

12.8 ADA—Ability to Perform Essential Functions—Factors

“An essential function of an employment position” means the fundamental job duties of the employment position that the plaintiff holds or desires. It does not include the marginal functions that may occur through the course of a job.

You must consider the employer’s judgment as to what functions of a job are essential. If any employer has prepared a written description before advertising or interviewing applicants for the job, this description is evidence of the essential functions of the job.

Other factors that may bear upon whether a job function is essential include, but are not limited to:

- (1) [whether the reason the position exists is to perform that function][;]
- (2) [whether there are a limited number of employees available among whom the performance of that job function can be distributed][;]
- (3) [whether the job function is highly specialized, and the person in that particular position is hired for [his] [her] [other pronoun] expertise or ability to perform the particular function][;]
- (4) [the amount of time spent performing the job function][;]
- (5) [the consequences of not requiring the individual holding the position to perform the function][;]
- (6) [the terms of any collective bargaining agreement][;]
- (7) [the work experience of past employees who have held the position][;] [and]
- (8) [the work experience of current employees who hold similar positions].

Comment

The second paragraph is based on 42 U.S.C. § 12111(8). The term “marginal functions” in the first paragraph and the factors in the third paragraph are in 29 C.F.R. § 1630.2(n) (1999). *See Dark v. Curry County*, 451 F.3d 1078, 1084-85 (9th Cir. 2006) (discussing essential functions and marginal functions); *see, e.g., Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1238 (9th Cir. 2012) (holding that attendance is an essential job function of neo-natal intensive care nurse).

The phrase “holds or desires” has been interpreted by the Ninth Circuit to refer to situations when employees request reassignment “even if they cannot perform the essential functions of the current position.” *Barnett v. U. S. Air, Inc.*, 228 F.3d 1105, 1111 (9th Cir.

2000), *vacated on other grounds*, 535 U.S. 391 (2002). A disabled individual who can no longer perform the essential functions of her position may be entitled to relief if reassignment is found to be a “reasonable accommodation.”

In *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232-33 (9th Cir. 2003), the court held that an employer had no duty to accommodate a deputy marshal when it was undisputed that he could not perform the essential function of restraining prisoners through hand-to-hand combat, even though the cause of hand pain had been misdiagnosed.

In *Cripe v. City of San Jose*, 261 F.3d 877, 887 (9th Cir. 2001), the court observed that “an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description.” (quoting *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1071 (9th Cir. 2000)). In *Cripe*, the Ninth Circuit held that the issue of whether the ability of all specialized police officers to make a forcible arrest constituted an essential function of the job presented a factual question under the circumstances of that case. *Id.* at 888-89.

In *Bates v. UPS, Inc.*, 511 F.3d 974, 990 (9th Cir. 2007) (en banc), the court emphasized that “essential functions” are not to be confused with “qualification standards” established by an employer for a certain position. “Whereas ‘essential functions’ are ‘basic duties,’ 29 C.F.R. § 1630.2(n)(1), ‘qualification standards’ are ‘personal and professional attributes’ that may include ‘physical, medical [and] safety’ requirements. *Id.* § 1630.2(q).” *Bates*, 511 F.3d at 990.

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