

# Night Vision Problems and the Application of the Americans with Disabilities Act

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**A**ccording to the National Highway Traffic Safety Administration, 49% of fatal crashes occur at night, despite less traffic on the road. The fatality rate at night is three times higher than during the day. Low light levels can cause focusing problems and blurred vision. Glare and dark conditions affect a driver's ability to see road obstacles and read road signs.

Night vision issues can be problematic for drivers in the trucking industry who commonly drive during the nighttime. It may not be safe for a professional driver to operate a commercial motor vehicle at night, but does dismissing such an individual pose an Americans with Disabilities Act (ADA) issue for trucking companies?

Title I of the ADA applies to employers with over 15 employees. It mandates that an employer not discriminate against a qualified

individual with a disability. 42 U.S.C. § 12111; 42 U.S.C. § 12112. The same standard applies under the Pennsylvania Human Resources Act (PHRA). A "disability" is: "(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) A record of such an impairment; or (iii) Being regarded as having such an impairment . . ." 29 CFR 1630.2(g).

Seeing is a major life activity, so night vision problems must substantially limit a person's ability to see. *Livingston v. Fred Meyer Stores, Inc.*, 388 Fed. Appx. 738, 740 (9th Cir. 2010). The ability to see is substantially limited if the person is "significantly restricted as to the condition, manner, or duration which she can see as compared to the average person." *Id.* (quoting 29 CFR 1630.2(j)(1)). Factors to consider in the determination are: (i) the nature and severity of the night vision problem; (ii) the duration



or expected duration of the night vision problem; and (iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the night vision problems. 29 CFR 1630.2(j)(1).

Courts have found that night vision problems are a disability under the ADA. *Capobianco v. City of New York*, 422 F.3d 47 (2d Cir. 2005); *Livingston*, 388 Fed. Appx. at 740-41. In these cases, the plaintiffs' night vision issues prevented them from safely driving, walking, or leaving their houses at night, things that an average person can do. *Livingston*, 388 Fed. Appx. at 740-41.

The severity of the night vision problem determines whether the person is considered disabled. If the vision problems are a permanent issue that significantly restricts the employee's driving in comparison to the average person, then the person is probably disabled under the ADA and PHRA.

If an employee's night vision problems are a disability, then the employee is protected under the ADA and PHRA. An employee or potential employee with a disability must be able to perform the essential functions of the job with or without a reasonable accommodation. 42 U.S.C. 12111(8). "Essential functions" are the "fundamental duties to be performed in the position in question, but not functions that are merely 'marginal.'" 29 CFR 1630.2(n)(1). Deference is given to the employer's judgment regarding the essential functions for a position. *Shannon v. N.Y. City Transit Auth.*, 332 F.3d 95, 100 (2d Cir. 2003) (citing *D'Amico v. City of New York*, 132 F.3d 145, 151 (2d Cir. 1998)). The requirements needed to pass the DOT physical are essential functions of a job. *Id.* at 102. This means that if an employee cannot pass the DOT physical, they do not have to be hired or retained.

The DOT requirements do not explicitly disqualify someone with night vision problems, but do exclude those whose vision cannot be corrected to 20/40. 49 CFR 391.41(b)(10). If an employee does not pass their DOT physical, the ADA is not an issue, because he is not medically qualified to operate a commercial motor vehicle. However, night vision problems do not explicitly mean that a person will fail the DOT exam. Unless their vision cannot be corrected to 20/40, they may pass the vision requirements of the exam. Night vision issues may not be detected in the physical because the person may have normal or corrected vision during the day. Even if an employee with night vision problems passes the DOT physical, there may be other issues relating to the driver's performance of the essential functions of the job.

In the transportation industry, night driving is generally an essential function due to the nature of the industry. If night driving is an essential function, then the employer is not required to hire or retain the driver if he cannot drive at night.

The employer may still have to employ the driver if he can perform the essential functions of the job with a reasonable accommodation. An employer must give an employee a reasonable accommodation that will allow him to perform the essential functions of the job unless that would result in an undue hardship on the operation of the business. 29 CFR 1630.9(a). "Undue hardship" is a significant difficulty or expense. 42 U.S.C. S 12111(10). A modified work schedule is a potential accommodation. *Livingston*, 388 Fed. Appx. at 740. An employee must request a reasonable accommodation before the employer is obligated to provide one. *Id.* at 741. The employer does not have to create a new position, remove an essential job function, or shift an essential job function onto others. *Gruener v. Ohio Cas. Co.*, 416 F. Supp. 2d 592, 600 (S.D. Ohio 2005) (citing *Hoskins v. Oakland County Sheriff's Dept.*, 227 F.3d 719, 729 (6th Cir. 2000)).

If an employee requests a reasonable accommodation due to night vision issues, one option would be a change to day shift, if a change to day shift would not cause undue hardship on the operation of the business. However, if the position requires night driving and the employer does not have any day shifts to offer the employee, then there is no reasonable accommodation. Also, if only allowing an employee to drive during the day would cause significant expense, the accommodation causes undue hardship and does not have to be made.

An employer does not have to hire a disabled individual if there is a direct threat to the safety of others. A direct threat exists if there is a "significant risk of substantial harm to . . . others that cannot be eliminated or reduced by reasonable accommodation. 29 CFR 1630.2(r). These factors should be looked at in the determination: "(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm." *Id.*

An employer may not be required to employ a driver with night vision problems due to safety concerns. Night vision problems cause a significant risk of a motor vehicle accident that could cause severe injury or death. If a reasonable accommodation can be given to the day shift, this would mitigate any safety concerns. However, if there is no day shift position, then the employee does not have to be employed due to safety concerns. Whether the night vision problems cause a direct threat depends on the severity of the problem and the likelihood that it will cause danger to others.

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