

## JOB FUNCTIONS, STANDARDS, AND ACCOMMODATIONS UNDER THE ADA: RECENT EEOC DECISIONS

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#### I. INTRODUCTION

What the Americans with Disabilities Act (ADA)<sup>1</sup> requires of employers, in one word, is flexibility. The law insists that employers reconsider standard practices and methods of performing jobs in light of an individual with a disability's unique abilities and skills.

In some areas of employment, this message has been received and readily accepted. Employers understand that the ADA might require them to modify their facilities (e.g., a heightened desk for a person in a wheelchair) or provide additional services or equipment to enable persons with disabilities to perform jobs (e.g., a screen reader for a person with a visual impairment).

In other areas, however, there is still resistance to the modifications that the ADA requires. This resistance is particularly acute in relation to physical job requirements and attendance standards.

The symposium jointly convened by the Saint Louis University Center for Health Law Studies and William C. Wefel Center for Employment Law focused on disability rights and the health care workforce. As my co-panelist, Professor Nicole Porter, noted, work in the health care field is particularly challenging for persons with disabilities precisely because health care jobs often have rigid physical requirements and attendance policies.<sup>2</sup> This essay describes three recent decisions from the United States Equal Employment Opportunity Commission (EEOC or Commission) in the federal sector that discuss how these policies should be evaluated under the ADA: a case involving a vision standard applied to an applicant to the Federal Bureau of Investigation (FBI),<sup>3</sup> a case challenging a rotating shift policy used by the

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1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2012).
2. See generally Nicole Buonocore Porter, *The Difficulty Accommodating Healthcare Workers*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 1 (2015).
3. Nathan v. Holder, Decision No. 0720070014, 2013 WL 3965241 (E.E.O.C. July 19, 2013).

Customs and Border Patrol,<sup>4</sup> and a case where a worker in the United States Postal Service (USPS) disputed the validity of a lifting standard.<sup>5</sup>

These cases broadly reinforce the need for flexibility in the application of general policies to persons with disabilities. They also highlight the importance of properly classifying policies. The ADA is an intricate law and it establishes a number of different defenses for different types of employment standards.<sup>6</sup> The manner in which a policy is labeled and defended, as these cases show, can have a vast impact on the protections available under the ADA to a person with a disability.

## II. THE EEOC IN THE FEDERAL SECTOR

The readers of this essay can be forgiven for asking what the author is talking about when he mentions EEOC decisions in the federal sector. The EEOC's role in adjudicating complaints of employment discrimination by federal employees is one of its lesser appreciated functions.

Section 717 of the Civil Rights Act of 1964 provides that “[a]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.”<sup>7</sup> The statute further states that the EEOC “shall have [the] authority to enforce the provisions . . . of this section through appropriate remedies . . . and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.”<sup>8</sup> Section

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4. *Petitioner v. Johnson (Alvara)*, Decision No. 0320110053, 2014 WL 3571431 (E.E.O.C. July 10, 2014).

5. *Complainant v. Donahoe (USPS)*, Appeal No. 0120080613, 2013 WL 8338375 (E.E.O.C. Dec. 23, 2013).

6. For example, if an entity claims that an individual is not qualified because that person cannot perform an essential function of a position, with or without accommodation, the entity must establish that the function is essential and not marginal. *See Regulations To Implement The Equal Employment Provisions Of The Americans With Disabilities Act*, 29 C.F.R. § 1630.2(n) (2015) (listing reasons why a job function may be considered essential). If the entity chooses to deny a request for accommodation because of the impact such accommodation will have on its finances or operation, the entity must meet the undue hardship defense. *Americans with Disabilities Act of 1990*, 42 U.S.C. § 12112(b)(5)(A) (2012). And if an entity believes that a person is not qualified to perform a job because she or he cannot meet a qualification standard, including a safety standard, the entity must show that the standard is job-related and consistent with business necessity. 42 U.S.C. §§ 12112(b)(6)-12113(b)-(c) (2012).

7. *Civil Rights Act of 1964*, 42 U.S.C. § 2000e-16(a) (2012). The statute originally gave the Civil Service Commission the authority to enforce this provision. That authority was transferred to the EEOC through President Carter's Reorganization Plan No. 1 of 1978. *See Reorganization Plan No. 1 of 1978*, 3 C.F.R. § 321 (1978), *reprinted in* 5 U.S.C. app. at § 1366 (2006), *and in* 92 Stat. § 3781 (1978).

8. 42 U.S.C. § 2000e-16(b).

501 of the Rehabilitation Act grants the EEOC the same authority over claims of discrimination on the basis of disability.<sup>9</sup>

The Commission enforces these responsibilities through what is known as the “1614 process,” named for the section of the Code of Federal Regulations where it resides.<sup>10</sup> The 1614 process has three basic components. The first occurs in the agency. If an employee or applicant believes he or she was discriminated against by the agency, the employee has forty-five days from the discriminatory event to make contact with an agency equal employment opportunity (EEO) counselor.<sup>11</sup> The employee works with the EEO counselor to either resolve the complaint or file a formal charge of discrimination.<sup>12</sup> If the employee or applicant elects to file a formal charge, the agency investigates the complaint and produces a Final Agency Decision (FAD) on its merit.<sup>13</sup>

After a FAD is issued, the employee/applicant can appeal the decision to the EEOC.<sup>14</sup> The Commission will invite briefs from the parties and issue a written decision based on a *de novo* review of the record.<sup>15</sup> This is the final step in the process for the agency—the agency does not have the right to appeal a Commission decision. An employee or applicant, however, retains the

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9. 29 U.S.C. §§ 791(g), 794a (2012). Section 501 of the Rehabilitation Act provides that each federal agency shall “provide[] sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.” 29 U.S.C. § 791(b). That commitment includes both an affirmative action component and a nondiscrimination component. 29 C.F.R. § 1614.204 (2015). For complaints of nondiscrimination, section 501 states that the “standards used to determine whether this section has been violated . . . shall be the standards applied under title I of the Americans with Disabilities Act of 1990.” 29 U.S.C. § 791(g). Section 505 of the Rehabilitation Act instructs that the “remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 . . . shall be available” to complaints under section 501. 29 U.S.C. § 794a(a)(1).

10. 29 C.F.R. § 1614 (2015).

11. *Id.* § 1614.105(a)(1).

12. *Id.* §§ 1614.105-.106.

13. *Id.* §§ 1614.108-.110. I am trying to summarize the process, so I have simplified certain elements of it. The requirements of an investigation are quite onerous and the applicant/employee also has the option of requesting a hearing and recommended decision from an EEOC AJ in place of an agency investigation. The agency, however, is always responsible for issuing a final decision on the complaint. Persons interested in the specific requirements of the federal sector complaint process should consult the Commission regulations at 29 C.F.R. § 1614.

14. *Id.* § 1614.110.

15. 29 C.F.R. § 1614.401-.405. Most decisions from the Commission are issued by the Director of the Office of Federal Operations under authority delegated to that office. *Id.* § 1614.405(a). A select few are issued after consideration by the full Commission. Decisions from either source are precedential and reflect Commission policy, though decisions from the Commission often involve novel questions of law. Each of the cases discussed in this essay were issued by the Commission.

right to file a suit in federal court if he or she is unhappy with either the FAD or an appellate decision from the Commission.<sup>16</sup>

These decisions often provide unique insights on the Commission's policy positions. Unlike guidance or regulations, appeals require the Commission to apply general policy to specific factual scenarios. And, most important for purposes of this essay, they require the Commission to step into the role of a court and show how it would evaluate the legality of certain actions under Title VII, the Genetic Information Nondiscrimination Act (GINA), the Age Discrimination in Employment Act (ADEA), or the ADA.

### III. REASONABLE ACCOMMODATION UNDER THE ADA: GENERAL PRINCIPLES AND OPEN QUESTIONS

Consistent with its broad protective purpose, the ADA provides few limits on reasonable accommodation for employees with disabilities. The statute defines accommodation through examples, such as “making existing facilities . . . accessible to and usable by individuals with disabilities” and “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices . . . and other similar accommodations for individuals with disabilities.”<sup>17</sup> EEOC guidance broadly describes accommodations as, “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”<sup>18</sup>

There are only three instances where accommodation of a person with a disability is explicitly not required under the ADA. The first is when the requested accommodation is not “reasonable” in the first instance.<sup>19</sup> The statute does not define “reasonable,” but, according to the Supreme Court, a request is reasonable if it is “feasible” or “plausible” in the run of cases.<sup>20</sup> The second is when an accommodation imposes an “undue hardship” on the operations or finances of the employer.<sup>21</sup> Employers can deny reasonable accommodations if they impose significant administrative difficulty or expense.<sup>22</sup> The third is when the person requesting the accommodation is not “qualified” to perform the job.<sup>23</sup> A person is qualified for a job if he or she “satisfies the requisite . . . job-related requirements of the employment position such individual holds or desires and, with or without reasonable

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16. 42 U.S.C. § 2000e-16(c) (2012).

17. 42 U.S.C. § 12111(9) (2012).

18. 29 C.F.R. app. § 1630.2(o) (2015).

19. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002).

20. *Id.* at 401-02.

21. 42 U.S.C. § 12112(b)(5)(A) (2012).

22. 29 C.F.R. app. § 1630.2(p).

23. 29 C.F.R. § 1630.2(m) (2015).

accommodation, can perform the essential functions of such position.”<sup>24</sup> This means that the person must be able to complete the essential functions of the job either unaided or with the assistance of reasonable accommodation. If a person cannot complete an essential function, that person is not qualified. The entity does not have to change the function or relieve the person of the duty to perform it as an accommodation.<sup>25</sup>

In cases involving physical job requirements or attendance standards, the qualified inquiry is crucial. Employers often argue that these requirements or standards should be considered essential job functions.<sup>26</sup> If that argument is accepted, then an employee with a disability that prevents him or her from meeting a standard is not qualified for the job, even if he or she is otherwise able to perform the job. Once the standard is framed as an essential function, the employer is no longer required to consider alternative standards or methods of measuring performance that the person with a disability might be able to meet. In some cases, the acceptance of certain physical job requirements as essential functions can result in the automatic exclusion of a whole class of persons with disabilities from certain jobs.<sup>27</sup>

A second important issue in the qualified inquiry is the scope of accommodations to “qualification standards.”<sup>28</sup> The ADA prohibits employers from:

[U]sing qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria,

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24. *Id.*

25. *See* 29 C.F.R. app. § 1630.2(n).

26. *See, e.g.,* EEOC v. Ford Motor Co., 782 F.3d 753, 766 (6th Cir. 2015) (en banc). Ford successfully argued that an employee who had requested the ability to telework could not meet the essential function of predictable on-site job attendance and was therefore not qualified to perform the job. *Id.*; *see, e.g.,* Samper v. Providence St. Vincent, 675 F.3d 1233, 1240-41 (9th Cir. 2012). Providence St. Vincent successfully argued that a nurse in the neonatal intensive care unit was not entitled to an accommodation that exempted her from the essential function or regular, predictable attendance. *Id.*

27. For example, in a case involving a deaf employee working in a photography studio, the Tenth Circuit found that “verbal communication” was an essential function of the employee’s position. *See* EEOC v. The Picture People, Inc., 684 F.3d 981, 985-87 (10th Cir. 2012). That, of course, meant that the plaintiff (and many other individuals with deafness) was categorically unqualified to perform the job. It seems unlikely, and contrary to the intent of the ADA, that all persons who are unable to communicate verbally are unable to be photography assistants. For a better example of a court considering the abilities of individuals with deafness, *see* Keith v. County of Oakland, 703 F.3d 918, 924-27 (6th Cir. 2012) (finding that a lifeguard with deafness could be otherwise qualified to perform the job).

28. 29 C.F.R. § 1630.10 (2015).

as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.<sup>29</sup>

The statute frames the defense to a charge of discrimination based on the application of a qualification standard as requiring a showing that the standard is “job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.”<sup>30</sup>

That last phrase, “and such performance cannot be accomplished by reasonable accommodation” is grammatically murky.<sup>31</sup> It could refer to the standard itself or it could refer to the performance of the function to which the standard is tied. For example, if an employer requires that employees meet a certain vision standard and the employer is able to show that the requirement is job-related and consistent with the business necessity for the position in question, is an applicant only qualified if there is an accommodation that permits him or her to meet that vision standard? Or, can the applicant argue that he or she is able to perform the job despite not being able to meet the standard?

EEOC guidance documents,<sup>32</sup> litigation,<sup>33</sup> and amicus briefs<sup>34</sup> touch on these issues, but they are also dealt with comprehensively in EEOC federal sector cases. Three such cases are detailed in the sections below: *Alvara v. Johnson*,<sup>35</sup> where the Commission discussed the difference between an essential function and an attendance standard; *Complainant v. USPS*,<sup>36</sup> where the Commission assessed a physical job requirement as a qualification standard

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29. 42 U.S.C. § 12112(b)(6) (2012).

30. 42 U.S.C. § 12113(a) (2012).

31. *Id.*

32. *See, e.g.*, 29 C.F.R. app. § 1630 (2015); Equal Emp’t. Opportunity Comm’n, No. 915.002 ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html).

33. *See, e.g.*, EEOC v. Ford Motor Co., No. 11-13742, 2012 WL 3945540, at \*5-7 (E.D. Mich. Sept. 10, 2012); EEOC v. The Picture People, Inc., No. 09-cv-02315-PAB-CBS, 2011 WL 1754522, at \*1, \*5 (D. Colo. May 9, 2011).

34. *See, e.g.*, Brief for the United States and EEOC as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal at 1-3, *Johnson v. Bd. of Trs. of Boundary Cty. Sch. Dist.* No. 101, 666 F.3d 561 (9th Cir. 2011) (No. 10-35233) (discussing the availability of accommodations to qualification requirements under the ADA); Brief of the EEOC as Amicus Curiae Supporting Plaintiffs-Appellees in Favor of Affirmance at 1-2, *Bates v. UPS*, 511 F.3d 974 (9th Cir. 2007) (No. 04-17295) (discussing the appropriate evaluation of qualification standards under the ADA).

35. *Alvara v. Johnson*, No. 0320110053, 2014 WL 3571431, at \*1 (E.E.O.C. July 10, 2014).

36. *Complainant v. Donahoe (USPS)*, Appeal No. 0120080613, 2013 WL 8338375 (E.E.O.C. Dec. 23, 2013).

under the ADA; and *Nathan v. Holder*,<sup>37</sup> where the Commission described the scope of accommodation in a qualification standard case.

#### IV. ALVARA V. JOHNSON: ATTENDANCE STANDARDS AS ESSENTIAL FUNCTIONS

Mr. Alvara was employed as a Customs and Border Protection Officer for the Department of Homeland Security.<sup>38</sup> Mr. Alvara's facility operated twenty-four hours a day and officers were rotated in and out of different shifts, including a "graveyard shift" that ran from 12:00 a.m. until 8:00 a.m.<sup>39</sup> Officers were permitted to voluntarily swap shifts with co-workers if needed.<sup>40</sup>

Mr. Alvara had a severe case of sleep apnea and required a consistent sleep schedule.<sup>41</sup> He requested, and was initially granted, an exemption from working the "graveyard" shift as an accommodation to his disability.<sup>42</sup> In 2008, however, a new manager ordered a comprehensive review of light duty cases at the facility, including Mr. Alvara's.<sup>43</sup> Mr. Alvara was told after the review that he needed to return to working the "graveyard" shift, apply for disability retirement, request an accommodation, or resign from his position.<sup>44</sup> Mr. Alvara requested the continuance of his prior accommodation, but his supervisors determined that his inability to work the rotating shift made him unqualified for his position.<sup>45</sup> He then filed a charge of employment discrimination.<sup>46</sup>

Mr. Alvara's complaint was initially processed by the Merit Systems Protection Board (MSPB), a body responsible for enforcing the federal government's civil service merit protections.<sup>47</sup> Relying on an EEOC decision

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37. *Nathan v. Holder*, No. 0720070014, 2013 WL 3965241, at \*7-8 (E.E.O.C. July 19, 2013).

38. *Alvara*, 2014 WL 3571431, at \*1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at \*1-2.

43. *Alvara*, 2014 WL 3571431, at \*1.

44. *Id.*

45. *Id.* at \*2.

46. *Id.*

47. There is significant overlap between federal civil service laws that prohibit making personnel decisions based on "non-merit factors" and federal equal employment opportunity (EEO) laws. Cases that raise both a civil service law claim and an EEO claim are called "mixed-case appeals" and the complainant has the option of initially going through either the MSPB or the EEOC. *See* 29 C.F.R. § 1614.302 (2015). To ensure that one body is not misinterpreting the law of the other, mixed case decisions can be appealed to whichever body did not initially hear the case. *See* 5 C.F.R. §§ 1201.161(c), 1201.162(a) (2015). When the two bodies disagree on the interpretation of a law a "Special Panel" consisting of one representative from MSPB, one representative from the EEOC, and a neutral party appointed by the President and confirmed by

from 2008, the MSPB found that working a rotating shift was an essential function of Mr. Alvara's job.<sup>48</sup> Since Mr. Alvara could not work a rotating shift due to his disability, the MSPB found that he was not qualified for the job and dismissed his complaint.<sup>49</sup> Mr. Alvara appealed that finding to the EEOC.<sup>50</sup>

The central question in the case was whether working a rotating shift was an essential function of the Customs and Border Officer position at the facility where Mr. Alvara worked.<sup>51</sup> The EEOC decision said definitively that it was not, and further, that a standard related to *when* a job is performed could never constitute an essential function under the ADA.<sup>52</sup>

The decision's reasoning on that point is relatively simple. According to the Commission, "[e]ssential functions are the duties of a job, that is, the outcomes that must be achieved by someone in that position."<sup>53</sup> A rotating shift is not an outcome of a Customs and Border Officer job. It is, instead, a "method[] . . . by which a person accomplishes" the duties of a Customs and Border Officer.<sup>54</sup> As a method of performing the job and not a fundamental duty of the job itself, the requirement to work a rotating shift is subject to accommodation—including a request like Mr. Alvara's that the individual be excused from meeting the requirement.<sup>55</sup> To view a requirement related to when a person performs the job as an essential function, in the Commission's view, "leads to the perverse and unacceptable conclusion that any employee with disability-related absences is an unqualified individual and, therefore, unable to claim the protections of the [ADA]."<sup>56</sup>

That finding was not the end of the Commission's analysis though. Rotating shift requirements and other standards related to when a person performs a job might not be essential functions, but they are often important to

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the Senate is convened to hear the case. *See* 5 U.S.C. § 7702(d)(6)(A) (2012). The Panels are rarely called, but, the MSPB asked for a Special Panel in this case after reviewing the Commission's decision. The Panel ultimately upheld the EEOC's analysis as the question decided—whether a rotating shift is an essential function—was solely within the EEOC's jurisdiction and was not an unreasonable reading of the law. *See* *Alvara v. Dep't of Homeland Sec.*, No. DA-0752-10-0223-E-1, 2014 WL 0320110053 (Spec. Pan. Sept. 29, 2014).

48. *Alvara*, 2014 WL 3571431, at \*3.

49. *Id.*

50. *Id.*

51. *Id.* at \*1.

52. *Id.* at \*4-5.

53. *Alvara*, 2014 WL 3571431, at \*4.

54. *Id.*

55. *Id.* ("And, as with other methods by which a function is accomplished (e.g. lifting as a method of transporting packages or use of certain software as a method of transcribing notes), attendance and tuning are subject to the law's obligation to provide a reasonable accommodation that does not impose an undue hardship.")

56. *Id.* at \*5.

the operation of a business.<sup>57</sup> As with other forms of accommodation, a covered entity has the ability to show that providing an exception to a rotating shift policy would impose an undue hardship on its operations or finances.<sup>58</sup>

Examining the record, the Commission determined that the Department of Homeland Security had not shown that accommodating Mr. Alvara's request would impose significant expense or operational difficulty.<sup>59</sup> The facility where Mr. Alvara worked had approximately 700 officers.<sup>60</sup> Those officers frequently exchanged shifts and the facility was able to accommodate requests to not work certain shifts due to pregnancy, leave, training, and other reasons (accommodations that the Department conceded were technically temporary but could remain in place for extended periods of time).<sup>61</sup> It was also uncontested that the facility was able to accommodate Mr. Alvara for a year without issue.<sup>62</sup> The Department was only able to put forward generalized concerns about the impact that accommodating Mr. Alvara might have on the morale of other employees, evidence that is not specific enough to show undue hardship.<sup>63</sup>

The implication of this decision for attendance standards in general is obvious. According to the Commission, these standards are never essential functions.<sup>64</sup> They are instead job standards related to when and how a person performs the essential functions of a job.<sup>65</sup> As such, a person with a disability can request that they be modified or waived. But the mere fact that a person is able to request such an accommodation does not mean an employer must provide it. The employer can still show that granting that accommodation to the person requesting it would impose an undue hardship on its finances or, more likely, operation.

#### V. COMPLAINANT V. USPS: PHYSICAL JOB-REQUIREMENTS AS QUALIFICATION STANDARDS

The Complainant in this case bid for a position as a Sales, Services, and Distribution Associate (SSD Associate)—essentially a front desk employee—in a branch of the Denver Post Office.<sup>66</sup> She was denied the position because a persistent shoulder injury prevented her from lifting more than ten pounds and

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57. *Id.*

58. *Alvara*, 2014 WL 3571431, at \*5.

59. *Id.* at \*6.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Alvara v. Holder*, No. 0320110053, 2014 WL 3571431, at \*7 (E.E.O.C. July 19, 2014).

64. *Id.* at \*4.

65. *Id.*

66. *Complainant v. USPS*, No. 0120080613, 2013 WL 8338375, at \*1-2 (E.E.O.C. Dec. 23, 2013).

the Postal Service believed that lifting packages of seventy pounds or more was an essential function of the SSD Associate position.<sup>67</sup>

The first question before the Commission was whether the Postal Service was correct in its description of the essential functions of the SSD Associate position.<sup>68</sup> In a statement that was repeated in *Alvara*, the Commission found that the “essential functions are the duties of a job – i.e., the outcomes that must be achieved by the person in the position.”<sup>69</sup> The relevant outcome that had to be achieved by a person in the SSD Associate position was “collecting and distributing mail” brought in by customers.<sup>70</sup> The lifting standard was a measure put in place by the Postal Service to determine if a person could perform the job as they believe it had to be performed (i.e., the Postal Service believed that a person had to lift up to seventy pounds to effectively collect and distribute mail brought in by customers).<sup>71</sup> In that sense, the lifting requirement was a qualification standard that screened out the Complainant on the basis of disability.<sup>72</sup>

Qualification standards are acceptable under the ADA if the covered entity is able to show that the standard is job-related and consistent with business necessity.<sup>73</sup> According to the Commission, the Postal Service could justify its lifting standard by showing that:

- (1) . . . the standard, criteria, or test is ‘job-related and consistent with business necessity;’ and
- (2) . . . that there is no accommodation that would enable the person to meet the existing standard or no alternative approach (itself a form of accommodation) through which the employer can determine whether the person can perform the essential function.<sup>74</sup>

The Commission further stated that “[w]hen determining if a standard or test is job-related and consistent with business necessity, the central question is whether the standard or test is ‘carefully tailored to measure [an individual's] actual ability to [perform] the essential function of the job.’”<sup>75</sup> In this instance, the Commission found that the standard was not carefully tailored.<sup>76</sup> It cited evidence in the record from a variety of Postal Service employees and officials indicating that lifting seventy pounds was only rarely required and that SSD Associates only “frequently” lifted packages between twenty and thirty

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67. *Id.* at \*4, \*7.

68. *Id.* at \*6-7.

69. *Id.* at \*7.

70. *Id.*

71. *Complainant v. USPS*, 2013 WL 8338375, at \*7.

72. *Id.* at \*7-8.

73. *Id.* at \*8.

74. *Id.*

75. *Id.* (quoting H.R. REP. 101-485 (II) at 36, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 303, 353-5).

76. *Complainant v. USPS*, 2013 WL 8338375, at \*8.

pounds.<sup>77</sup> That evidence might “support[] a finding that a lifting requirement of 35 pounds would be carefully tailored to measure the Complainant’s ability to perform the essential functions of a Sales and Distribution Associate at the Glendale facility.”<sup>78</sup> But it was “far from sufficient for the required showing by the Agency that its requirement that Sales and Distribution Associates be able to lift up to 70 pounds met this standard.”<sup>79</sup> As the Postal Service had failed to justify the standard it used to screen out the Complainant, the Commission found that it had discriminated against the Complainant on the basis of disability.<sup>80</sup>

According to this decision, a lifting standard is best considered a qualification standard and not an essential function under the ADA, as the standard relates to the method by which a person achieves an outcome and is not an outcome in and of itself. If an employer uses a lifting requirement to disqualify a person with a disability from employment, the employer must be prepared to demonstrate that requirement is job-related and consistent with business necessity as applied to that person or “carefully tailored to measure [an individual’s] actual ability to [perform] th[e] essential function of the job.”<sup>81</sup>

This interpretation is at odds with how courts tend to examine these requirements. In a quick search of the ADA case law, one can find a number of cases analyzing whether a lifting requirement is an essential or marginal function under the ADA,<sup>82</sup> but there are almost no cases analyzing lifting as a qualification standard.<sup>83</sup> This is largely because plaintiffs have framed their

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77. *Id.*

78. *Id.* at \*9.

79. *Id.* The Commission further noted that “[u]ndoubtedly, the Agency may have been able to justify a qualification standard that tied a lower lifting requirement to these essential functions. But the Agency did not utilize a lower standard and hypothesizing about which standards might be sufficient would be speculation on our part.” *Id.*

80. *Id.*

81. H.R. REP. NO. 101-485(II), at 353-54 (1990).

82. *See, e.g.,* EEOC v. Womble Carlyle Sandbridge & Rice, LLP, No. 1:13-CV-46, slip op. at 8, 9 (D.N.C. June 26, 2014); Fornes v. Osceola Cty. Sheriff’s Office, 179 Fed. App’x 633, 635 (11th Cir. 2006); Dropinski v. Douglas County, 298 F.3d 704, 707 (8th Cir. 2002); Phelps v. Optima Health, Inc., 251 F.3d 21, 26 (1st Cir. 2001); Basith v. Cook County, 241 F.3d 919, 931 (7th Cir. 2001); Deane v. Pocono Med. Ctr., 142 F.3d 138, 140 (3d Cir. 1998); Ingerson v. Healthsouth Corp., No. 96-6395, slip op. at 2 (10th Cir. 1998); Brickers v. Cleveland Bd. Educ., 145 F.3d 846, 849-50 (6th Cir. 1998).

83. The only decision I could find that even indirectly addressed the issue was an unreported order recommendation from a magistrate judge in the Northern District of Illinois that denied a jury instruction that framed a lifting requirement as a work standard. *Kohnke v. Delta Airlines, Inc.*, No. 93 C 7096, 1995 WL 478858, at \*12 (N.D. Ill. 1995). Interestingly, the magistrate rejected that framing because he felt job-relatedness was a lower bar than showing that job duty is an essential function. *Id.*

challenges this way. In fact, in *Complainant v. USPS*, both parties had addressed the lifting requirement as an essential function.<sup>84</sup> The Commission corrected that interpretation, saying that:

Both the Complainant and Agency are mistaken about the central issue in this case. The specific lifting requirement imposed by the Agency is not an essential function of the position. Rather, it is a qualification standard that has been established by the Agency in order to ensure that employees can perform the essential functions of the job.<sup>85</sup>

Examining a lifting requirement under the qualification standard test instead of looking at it as a job function has profound implications for the ADA. As the analysis in *Complainant* illustrates, the evidence required to meet the first step in the job-related and consistent with business necessity defense will look similar to the evidence required to show that a job function is essential. The evidence required by both tests relates largely to how a job is actually performed and whether that performance is consistent with the lifting that the employer says is required to perform the job.<sup>86</sup> But an employer defending a qualification standard has to make an additional showing. It must show that “such performance cannot be accomplished by reasonable accommodation.”<sup>87</sup> As noted above, the EEOC read this in *Complainant* as requiring a showing “that there is no accommodation that would enable the person to meet the existing standard or no alternative approach (itself a form of accommodation) through which the employer can determine whether the person can perform the essential function.”<sup>88</sup> The employee or applicant can propose an alternative method of performance or measure of performance that he or she meets even if the employer can demonstrate that the standard is carefully tailored to measure job performance.<sup>89</sup> When a lifting standard is viewed as a job function, however, the analysis ends after a finding that it is an essential function. If the employee is unable to meet it, then by definition, they are unable to perform the job and are not qualified under the ADA. The Commission’s interpretation in *Complainant*, therefore, provides additional protections to persons with disabilities by extending the accommodation requirement.

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84. *Complainant v. USPS*, Appeal No. 0120080613, 2013 WL 8338375, at \*4 (E.E.O.C. Dec. 23, 2013).

85. *Id.* at \*7.

86. See 29 C.F.R. § 1630.2(n)(3) (2015) (“Evidence of whether a particular function is essential includes, but is not limited to: . . . (iii) the amount of time spent on the job performing the function; . . . (vi) the work experience of past incumbents in the job; and/or (vii) the current work experience of incumbents in similar jobs.”).

87. 42 U.S.C. § 12113(a) (2012).

88. *Complainant v. USPS*, 2013 WL 8338375, at \*8.

89. *Id.* at \*8-9.

## VI. NATHAN V. HOLDER: ACCOMMODATIONS TO QUALIFICATION STANDARDS

The analysis in *Complainant* mentions the accommodation requirement in the qualification standards defense, but it does not grapple with it in detail. The *Nathan* case, however, offers a good illustration of the Commission's view on this topic.<sup>90</sup>

Jeremy Nathan is an attorney and former officer in the United States Army.<sup>91</sup> Mr. Nathan has monocular vision due to a detached retina that cannot be surgically repaired.<sup>92</sup> His impairment was diagnosed during his service in the Army and did not result in any restrictions on his military duties.<sup>93</sup> After Mr. Nathan left the Army, he enrolled in law school.<sup>94</sup> Upon graduation he applied to work as a Special Agent (SA) in the FBI.<sup>95</sup> The FBI denied his application due to his monocular vision.<sup>96</sup> They argued that applicants had to have uncorrected vision of 20/200 in each eye and corrected vision of 20/20 in one eye and 20/40 in the other in order to safely perform the functions of a SA.<sup>97</sup> Mr. Nathan, of course, could not meet this standard, but he argued that his background in the Army and his experience in adjusting to his limited vision made him able to safely perform the SA job.<sup>98</sup>

The question before the Commission was whether the ADA required that the FBI give Mr. Nathan the opportunity to demonstrate his ability to safely perform the job in spite of his visual impairment.<sup>99</sup> Unlike the agencies in *Alvara* and *Complainant*, the FBI did not argue that the vision standard was an essential function of the job.<sup>100</sup> They argued instead that the vision standard measured whether an applicant could safely perform the essential tasks of an SA, such as "clearing a room" (quickly scanning an area to determine if any threats were present).<sup>101</sup>

The ADA states that a qualification standard "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals."<sup>102</sup> EEOC regulations state that a covered entity must show that the person with a disability poses a "significant risk of substantial harm to the

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90. See, e.g., *Nathan v. Holder*, Appeal No. 0720070014, 2013 WL 3965241 (E.E.O.C. July 19, 2013).

91. *Id.* at \*1-2.

92. *Id.* at \*1.

93. *Id.*

94. *Id.* at \*2.

95. *Nathan*, 2013 WL 3965241, at \*2.

96. *Id.*

97. *Id.* at \*7.

98. *Id.* at \*10.

99. *Id.* at \*9-10.

100. *Nathan*, 2013 WL 3965241, at \*4.

101. *Id.*

102. 42 U.S.C. § 12113(b) (2012).

health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation” (often called the “direct threat defense”) in order to justify excluding him or her from a job based on safety concerns.<sup>103</sup> A determination that a person with a disability poses such a risk must be based on an “individualized assessment” and rely on “reasonable medical judgment.”<sup>104</sup> Though this test obviously differs from the “job-related” defense laid out in the statute, the two standards do not, as the Fifth Circuit noted in *EEOC v. Exxon*, “present hurdles that comparatively are inevitably higher or lower but rather require different types of proof.”<sup>105</sup>

In *Nathan*, the Commission found that the FBI had not conducted the individualized assessment required by the direct threat defense.<sup>106</sup> Specifically, the FBI had relied on generalized evidence about the limitations of persons with monocular vision and had failed to take Mr. Nathan’s specialized experience into account when rejecting his application.<sup>107</sup> In addition, the Commission stated that a review of Mr. Nathan’s skills on paper alone was not sufficient.<sup>108</sup> The FBI was required to permit Mr. Nathan to actively demonstrate how he was able to perform the SA job even in spite of his monocular vision.<sup>109</sup> As the order attached to the decision reveals, the only effective way for Mr. Nathan to make that showing would be to attend the FBI training academy for new agents.<sup>110</sup> If he is able to pass, he will have demonstrated his ability to safely perform the job using his experience and acquired skills.<sup>111</sup>

Despite the fact that the *Nathan* decision discusses the direct threat defense and not the job-related defense, it tells us quite a bit about the EEOC’s view on how the accommodation requirement works under the job-related defense. As the language quoted from the *Exxon* decision implies,<sup>112</sup> when considering a safety standard, the difference between the direct threat and job-related defenses is one of degree, not kind—particularly as the two are applied in EEOC decisions. Both defenses require that the employer consider the standard as applied to the individual and not just in general (i.e., the individualized

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103. 29 C.F.R. § 1630.2(r) (2015).

104. *Id.*

105. *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000).

106. *Nathan*, 2013 WL 3965241, at \*10.

107. *Id.* at \*9.

108. *Id.* at \*9-10.

109. *Id.*

110. *Id.* at \*10 (“Notify Complainant of the reporting dates of upcoming New Agent training classes. The Agency shall allow Complainant 90 days notice between the successful completion of his background investigation and the date on which he is required to report for New Agent training. Complainant may request an earlier reporting date if one is available . . . .”)

111. *Nathan*, 2013 WL 3965241, at \*10.

112. *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000).

assessment), and both require that the employer consider accommodations that permit the individual to perform the job safely. The relief ordered in *Nathan*<sup>113</sup> demonstrates that when individuals with disabilities are unable to meet a standard they have the right not only to suggest accommodations that enable them to meet those standards, but they also have the right to show that they can perform the job, with or without accommodation, in spite of the standard.

## VII. CONCLUSION

The decisions in *Alvara*, *Complainant*, and *Nathan* provide three significant insights. First, properly drawing the line between essential functions and qualification standards is incredibly important to the operation of the ADA. The essential functions of a position are the outcomes that a person in that position must achieve. They are not the *methods* that a person uses to achieve that outcome or *the time* at which the outcomes are achieved. Viewing a requirement that dictates the method of job performance as an essential function relieves the covered entity from the fundamental requirement of the ADA—namely, rethinking the way in which a job is performed in order to give persons with disabilities a chance to demonstrate their capabilities.

Second, reasonable accommodations to qualification standards are permitted by the statute. If a qualification standard, like a vision test or a lifting requirement, screens out a person with a disability, the employer needs to consider both accommodations that enable the person to meet the standard and alternative standards (or the waiver of the standard), so long as the person is otherwise able to perform the job.

Finally, a finding that a physical job requirement or attendance standard is not an essential function does not leave the employer defenseless. An employer can show that accommodations to these policies impose an undue hardship on its finances or operations, or challenge the effectiveness of any alternative measure proposed by the employee or applicant. But, importantly, the employer must be open to changes in these practices if those changes will permit a person with a disability to successfully perform the job. Rote application of a policy, and disqualification of persons with disabilities, is not permitted.

Of course, these decisions only represent the view of the EEOC. The courts have, to date, tended to go in a different direction. But the principles announced in *Alvara*, *Complainant*, and *Nathan* are in line with the fundamental mission of the ADA and deserve considered attention. The ADA was meant to open up employment opportunities for persons with disabilities. Many persons with disabilities are only able to perform jobs by using methods that differ from the methods traditionally used by employees without

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113. *Nathan*, 2013 WL 3965241, at \*10, 14.

disabilities. Having employers consider those alternative methods is how the promise of the ADA is ultimately fulfilled.