

Henschel v. Clare County Road Commission 2013 U.S. App. LEXIS 24746 (6th Cir.)

OPINION BY CIRCUIT JUDGE STRANCH:

Wayne Henschel was working as an excavator operator for Clare County Road Commission (CCRC) when he lost his left leg above the knee in a motorcycle accident. Because he was not allowed to return to work, Henschel asserts that CCRC discriminated against him on account of his disability in violation of the Americans with Disabilities Act (ADA). The district court granted CCRC's motion for summary judgment, finding that Henschel could not perform the essential functions of the excavator operator position and that no reasonable accommodation was possible. Because genuine issues of material fact exist as to the essential functions of the excavator operator position, we . . . REVERSE. . .

*** Henschel started working for CCRC in February 2007. *** Henschel applied for and was assigned to CCRC's excavator operator position shortly after he was hired. Then in August 2009, Henschel was involved in a motorcycle accident that resulted in the amputation of his left leg above the knee. He was off work for a few months recovering from his injuries during which time he was fitted for a prosthetic leg. While recovering he told others that he wanted to return to work. In the meantime, CCRC advertised for and hired a temporary excavator operator to fill Henschel's position until he could return.

As excavator operator, Henschel ran an excavator—a piece of heavy equipment used for digging ditches and trenches—that was delivered to work sites on a trailer pulled by a manual transmission semi-truck. Over the past decade, employees in various CCRC positions hauled the excavator to the work site. Lee Schunk, a former long-term CCRC employee, operated the excavator for two years before Henschel took that job. Schunk testified that during his tenure as an excavator operator, a semi-truck driver was responsible for transporting the excavator, allowing Schunk to drive an automatic-transmission pick-up truck to the work site. As excavator operator, Henschel hauled the excavator to the work site 70 percent of the time and other CCRC employees, often the semi-truck driver, 30 percent. During Henschel's tenure as excavator operator there was one regular semi-truck driver; during Schunk's tenure there were two.

CCRC specified the duty to haul equipment as a function assigned to its job description for Truck/Tractor Driver. CCRC did not include the hauling function in its Operator-Excavator job description; it did include in that description an "Other duties assigned" task, which could cover any CCRC task assigned. The person holding the Truck/Tractor Driver position was referred to as the semi-truck driver because his primary responsibility was to pull trailers in a semi-truck. Robert Fisch, who held the Truck/Tractor Driver position when Henschel sought to return to work, testified that he considered hauling the excavator to the work site to be one of the semi-truck driver's job duties. While the semi-truck driver sometimes has all-day tasks that would limit his availability to haul the excavator, Schunk testified that there were a number of other CCRC employees qualified to drive a semi-truck, as Henschel had been, and who could potentially haul the excavator.

The excavator was generally moved only when it needed to be brought to a new work site and, according to Henschel's testimony, 90 percent of the time it stayed at the work site. It was used at various work sites throughout the year for varying lengths of time; sometimes it was operated at the same site for weeks and other times the jobs were completed in a day. During the winter, the excavator was generally not in use and the excavator operator plowed snow using a blade truck or a grader.

After recovering sufficiently from his accident, Henschel asked to return to work on the excavator. Henschel met with his supervisor John Krchmar and CCRC's Engineer-Manager Steve Stocking at least twice about returning to the excavator operator position. Before returning, Henschel had to apply for a medical waiver to maintain the commercial driver's license (CDL) required by CCRC. Upon receiving his medical waiver application, the Michigan Traffic Safety Division sent a letter to CCRC requesting additional information, including "[a]n evaluation of Mr. Henschel's ability to perform the essential job functions of a truck driver, including driving a manual transmission, while using his prosthetic device." CCRC did not limit Henschel's testing to the essential functions of a truck driver; rather, on the direction of Stocking, Krchmar tested Henschel's ability to perform job functions related to every position at CCRC. After receiving the results of the testing from Stocking, the

Michigan Traffic Safety Division granted Henschel a medical waiver allowing him to retain his CDL, but limited him to automatic-transmission vehicles.

After Henschel's testing, CCRC did not try to return him to the excavator but looked into assigning him to a year-round blade truck driver position in an automatic-transmission blade truck. *** [After those efforts failed,] CCRC's management decided that it did not have a position for Henschel and ultimately that he would be terminated. In a letter to Henschel, CCRC told him that he was being terminated because of his inability to transport the excavator to the work site. ***

Henschel filed a claim against CCRC with the Equal Employment Opportunity Commission (EEOC). In a September 29, 2011 letter, the EEOC sent a determination letter stating that the evidence submitted supported a finding of a violation of the ADA. In April 2012, Henschel filed suit against CCRC under the ADA. The district court ruled for CCRC on summary judgment, finding that transporting the excavator to the work site was an essential function of the excavator operator position [and] that Henschel was unable to haul the excavator . . . ***

In an employment discrimination case under the ADA, a plaintiff must show that 1) he is an individual with a disability within the meaning of the ADA; 2) he is qualified to perform the essential functions of the job, with or without reasonable accommodation; and 3) he suffered an adverse employment decision because of his disability. CCRC contends that Henschel's claim fails at the second prong because Henschel is not qualified for employment with CCRC, with or without reasonable accommodations.

*** "A job function is essential if its removal would 'fundamentally alter' the position." According to the ADA, "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." The regulations accompanying the ADA provide seven non-exclusive factors for determining whether a particular function is essential:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;

- (v) The terms of a collective bargaining agreement;
- (vi) The experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

In finding that hauling the excavator was an essential function, the district court relied on: (1) CCRC's testimonial opinion that hauling is an essential function of the excavator operator position; (2) on its own conclusions that the position would fundamentally change if that responsibility were given to another employee; and (3) that CCRC lacked other employees to undertake the responsibility.

As the employer, CCRC's opinion that hauling is an essential function carries weight but is only one factor to be considered. A court also must "conduct a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice." We next review the job descriptions created by CCRC. First, the duty of hauling equipment is already assigned; it is specified in the job description for the Truck/Tractor Driver. Second, none of the three excavator operator job descriptions posted by CCRC since 2007 included hauling the excavator—or driving a manual transmission. The excavator operator job descriptions do include "Other duties assigned" as a job duty. The district court found it important that Clare County Manager Ron Bushong said that the other duties assigned may be "anything from any of the other [job] categories." However, not every other duty under every other job category is an essential function of the excavator operator position. To reach that conclusion would make the various job descriptions meaningless. Essential functions are those that are fundamental to a particular position, not marginal functions.

The remaining five factors specified in the regulations for determining if a function is essential examine the actual functions and circumstances of the position. Turning to those, we first examine the amount of time that the excavator operator spends hauling the excavator and the consequences of reassigning this responsibility. The district court determined that hauling the excavator took a substantial amount of the excavator operator's time, relying on Henschel's testimony that he hauled it 70 percent of the time. That evidence, however, only addresses the distribution of the work, not the amount of time actually spent transporting the excavator. The excavator is not moved every day and is sometimes operated at the same work site for weeks at a time. Henschel testified that 90 percent of the time, the excavator stayed at the job site. The record does not

address how much time Henschel actually spent hauling the excavator to different work sites, but this obviously varies depending on the number and location of work sites. Viewed in the light most favorable to Henschel, there is sufficient evidence that hauling the excavator did not take much of the excavator operator's time and was a relatively marginal function.

The district court also found that CCRC lacked employees to take on the responsibility of hauling the excavator because CCRC previously had two regular semi-truck drivers but during Henschel's employment, only had one. There is evidence in the record, however, to support the inference that even with only one regular semi-truck driver there would be minimal consequences to CCRC's operations if the excavator operator no longer hauled the excavator. Schunk, a former excavator operator for CCRC, testified that the semi-truck driver could have hauled the excavator for Henschel without a problem and that there were a number of CCRC employees other than the semi-truck driver who could do so when needed. In Schunk's experience as excavator operator—when CCRC had two semi-truck drivers rather [than] one—a semi-truck driver was responsible for hauling the excavator to the work site and Schunk drove an automatic-transmission pickup truck to the excavator work site. While the number of regular semi-truck drivers has been reduced, Schunk's prior experience should not be summarily dismissed, given the evidence that hauling the excavator entailed a marginal time investment and that other CCRC employees were qualified and capable of doing the hauling. Furthermore, Robert Fisch, CCRC's semi-truck driver when Henschel attempted to return to work, testified

that while he regularly had other day-long responsibilities, he would be able to do the hauling.

CCRC's written job descriptions provide evidence that hauling the excavator was the Truck/Tractor Driver's job duty and not one of the excavator operator's essential functions. There is also sufficient evidence for a reasonable jury to find that a number of the other factors—including the amount of time hauling takes, the consequences to other positions, and the experiences of past incumbents—support Henschel's position. CCRC's testimonial opinion is simply one factor that cuts the other way. Thus, there exists a genuine issue of material fact concerning whether hauling the excavator is an essential function of the excavator operator position, and summary judgment is not appropriate.

CASE QUESTIONS

1. What was the legal issue in this case? What did the appeals court decide?
2. What is the job that the plaintiff held prior to becoming disabled and to which he is seeking reinstatement? How does his disability affect performance of that job?
3. Why does it matter whether driving a semi-truck and trailer is an essential function of his job?
4. What factors do courts consider in deciding whether particular tasks are essential functions of jobs? What evidence did the district court rely on in deciding that hauling the excavator was an essential function of the excavator operator job? Why did the appeals court reverse the district court's decision?
5. What should the county have done to better handle this situation?

screen out) an individual with a disability or a class of such persons, the employer must be prepared to prove that the requirement is job-related and consistent with business necessity. Only those requirements that relate to ability to perform the essential functions of a job are "consistent with business necessity." Thus, possession of a valid driver's license—a qualification not available to some disabled persons because of the nature of their conditions—is a lawful requirement only if driving is an essential function of the specific position.²³ A trucking company could not establish the business necessity of a policy under which drivers that disclosed their alcohol problems and successfully completed substance abuse treatment could not be returned to positions as drivers.²⁴ In contrast, the U.S. Marshals Service was able to establish the job relatedness and business necessity of its prohibition against the use of hearing aids during preemployment medical exams that include hearing tests. The ban came after a careful study of the job of court security officer. A number of hearing-related essential functions were identified, including comprehending speech over the radio

²³ *Baily v. AmeriGas Propane*, 2013 U.S. Dist. LEXIS 38462 (D. Md.).

²⁴ *EEOC v. Old Dominion Freight Line*, 2013 U.S. Dist. LEXIS 88352 (W.D. Ark.).

JUST THE FACTS

A photography studio hired a profoundly deaf employee as a “performer.” She communicates with hearing individuals by writing notes, gesturing, pointing, and miming. She can also type, text message, use body language, employ basic American Sign Language signs that most people can understand, and speak some words. However, she cannot read lips effectively and she speaks only a few words. Her written communication skills are poor and she scores below average on vocational tests. Performers have four areas of responsibility: customer intake, sales, portrait photography, and laboratory duties. The job description lists “strong verbal communication skills” and “strong customer service skills” as job qualifications for performers. During peak (holiday) periods, performers mainly work in one area of responsibility, and she was assigned to work primarily in the camera room doing photography. However, during nonpeak periods, only one manager and one performer are scheduled to work at a time. During these periods, performers are expected to cover all four areas of responsibility. The woman had the opportunity to shoot photographs on fifteen to twenty occasions with a hearing performer and she conducted shoots by herself on a couple of occasions. She communicated with photo subjects by writing notes, gesturing, and miming. She experienced some difficulty doing this, particularly because the photo subjects were usually young children. To sell photo packages to customers, she had to write notes, gesture, or get assistance from a coworker. The woman made several requests for an ASL interpreter, including during her initial orientation and then for a subsequent training session for performers, but no interpreter was ever provided. After the holiday season, the woman’s hours were eliminated and she was eventually terminated. She sued. What should the court decide? Why?

and under other difficult circumstances, hearing sounds requiring investigation, and pinpointing the source of sounds. The facts that hearing aids can malfunction, break, or come loose made it a business necessity for court security officers to be able to perform their jobs relying on unaided hearing.²⁵

Not a Direct Threat Employers sometimes identify individuals as unfit for employment because their disabilities are thought to present a direct threat to safety and health. Such individuals can perform the essential functions of the jobs in question but, for reasons such as the contagious nature of their conditions (e.g., food handlers with hepatitis) or the episodic and unpredictable character of their symptoms (e.g., some persons with epilepsy or mental illness), pose a substantial risk of harm. An employee who had worked in oil refineries for years and who sought employment at a refinery was rejected because of a liver condition that might be worsened by contact with toxic chemicals. The Supreme Court ruled for the employer, holding that substantial risk to an employee’s own safety or health, as well as that of coworkers and customers, falls within the meaning of “direct threat.”²⁶ However, to establish that a person’s disability constitutes a **direct threat**, the employer must show that the employee *currently poses a specific risk of significant harm*. This judgment must be made on the basis of *objective medical evidence*, not on stereotypes or fears.

²⁵*Allmond v. Akal Security*, 558 F.3d 1312 (11th Cir. 2009), cert. denied, 2010 U.S. LEXIS 742.

²⁶*Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002).