



Hiring Advertisements May Help Avoid Claims Under The ADA

September 1, 2015 | [Employment Discrimination, Labor And Employment](#)

Employers should carefully consider what their hiring advertisements say and include language regarding the essential functions of the positions for which they are hiring; such wording may assist in a discrimination claim. In [Kilcrease v. Domenico Transp. Co., Court No. 13-cv-03193-WYD-MJW \(D. Colo. Aug. 28, 2015\)](#), the employer successfully defended claims under the Americans with Disabilities Act (ADA), as amended and such success was based, in large part, upon the company's job advertisement which clearly outlined the essential functions of the position.

Mark Kilcrease was a commercial truck driver who had been diagnosed with leukemia in 2002 and, having been in remission since 2005, was declared to be healthy enough to return to work in 2006. In October 2009, Kilcrease applied for a truck driver position with Domenico Transportation (Domenico) after reviewing a job advertisement, which stated that one of the job requirements included three years of verifiable mountain driving experience. In his application, Kilcrease stated he had eight years tractor/trailor experience and three years of mountain driving experience. Kilcrease did not list his most recent motor carrier experience (despite the request in the application) and, instead, stated he had been "unemployed since June 13, 2002, in remission for . . . leukemia." Kilcrease offered no explanation as to why he had not worked since entering remission. Ultimately, the company chose not to hire Kilcrease based upon his lack of verifiable mountain driving experience for at least three years.

Although there was no written policy regarding this specified amount of experience, Domenico successfully relied upon its job advertisement in explaining the company would not hire any employees with less than three years of verifiable mountain driving experience. Among other things, Domenico explained that this experience requirement was for safety reasons,

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given that almost 70 percent of its drivers' routes involved mountain terrain. The company also demonstrated its prior hiring practices, which included hiring individuals with the requisite years of experience of mountain driving.

Based upon the evidence presented by the company, the U.S. District Court sided with Domenico, holding that Kilcrease failed to establish a *prima facie* case of disability discrimination because he not a "qualified individual with a disability." Specifically, the court determined Kilcrease failed to have the requisite mountain driving experience and that the company's evidence, including the job advertisement, demonstrated this experience was "job-related" and "consistent with business necessity." As a result, the court granted summary judgment in favor of Domenico on the disability discrimination claim.

This case serves as a good reminder for employers to carefully review their job postings. Including language regarding the essential functions for the job, such as relevant and requisite experience, may help employers build a defense to an ADA discrimination claim.