

# THE DAILY RECORDER

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## Disability Discrimination and Qualification Standards

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### Background

The federal Americans with Disabilities Act protects individuals with disabilities from discrimination. The Fair Employment and Housing Act is the California anti-discrimination law that provides similar protections. Both the ADA and FEHA require employers to make reasonable accommodations when qualified employees can perform the essential functions, but not necessarily all other requirements, of a job.

Recent legal developments are equalizing the way disability law is applied in California and federal courts. The ADA Amendments Act of 2008 goes into effect on January 1, 2009. The ADAAA expands the definition of disability to include more employees. Although the full impact remains to be seen, the ADAAA makes federal law more like California law by applying it to employees whose medical conditions may not be visible and may already be controlled by medication. For example, under the ADA as it currently is applied, an employee with a heart condition may not be entitled to accommodation if the heart condition is controlled by medication. Under the ADAAA, the heart condition is more likely to constitute a disability, because it is a limitation of an important bodily function; the medication no longer will be considered in the analysis.

In Green v. California Department of Corrections and Rehabilitation, the

California Supreme Court emphasized that the employee has the burden of proving he is qualified to perform the essential functions of a job before the employee can claim the employer did not accommodate him. In Green, the Court explained that the law “does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability. . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would endanger his or her health or safety or the health or safety of others even with reasonable accommodations.”

Therefore, under both state and federal law, only a “qualified” individual with a disability is entitled to legal protection. That is an individual with a disability who can (1) satisfy the requisite skill, experience, education and other job-related requirements and (2) perform the essential functions of a position with or without reasonable accommodation.

### Essential v. Marginal Job Functions

As explained by the Equal Employment Opportunity Commission, “Most jobs require that employees perform both ‘essential functions’ and ‘marginal functions.’ The ‘essential functions’ are the most important job duties, the critical elements that must be performed to achieve the objectives of the job.

Removal of an essential function would fundamentally change a job.” For example, if a person is employed to make deliveries, but asks to stay in the office and organize files as an accommodation, the job of delivery-person has fundamentally changed. The employer is not required to make such a change.

Marginal job functions are usually expected of employees, but are not as important as essential functions. For instance, an employer may require a delivery person to wash the delivery van, but the delivery driver is allergic to one of the solvents used to clean the van. By removing that non-essential function of washing the van, the driver can perform the essential functions of driving and making deliveries.

The difference between essential and marginal functions is very important to reasonable accommodation law. Employees with disabilities must perform essential job functions to the same extent as everyone else (although they may be entitled to accommodations in how they meet the requirements). As the EEOC has explained, “an employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employees in the same job. Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation.” Therefore, if a customer service employee is required to handle a certain number

of telephone calls per hour, the disabled employee must answer the same number of calls as a non-disabled employee.

### Job Qualifications

An employer may legally set neutral qualification and performance standards it believes are good for business. But the law places certain limitations on employers when the standards screen out individuals in protected groups, including women, minorities and individuals with disabilities.

There is a difference between an essential job function and a “qualification standard.” The EEOC regulations define “qualifications standards” as “the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.”

When an employer adopts a job requirement that implicates an applicant or employee’s disability, the employer must show that the requirement is: (1) “job-related;” (2) “consistent with business necessity;” and (3) that “performance cannot be accomplished by reasonable accommodation.” This requirement follows the marginal function standard in that an employer cannot simply add unnecessary physical requirements to a job to exclude an individual with a disability, such as asking an accountant to throw a football through a moving tire from 20 yards.

### Bates v. United Parcel Service

The difference between a qualification or performance standard and an essential job

function is illustrated by the Ninth Circuit Court of Appeals’ en banc decision in Bates v. United Parcel Service. There, hearing impaired employees complained that UPS’s employment standards for “package car” drivers were discriminatory. Under federal law, operators of certain trucks over 10,000 pounds are required to pass a physical and demonstrate a minimum ability to hear. There is no hearing requirement to become licensed to drive a car or a smaller truck, such as a “package car” (that is, UPS’s trademark brown panel vans). However, UPS implemented a policy requiring all drivers to meet the U.S. Department of Transportation’s (DOT) requirements for operators of vehicles heavier than 10,000 pounds.

The court set forth standards for how the hearing-impaired plaintiffs could prove that UPS’s qualification standards unlawfully discriminated against them. First, the applicants had to prove they could perform the job’s essential functions. UPS and the employees agreed that two of the “essential functions” of the package-car driver position are (1) “the ability to communicate effectively” and (2) “the ability to drive safely.” The court rejected UPS’s argument that “the ability to drive DOT-regulated vehicles” was also an essential function because UPS did not require all drivers to satisfy all DOT standards when driving vehicles not subject to DOT regulation.

UPS also argued that the ability to drive with hearing acuity sufficient to pass DOT requirements was a necessary part of the essential function of safe driving. The court disagreed, holding that hearing at a certain level was a qualification standard that the employer considered necessary to perform at the requisite level of safety, rather than an essential function of the job

As a result, the employees had the burden of showing they otherwise could drive the panel trucks safely notwithstanding the hearing standard. Then, the court explained, it was UPS’s burden to show that “the higher qualification standard is job-related and consistent with business necessity, and that performance cannot be achieved through reasonable accommodation.”

### Proving the Defense

The court in Bates explained that, to show “job-relatedness,” an employer must demonstrate that the qualification standard fairly and accurately measures the individual’s actual ability to perform the essential functions of the job. Thus, “when every person excluded by the qualification standard is a member of a protected class -- that is, persons with a disability -- an employer must demonstrate a predictive or significant correlation between the qualification and performance of the job’s essential functions.”

To show that the disputed qualification standard is “consistent with business necessity,” the employer must show that it substantially promotes the business’s needs. The court noted that the “business necessity standard is quite high, and is not to be confused with mere expediency.” In the case of the safety-related standard at issue in UPS, such evidence would include the magnitude of potential harm and the likelihood of harm occurring.

The court also explained that, to show that reasonable accommodation is not possible, the employer must show “either that no reasonable accommodation currently available would cure the performance deficiency or that such

reasonable accommodation poses an 'undue hardship' on the employer."

### Conclusion

The ADAAA does not specifically address qualification standards. However, the broader definition of "disability" that the new law imposes means that employers will be required to consider their

obligations more frequently and in a broader variety of situations. More than ever, employers must understand and apply the differences between essential and marginal job functions, as well as the distinction between essential job functions and job qualifications such as the court in Bates confronted.

When employers impose physical and mental job requirements, they should examine whether these are job-related and consistent with business necessity. Even employees who do not meet such requirements may be entitled to accommodation that will enable them to perform their essential functions if undue hardship does not result.

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