mathews appealed.

While the Tenth Circuit did not decide the issue of disability, it agreed with the lower court that Mathews was not a "qualified" individual with a disability. In analyzing the case, the court began by noting the rule for determining whether a plaintiff is qualified, that is, (1) whether the individual could perform the essential functions of the job and if not, (2) whether any reasonable accommodation would enable the individual to perform those functions. The court noted that there was no doubt that operating heavy machinery was an essential function of Mathews' job. Notably, the Post's written job description for journey-level mailer included five essential functions, three of which involved heavy machinery. The court further determined that Mathews was not able to perform those essential functions.

Mathews argued that the doctor's letter did not state that he was prohibited from operating equipment, but rather that the equipment "may pose problems." Thus, Mathews claimed he was still able to perform those functions. In rejecting this argument, the court stated, "We cannot agree that it would be using common sense to disregard the doctor's specific warning that allowing a person subject to grand mal seizures to work with a particular machine "may pose problems."
The court then determined whether Mathews could have performed the essential functions with an accommodation. Both Mathews and his union representative testified that at some point during a mailroom shift, Mathews would have to use the heavy machinery. Based on this, the court determined that the Post was not required to accommodate Mathews, as operating the heaving equipment was indeed an essential function. According to the court, the request to perform only a portion of the essential functions was essentially a request for permanent "light duty." The court stated, "accommodation does not require the employer to create a new job." Thus, the court upheld the lower court's ruling to dismiss the case.