MEMORANDUM OF LAW

DATE: June 28, 1995

TO: D. Cruz Gonzalez, Risk Management Director

FROM: City Attorney

SUBJECT: The Americans with Disabilities Act and Job Related Stress

QUESTION PRESENTED

Must the City transfer an employee to a different position if the employee's inability to cope with a particular job, because of co-workers, supervisors or other job factors, has created a medically diagnosed stress condition for the employee?

SHORT ANSWER

No. Although job-related stress may qualify as a disability under the Americans with Disabilities Act ("ADA"), transfer is not considered a required "reasonable accommodation." An employee suffering from such stress does not have to be accommodated under the statute and is, therefore, not a qualified individual with a disability.

BACKGROUND

Recently, the Rehabilitation Division of Risk Management has been receiving a number of requests from employees asking for help in transferring to different departments. Employees and their unions assert that transfers are a reasonable accommodation for the disability and are, therefore, mandated by the ADA.

In most instances, the employee's doctor indicates the employee is suffering from "job related stress." The stress is a result of the employee's inability to get along with a particular supervisor or employee, or because he or she has trouble coping with the daily demands and stresses of his or her job. Since the employee cannot perform in his or her current position, a transfer is requested.

The request is not based upon the employee's inability to perform one or more of the essential functions of his or her job. In the new position the employee would perform the same essential functions he or she performed in the previous position. The only job condition that would change would be the location or time and, therefore, the supervisors and coworkers. You have asked whether the Rehabilitation Division must assist employees in the transfer process as a reasonable accommodation mandated by the ADA.

ANALYSIS

I. Is Stress a Disability?

The Equal Employment Opportunity Commission has indicated that stress and depression are conditions that may or may not be impairments, "depending on whether these conditions result from a documented physiological or mental disorder." U.S. Equal Employment Opportunity Commission, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, II-3 (1992). By way of illustration the Commission gives the following example: "A person suffering from general 'stress' because of job or personal life pressures would not be considered to have an impairment. However, if this person is diagnosed by a psychiatrist as having an identifiable stress disorder, s/he would have an impairment that may be a disability." Id.

A person is disabled within the meaning of the statute if he or she has a physical or mental limitation that substantially limits a major life activity. Major life activities mean "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 56 Fed. Reg. 35735 (1991) (to be codified at 29 C.F.R. Part 1630).

If a person is substantially limited in a major life activity other than working, no inquiry needs to be made as to whether the person is substantially limited in the activity of working. If, however, the person is not substantially limited in one of life's major activities, then work should be considered in determining if the individual is disabled. U.S. Equal Employment Opportunity Commission, Americans With Disabilities Act Handbook, I-30 (1992).

Courts have indicated that "if an applicant were disqualified from an entire field, there would be a substantial handicap to employment." E. E. Black, Ltd. v. Marshall, 497 F.Supp. 1088, 1101 (1980). Similarly, with respect to working, the Equal Employment Opportunity Commission ("EEOC") has said that "substantially limited" means a person is:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Equal Employment Opportunity Commission, 56 Fed. Reg. 35735 (1991) (to be codified at 29 C.F.R. Part 1630).

The analysis of whether an individual is substantially limited must include a determination of an individual's fitness for employment in general, not the individual's ability to perform in a specific, desired position. Just as job qualifications may include licensing or certification requirements, they may also include certain mental or

physical requirements without running afoul of the ADA.

For example, in one case in which a flight attendant argued that he was disabled because he was overweight, the Court disagreed. The Court explained that he was not substantially limited in the major life activity of work because "the regulations define major life activity as 'working,' . . . but not working at the specific job of one's choice." Tudyman v. United Airlines, 608 F. Supp. 739, 745 (D.C. Cal. 1984). In another case, the court held that a person who tested poorly on the personality portion of the police exam was not handicapped, because "being declared unsuitable for the particular position of police officer is not a substantial limitation on a major life activity." Daley v. Koch, 892 F.2d 212 (2nd Cir. 1989). Finally, in Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986), a utility systems repairer who was an acrophobic was found not to be substantially limited in the major life activity of working because he could not climb ladders. This precluded him only from the position for which he was applying. He had previously been employed as a utility systems repairer in other areas and thus was not substantially limited in working. Nevertheless, an employee suffering from job-related stress may be "substantially limited" in his or her job duties and, therefore, disabled as defined by the ADA.

For example, the courts have held the following individuals were disabled within the meaning of the Rehabilitation Act:F

> The ADA defines "an individual with a disability" in the same terms as the Rehabilitation Act of 1973 defines "a handicapped individual." Thus, courts are guided by the Rehabilitation Act in construing the language of the ADA, Belton v. Scrivner, Inc., 836 F. Supp. 783, 787 (W.D. Okl. 1993).

a nurse suffering from depression, anxiety, insomnia and migraine headaches, all stemming from job-related stress: Guice-Mills v. Derwinski, 967 F.2d 794 (2nd Cir. 1992); a tool room attendant suffering from job-related stress and anxiety stemming from a feeling of being harassed by his superiors: Pesterfield v. Tennessee Valley Authority, 941 F.2d 437 (6th Cir. 1991); an office supplies salesman depressed by a number of personal and work problems, including the fact that his pay had been cut in half: August v. Offices Unlimited, 981 F.2d 576 (1st Cir. 1992); a postman who suffered from anxiety disorder, which disorder was compounded by having to drive through Boston to get to work: Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989).

In these cases, the court accepted that the plaintiff was disabled or handicapped within the meaning of the statute. Each plaintiff was under the treatment of a doctor or psychiatrist, and the issue of disability was not hotly contested. Nevertheless, the mere fact that the court determined the individuals were disabled did not mean that they were "qualified individuals with a disability" for purposes of the ADA. Disability, standing alone, is insufficient to meet the

requirements necessary to be considered a "qualified individual with a disability."

II. Is the Employee "A Qualified Individual with a Disability" for Purposes of the ADA?

If it has been determined that an employee is disabled by his or her stress condition, the next step in the analysis is to determine whether the employee is a "qualified individual with a disability." To make this determination a two part analysis is required. First, one must determine the essential functions of the job and second, he or she must consider whether an individual can perform those essential functions with reasonable accommodations if necessary.

A. Essential Functions

A qualified disabled person is one "who, with or without reasonable accommodation, can perform the essential functions of the job position in question." Pesterfield, 941 F.2d at 441. "Essential functions," according to the implementing regulations, means "the fundamental job duties of the employment position the individual with a disability holds or desires." Equal Employment Opportunity for Individuals With Disabilities, 56 Fed. Reg. 35735 (1991) (to be codified at 29 C.F.R. Part 1630).

Essential functions have been narrowly construed by the courts. "The determination of whether physical qualifications are essential functions of a job requires the court to engage in a highly fact-specific inquiry. Such a determination should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved." Hall v. U.S. Postal Service, 857 F.2d 1073, 1079 (6th Cir. 1988) (emphasis in original).

Peripheral or collateral functions, which might be helpful, but not essential, to a position cannot be used as a reason to deny an applicant a position. The employer bears the burden of persuasion in ADA cases, and the courts will "focus attention on whether job requirements set forth by an employer are in fact necessary and legitimate to the job." Simon v. St. Louis County, Missouri, 735 F.2d 1082 (8th Cir. 1984).

B. Reasonable Accommodations

Reasonable accommodations should not cause undue hardship to the employer. The statute is not written to place an unreasonable burden on employers. Rather, the purpose of the statute is to give all qualified individuals reasonable access to employment opportunities. Reasonable accommodations may include, among other things, job restructuring or modified work schedules. 29 C.F.R. Section 1613.704(b).

In differentiating between reasonable and unreasonable, the court in one case indicated that an employee's insistence that she be allowed to maintain her head nurse position with flexible hours was not a required accommodation. However, an offer of a staff nurse position with flexible hours was reasonable accommodation and, hence, required. In

reaching its decision, the court agreed with the employer that the head nurse position required the employee's presence during the peak hours, therefore, flexible hours in that position was not a reasonable request. Guice-Mills v. Derwinski, 467 F.2d 794 (2nd Cir. 1992).

It is possible that a person could be so debilitated by stress or depression that he or she could not fulfil the essential functions of any job even with an accommodation. For example, in Pesterfield the plaintiff was so anxious and depressed that he could not withstand the ordinary pressures of the work place due to his hypersensitivity to criticism. The court held that, under these circumstances, he was not otherwise qualified to perform his job, and that there would have been no way for the employer to reasonably accommodate him. In explaining its finding, the court noted:

> The court is unable to imagine any jobs where plaintiff could be immunized from any criticism or other normal stresses of the workplace. To accommodate the plaintiff, TVA would have had to have placed him in a virtually stress-free environment. The court finds that such a job does not exist at the Bull Run Steam Plant and perhaps cannot be found in any workplace.

941 F.2d at 441.

In sum, for an individual to be a "qualified individual with a disability," he or she must be substantially limited in obtaining employment in a broad class of jobs and not just one particular position. If the individual meets this initial threshold, he or she must then be able to perform the essential functions of any job in this broad class with a reasonable accommodation.

III. Is Transfer a Required Reasonable Accommodation?

The courts have frequently been asked to determine whether a transfer is a required reasonable accommodation. They have looked to the Code of Federal Regulations, Title 29, section 1630.2(m), for guidance. This section defines "Qualified individual with a disability" as "individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." Equal Employment Opportunity Commission, 56 Fed. Reg. 35735 (1991) (to be codified at 29 C.F.R. Part 1630) (emphasis added).

The narrow focus of the regulation is the specific position sought, not a broad category of jobs. Interpreting this language, the courts have found: "The case law is clear that, if . . . an employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment." Carter v. Tisch, 822 F.2d 465, 467 (4th

Cir. 1987); citing School Board of Nassau County v. Arline, 480 U.S. 273 (1987).

The Supreme Court's finding in the oft-cited footnote in the Arline case was further clarified by the Court in Guillot v. Garrett, 970 F.2d 1320 (1992). The Guillot court stated:

> The Arline footnote is somewhat ambiguous, principally because of its reference to "alternative employment opportunities" following its categorical statement that employers "are not required to find another job for an employee who is not qualified for the job he or she was doing," and its indefinite reference to "existing policies." We believe, however, that the passage was intended only to restate the obvious fact, discussed earlier in its opinion, that an employer is required by regulation to reasonably accommodate an employee's handicap so as to enable him to perform the functions of the position he currently holds.

Guillot v. Garrett, 970 F.2d 1320, 1326 (1992) (citation omitted) (emphasis added).

Thus, in the case of a City employee who is able to perform all the essential functions of the job, but cannot perform those functions in his or her current position, no reasonable accommodation must be made. "It is the location (and timing) of the duties - not the duties themselves - which pose the problem." Shea v. Tisch, 870 F.2d at 790.

CONCLUSION

To be entitled to a reasonable accommodation, an employee must first be a "qualified individual with a disability." An employee who can perform all the essential functions of a job, but who cannot perform them at a specific time or place is not a "qualified individual with a disability" for purposes of the ADA. Therefore, no reasonable accommodation is required. Although the City is not precluded from assisting employees in finding alternative positions, the City is not required to transfer an employee under the reasonable accommodation provisions mandated by the ADA.

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