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Job Descriptions Provide Protection from Employers Against Discrimination Claims

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Clear and current job descriptions outlining the essential functions of a position are a vital tool for employers in deterring and combatting claims of discrimination under both the American Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII). Employers should maintain a detailed job description containing the essential and non-essential functions of a job, the production standards, as well as, any necessary qualification standards for the job. These important components assist in enabling the Courts to have a clear picture of the vital responsibilities of the positions in order to determine whether to sustain an allegation of discrimination. Specifically, with regards to

claims of discrimination based on a denial of an alleged reasonable accommodation and in the conducting of criminal background checks, courts rely on job descriptions in shaping their analysis of discrimination claims.

Under 42 US Code §12102, a disability is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual."[1] Major life activities include walking, speaking and reading and additionally include major bodily functions, such as limits to the immune system and digestive system among others. The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) provides for broad construction of the phraseology "substantially limits" to include temporary impairments. ADAAA legislation now makes it easier for a person to establish coverage as a person with a disability. Therefore, moving forward the court's focus will turn to the essential requirements of the position and the employee's request for accommodation.[2] A job description outlining the essential and non-essential functions of the job, the production standards required and the necessary qualifications for the position become an important defense tool for employers.

ADA legislation affords deference to employers in determining the essential functions and level of performance required for a position.[3] Setting out these functions in writing, prior to a request for a reasonable accommodation, allows employers to point to specific essential job functions previously known to an employee when denying a reasonable accommodation due to an employer's undue hardship. Further, in the event of a lawsuit, a job description sets out clear guidelines that can be reviewed by a Court in determining whether the employer violated the ADA in denying an accommodation. Although deference is given to employers, a Court may still look beyond the description to the essence of the job to determine whether a function is essential or marginal. In determining, whether a job function is essential the court looks to several factors including: (1) whether the position exists to perform that function; (2) the function is essential due to the limited number of employees available to whom the job function can be distributed or (3) the function is highly specialized so that the incumbent is hired for his or her expertise or ability to perform that particular function.[4] Consequently, to preserve employer deference it is imperative that when drafting job descriptions employers are concise and succinct in documenting the essential job functions.

The Courts will determine whether the request is reasonable in light of the job's essential functions and whether the employer will sustain an undue hardship in obliging the

[1] 42 US §12102
[2] Chai Feldman, *Update on Disability Discrimination and Sex Discrimination in the Federal Sector*, EXCEL Conference 2012 available at http://www.eeotraining.eeoc.gov/images/content/Feldblum%20Excel%202012%20Presentation.pdf
[3] 29 CFR 1630.2
[4] 29 CFR 1630.2(n)(2)(i-iii)

request. An undue hardship is defined as a significant difficulty or expense incurred by the employer.[5] The job description provides a roadmap for the employer when an accommodation request is made and is a first place of reference for the courts with regards to discrimination claims filed under the ADA.

Courts will also turn to a job description when faced with claims of discrimination under Title VII, in reference to requirements of a criminal background check for a specified position. In 2012, the US Equal Employment Opportunity Commission (EEOC) updated its guidelines on the use of criminal records with regards to employment decisions. The guidelines focus on assisting the employer in creating a neutral policy that is consistent with the job duties and business necessity and is not indiscriminately enforced.

In reviewing claims of discrimination, the courts will first focus on whether the criminal background policy creates a disparate impact, in other words, whether the policy disproportionately excludes members of a protected class even if the policy is applied neutrally. Once a disparate impact is shown, the burden then shifts to the employer to demonstrate that the use of criminal records is "job related and consistent with business necessity".[6] Job descriptions provide employer with an important tool to combat a claim of discrimination. The maintenance of clear job descriptions allows the court to review and point to clear indicators that raise the need for background checks, such as, access to sensitive financial information or direct contact with children. Further, it allows the employer to demonstrate to the court that the criminal background check policy is neutral and job specific rather than targeted towards a protected class.

In conjunction with detailed job description, the EEOC recommends the creation of a "targeted screen".[7] A targeted screen allows employers to create specific guidelines for the evaluation of crimes in combination with the position. The factors a targeted screen should balance include: (1) the nature and gravity of the crime; (2) the time elapsed since the conviction and/or completion of sentence and (3) the nature of the job.[8] A job description and a targeted screen test present strong evidence that the employer takes active steps to assure the targeted use of criminal background screenings. It is imperative for employers to limit the inquiry into a criminal background to crimes that would exclude an individual for a specific position. A job description that contains the prohibitive crimes, as well as, the essential functions that would create such a prohibition can help employers to fight claims of discrimination. It helps to demonstrate a targeted approach meant to sustain good business practices without unduly discriminating against members of a protected class.

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[5] 29 CFR 1630.2(p)

[6] *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

[7] Id.

[8] These three factors are known as the "Green factors". *See Green v. Missouri Pacific Railroad,* 549 F.2d 1158 (8th Cir. 1977).

Creating and updating job descriptions helps employers in both preventing and defending claims of discrimination. Job descriptions provide employers with clear guidelines that are easy to apply when hiring, firing or responding to requests for reasonable accommodations. Further, they provide the Court with a starting point in evaluating a defense against a claim for discrimination. If employers rely on up to date and clear job descriptions when engaging in their human resource practice they can provide a strong defense in claims for discrimination.

Removal: 30 Days from Service or 30 Days from Receipt?

By: Kelly M. Lippincott, Esq. and Matthew D. Berkowitz, Esq.

What if, in an effort to negotiate resolution, your client is sent a courtesy copy of the Virginia state-filed complaint, which has yet to be served? Plaintiff's counsel holds off serving the complaint while the parties discuss possible settlement. But settlement negotiations fail, and now weeks or even months after the complaint is filed, your client is served. You seek to remove within 30 days after service. Did you remove or did you lose your chance by waiting more than 30 days after receiving the complaint? The language of the federal removal statute, 28 U.S.C. § 1446(b)(1), does not necessarily provide a clear answer.

Section 1446(b)(1) provides:

> The notice of removal of a civil action or proceeding shall be filed *within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading* setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

The clause "through service or otherwise" is arguably ambiguous. For example, does receiving a courtesy copy of the filed complaint via email start the clock? For years, Virginia federal courts said yes. The Eastern and Western Districts of Virginia follow the "receipt rule" rather than the "proper service rule." Receipt of the complaint triggered the

removal clock, regardless as to whether proper service was effected.[9] It is the *actual receipt of a filed copy of the initial pleading*, not notice, that triggers the removal period.[10]

In *Kurihara*, Judge Brinkema acknowledged that the "receipt rule" is "fraught with potential problems," but explained the Court's rationale for the adoption of the rule:

> [The receipt rule] is better supported by the plain language of § 1446(b) than is the proper service rule. The removal statute explicitly ties the running of the thirty-day removal period to 'receipt by the defendant,' and not to service on the defendant. Moreover, the statute provides that receipt can be had 'through service or otherwise.' Thus, service is listed merely as one method, but not the exclusive method, by which the defendant may 'receive' a copy of the initial pleading. Nothing in the statute itself reasonably suggests any other interpretation, and we therefore will adopt the receipt rule for computing time in which a defendant must remove a case to federal court.[11]

But not so fast. In 1999, the U.S. Supreme Court held that the "proper service rule" should apply – the time to remove starts only when the defendant is properly served with the complaint. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S 344, 347-48 (1999).

However, *Murphy Brothers* did not resolve the issue, as the Virginia federal courts have ignored *Murphy Brothers'* holding and have continued to apply the "receipt rule."[12] In fact, two 2014 decisions out of the Western District make clear that the "receipt rule" remains the rule in Virginia. In April 2014, the Court in *Nasser v. Whitepages, Inc.*, ruled that "[t]he plain language of the statute ("or otherwise") requires a defendant who obtains a copy of a civil complaint by some means other than service to remove the case within 30 days, even if the plaintiff had not served the complaint."[13] Also in April 2014, the Court in *Jasiurkowski v. Stanley Black & Decker, Inc.*, explained that "it is well settled within this district that the language of § 1446(b) does not require actual service in order for there to

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[9] *See, e.g., Shoemaker v. GAF Corp.*, 814 F. Supp. 495, 498 (W.D. Va. 1993) (holding that the 30-day removal period commences when defendant receives a copy of the initial pleading, even if that is before service of process and explaining, "this court is persuaded to follow the 'receipt rule.' First, the court believes that the language of the statute is clear. The removal period commences when the defendant receives a copy of the initial pleading 'through service or otherwise' . . . [t]he 'proper service rule' cases unjustifiably ignore the plain language of the statute."); *Kurihara v. CH2M Hill, Inc.*, 6 F. Supp. 2d 533, 535 (E.D. Va. 1998) (holding that "receipt of the initial pleading," for purposes of triggering the removal period, includes receipt other than by service of process).

[10] *See Kurihara*, 6 F. Supp. 2d at 535-36.

[11] *Id.* at 535.

[12] *See*, *e.g.*, *Marro v. Citibank N.A.*, No. 1:12cv932, 2012 WL 5361003, at *3-4 (Oct. 31, 2012 E.D. Va.) (explaining that formal service is not necessary and that the Court follows the "receipt rule," and thus, the 30 day period to remove begins after the defendant receives an actual copy of the initial pleading).

[13] C.A. No. 5:12cv00097, 2014 WL 1630746, at *3 (W.D. April 24, 2014).

be receipt," and thus, removal was proper even though the defendant had not been served.[14]

The Virginia courts' rationale for rejecting the Supreme Court's *Murphy Brothers'* decision and the "proper service rule" was best explained in *Abraham v. Cracker Barrell Old Country Store*.[15] Initially, the District Court stressed that the context in which *Murphy Brothers* was decided was critical to that holding. The Court explained that the Supreme Court "recognized that Congress added the 'other or otherwise' language to Section 1446(b) in order to protect defendants' right of removal in states where an action is commenced by mere 'service of a summons, without any requirement that the complaint be served or filed contemporaneously."[16] This decision was based on "the bedrock principle that an individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process."[17]

However, the District Court went on to explain that "[n]othing in Section 1446(b) or *Murphy* suggests that a defendant who *voluntarily* appears prior to service should be precluded from removing the action until after he is served."[18]" Moreover, requiring service prior to removal . . . would defy common sense, as Virginia state courts explicitly permit a defendant to appear voluntarily and obviate the need for service altogether."[19] "It cannot be the case that a defendant for whom service is never required must await service in order to remove the action to federal court."[20] Accordingly, because of Virginia state rules and practice, the District Court ruled that formal service is not required prior to removal.[21] Yet because of its unique service rules, Virginia is in the minority as the majority of other districts and circuits generally follow *Murphy Brothers* and the "proper service rule."[22]

Indeed, against the backdrop of the foregoing district court cases, defendants in Virginia must be mindful that regardless as to what the Supreme Court held and what § 1446(b) might say, the clock to remove a case to a federal court in Virginia starts when the defendant receives a file-stamped copy of the complaint. In this regard, although ongoing settlement discussions to avoid full-blown litigation may be desired in many situations, it

[14] No. 3:14-CV-00012, 2014 WL 1463783, at *1 (W.D. Va. April 15, 2014).
[15] C.A. No. 3:11CV182-HEH, 2011 WL 1790168 (E.D. Va. May 9, 2011).
[16] 2011 WL 1790168, at *3 (citation omitted).
[17] *Id.* (quotation marks and citation omitted).
[18] 2011 WL 1790168, at *3.
[19] *Id.* at *4 (citing Va. Sup. Ct. R. 3.5).
[20] *Id.*
[21] *Id.*
[22] *See, e.g., Di Loreto v. Costigan*, 351 Fed. App'x 747, 751 (3d Cir. 2009); *Bailey v. Jannsen Pharmaceutica, Inc.*, 536 F.3d 1202, 1208 (11th Cir. 2008); *City of Clarksdale v. BellSouth Telecomm., Inc.*, 428 F.3d 206, 2010 (5th Cir. 2005); *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.*, 254 F.3d 753, 756 (8th Cir. 2001); *Soin v. JPMorgan Chase Bank, N.A.*, CIV.A. H-14-1861, 2014 WL 4386003, at *1 (S.D. Tex. Sept. 4, 2014); *Crosby v. A.O. Smith Water Products Co.*, 14-CV-348 AJN, 2014 WL 4059815, at *2 (S.D.N.Y. Aug. 15, 2014); *Hutton v. KDM Transp., Inc.*, CIV.A. 14-3264, 2014 WL 3353237, at *2 (E.D. Pa. July 9, 2014); *Dultra v. US Med. Home, Inc.*, 13 C 07598, 2014 WL 1347107, at *3 (N.D. Ill. Apr. 4, 2014).

may not be ideal if it means running the risk of losing the potential strategic advantage of being in federal court. Relatedly, defense attorneys and their clients should be aware that certain plaintiffs' attorneys may send a copy of the complaint to the defendant under the guise of "negotiating," when, in fact, the true desire is to avoid federal court by starting the clock unbeknownst to the defendant.

Lessons for Premises Liability from the Sony Pictures Hack Attack

By: Alexander M. Gormley, Esq.

One of the biggest headlines in 2014 was the cyberattack on Sony Pictures Entertainment and its aftermath. The alarming events cast a spotlight on various issues of potential liability that corporations now have to contend with in the age of cyber terrorism. Aside from concerns about protecting proprietary information and the confidential personal data of customers and employees from cyber-attacks, corporations also have to deal with potential liability from physical attacks that occur on their premises. To put that issue into context, it helps to recap what happened at Sony.

The story played out like the plot of a Hollywood disaster-epic. In late November 2014, a group of hackers calling themselves "The Guardians of Peace" breached Sony Pictures' digital network, stealing and disseminating torrents of sensitive data, including unfinished cuts of films in production. Within a few days, the media began reporting that Sony believed North Korea may have orchestrated the attack in retaliation for Sony's upcoming release of *The Interview,* a comedic farce about an assassination attempt on North Korean leader Kim Jong Un. North Korea denied that it was behind the attack, but praised it. Then, a few days before the planned Christmas-day theatrical release of *The Interview*, the hackers sent the media an email with threats to blow up theaters that released the film. The major movie theater chains decided not to show the movie, which prompted Sony to cancel the release of the film altogether.

The public was outraged and even President Obama felt compelled to join the fray, faulting Sony for backing down to the threats. Sony blamed the theater owners, citing their concerns about keeping their patrons safe and not wanting to be held liable for any harm that resulted from attacks on the theaters. Free speech advocates and the movie-going public hungry to see such a suddenly controversial film were not mollified by this explanation. Everyone was left wondering whether this was an overreaction: could the theaters really be held responsible for attacks by cyberterrorists that they had nothing to do with? It turns out that a federal court in Colorado may have already answered that question

over the summer in the case of *Axelrod v. Cinemark Holdings, Inc.*, 2014 WL 4470728 (D. Colo. Aug. 15, 2014).

The *Cinemark* suit was filed on behalf of the patrons who had been injured or killed by the mass shootings that occurred during the midnight premier of *The Dark Night Rises* at an Aurora, Colorado movie theater on July 20, 2012. The defendants, the owners of the theater, sought to have the case dismissed on legal grounds. The United States District Court for Colorado denied dismissal twice, however, holding that the question of whether the theater was liable should be taken up by a jury. Judge R. Brooke Jackson held that the theater's liability came down to the question of whether it knew or should have known about the danger faced by its patrons, and whether they took reasonable steps to protect them from that danger.

Judge Jackson's opinion focused on the first part of the analysis, stating that the determination of whether the theater "should have known" about the danger depends on whether that danger was "foreseeable." He noted that if the theater owners "had been specifically warned that someone was planning such an incident [as the shooting] at one of its theaters – that presumably would have made such an incident foreseeable." He noted further that "foreseeability includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in its guiding practical conduct." Applying that rationale, Judge Jackson determined that the possibility of mass shootings in places "where large numbers of people congregate" is a fact of modern life, and that therefore a shooting incident in a theater "was likely enough" to be a foreseeable action by deranged individuals.

Judge Jackson emphasized that a jury still had to find that the theater owners knew or should have known of the danger that the moviegoers faced in Colorado on that horrific night. And, he cautioned that the plaintiffs also had to clear the hurdle of establishing that the theater had not implemented adequate protections against the possibility of a shooting. However, the clear implication of the Court's opinion was that owners of places where "large numbers of people congregate" have significant duties to anticipate and protect against foreseeable attacks. In light of that opinion, the decision of theater chains not to show *The Interview* appears to have been the pragmatic - albeit unpopular - course.

The Cinemark decision was based on the application of a Colorado statute that codified common law principles of premises liability. Those principles are generally applied in the common law of states across the country. With that in mind, business owners should heed the lessons of *Cinemark* and the Sony incident in implementing safeguards to protect against threats of attack – both in the cyber realm and real world.