Is back pain a disability? Not always.

According to the National Institute of Health, about 80% of adults experience lower back pain at some time during their lives. In fact, back pain is the most commonly cited cause of work-related disability.

But is back pain always an ADA-qualifying disability? Sometimes it isn't.

Recent case

A recent case shows that not everyone who suffers from back pain is disabled—meaning it impairs a major life function—and therefore entitled to reasonable accommodation. That determination requires having an interactive conversation with the employee to discuss possible accommodations. Only at that point can an employer either approve or turn down an accommodation request.

Nicola worked for Tyson Farms as a meatpacker. On her pre-employment forms, she identified back problems as a health concern but checked "no" when asked if she had any work restrictions. Her past jobs included working as a nursing assistant at skilled nursing facilities.

Because back pain is a common complaint among packers, Tyson provides floor mats and stands for employees to use. Nicola asked for a specific kind of mat and stand, but Tyson denied her request.

Within a week of starting the packer job, she complained of back pain to her manager, who sent her to the nurse's station to discuss her complaints. The nurse sent her home and told her to get her doctor to fill out a physical recommendation form.

Nicola's doctor recommended taking a 15-minute break to sit every hour. Tyson refused, saying it was unable to accommodate her restrictions. She then got another doctor to remove the restriction. His exam noted that her back was "normal" with a "full range of motion."

She returned to work. But within a few days, she quit and returned to work in nursing.

Then Nicola sued Tyson, alleging it refused to accommodate her disability. Tyson argued her back pain wasn't disabling and thus didn't require accommodation.

The court agreed, concluding that while Nicola might very well feel pain, it didn't limit a major life function like working. It was not enough that she might not be able to tolerate work in a chicken processing plant. She would have to be unable to perform a wide range of jobs. That clearly wasn't the case. (*Hudson v. Tyson Farms*, 11th Cir., 2019)

Key takeaways

The company did everything right. It provided mats and stands for what is undoubtedly a physically difficult job.

It hired Nicola despite her revelation that she suffered from back pain. When she complained of pain, Tyson sent her home, with instructions to get more information from her medical provider. The company considered her

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doctor's request for frequent breaks while assessing whether she was disabled under the ADA.

When she then got another doctor to remove the restrictions, it let her return.

You could be liable for disability bias even if ADA accommodation denial was legitimate

Don't get overconfident because you turned down an employee's request for an ADA accommodation that you sincerely believed was unnecessary. You can still be sued—and you might lose!

You could legitimately turn down an accommodation request as unneeded and still be liable for disability discrimination based on how you otherwise treated the worker.

Recent case: Matthew has a condition called esophageal achalasia, which affects his ability to sleep, eat and digest food. When he was first hired as a custodian for Bucks County, he disclosed his disability. He soon earned a promotion to level one groundskeeper.

During 2011, he worked at Core Creek Park, which was close to his home. Sometimes the county assigned him to work at another facility, Neshaminy Manor.

Matthew didn't like the Neshaminy Manor assignments because they extended his commuting time. He claimed the commute caused more nighttime digestive problems and chest pain, reducing the amount of sleep he got. However, he offered no medical evidence or doctor's notes to back up that assertion.

Matthew took FMLA leave in the spring of 2015 to have surgery related to his esophageal achalasia. About a year later, he was disciplined for allegedly exceeding his FMLA leave.

Matthew then asserted he would need less FMLA leave if he didn't have to commute to Neshaminy Manor. He requested assignments closer to home as a reasonable accommodation of his disability. The county denied his request.

Then, about a year later, Matthew was permanently assigned to Neshaminy Manor. He again requested assignment back to Core Creek Park.

He then took four days of FMLA leave to have an endoscopy. When he returned, his supervisor requested a medical clearance to resume his duties. He got the clearance and resumed working.

Shortly after, Matthew was fired for alleged FMLA fraud and abuse that had supposedly occurred several months before.

Matthew sued, alleging both failure to accommodate and discrimination based on his disability.

The county argued that no accommodation had been due because Matthew presented no evidence that a longer commute actually caused his disability to worsen. Plus, it argued, his doctors completely cleared him to work following each FMLA leave. If an employee can fully perform his job without an accommodation, it argued, then he's not entitled to one. Letting him work closer to home, therefore, wasn't necessary under the ADA.

The court agreed no accommodation was due.

However, it sided with Matthew on the disability discrimination claim. Matthew had told the court that every time he took FMLA leave for his disability-related medical problems, he was criticized and even disciplined.

He also claimed he had been singled out for the transfer even though more junior co-workers could have been

given the less-desirable assignments. Matthew said this was an effort to get back at him for being disabled. He also alleged the county's HR department tried to talk him out of even asking for a reasonable accommodation.

The court sided with Matthew and ordered a trial. A jury will now decide whether the efforts to punish alleged FMLA abuse—including firing Matthew—amounted to discrimination against him because of his disability. (*Beishl v. County of Bucks*, ED PA, 2018)