bounds to how far employers must go. Employers remain free to *exceed* minimum legal requirements in meeting the needs of employees. The following are criteria for determining the reasonableness of a proposed accommodation:

- Is effective (i.e., removes or sufficiently reduces the barrier to employment opportunity)
- Does not need to be the employee's preferred option
- Does not include provision of items that are primarily for personal use (e.g., eyeglasses)
- Does not need to be as far reaching as accommodations made previously if these exceeded legal requirements
- Does not need to render working conditions strictly equal to those of other employees; effective removal of barriers is sufficient
- Does not require creating a new position or making a promotion
- Does not require providing paid leave not available to other employees
- Does not require eliminating essential functions from a job or lowering production standards
- Does not require excusing or refraining from disciplining misconduct related to a disability
- Does not usually require making exceptions to established seniority rules

In *Keith v. County of Oakland*, the court considers whether this employer failed to reasonably accommodate and hire a deaf person as a lifeguard.

Keith v. County of Oakland
2013 U.S. App. LEXIS 595 (6th Cir.)

OPINION BY CIRCUIT JUDGE GRIFFIN:

Plaintiff Nicholas Keith, a deaf individual, filed the instant action alleging that defendant Oakland County discriminated against him on the basis of disability in violation of the Americans with Disabilities Act ("ADA"), when it failed to hire him as a lifeguard. The district court granted Oakland County's motion for summary judgment. For the reasons that follow, we hold that genuine issues of material fact exist regarding whether Keith is otherwise qualified to be a lifeguard at Oakland County's wave pool, with or without reasonable accommodation. Accordingly, we reverse the district court's judgment and remand for further proceedings consistent with this opinion.

Keith has been deaf since his birth in 1980. When wearing an external sound transmitter, he can detect noises through his cochlear implant, such as alarms, whistles, and people calling for him. Because he is unable to speak verbally, he communicates using American Sign Language ("ASL").

In 2006, Keith enrolled in Oakland County's junior lifeguard training course. Oakland County provided an ASL interpreter to relay verbal instructions to him. The interpreter did not assist Keith in executing lifesaving tasks. Keith successfully completed the course. In 2007, Keith enrolled in Oakland County's lifeguard training program. Candidates must pass a basic swim test to participate in the training. During training, candidates are taught how to enter the water, scan the water for distressed swimmers, execute basic saves, respond to spinal injuries, and perform CPR. With the assistance of an ASL interpreter to communicate verbal instructions, Keith successfully completed the training.

Having received his lifeguard certification, Keith applied for a lifeguard position at Oakland County's wave pool. The job announcement required applicants to be at least sixteen years old and pass Oakland County's water safety test and lifeguard training program. The application also contained the following condition of employment: "All persons hired by Oakland County must take and pass a medical examination

from a county-appointed physician, at no cost to the applicant."

Katherine Stavale is Oakland County's recreation specialist. She contacted her supervisors to ask if she could offer Keith the position. She explained that Keith had requested an ASL interpreter to be present at staff meetings and further classroom instruction. Having received no objection, Stavale extended Keith an offer of employment, conditioned upon a pre-employment physical. In an email, Stavale told Keith, "you passed training and you did a good job, so we would like to offer you a part-time position as a lifeguard." * * *

Shortly thereafter, Keith was examined by Dr. Paul Work, D.O. When Dr. Work entered the examination room, he looked at Keith's medical history and stated, "He's deaf; he can't be a lifeguard." Keith's mother asked Dr. Work, "Are you telling me you're going to fail him because he's deaf?" Dr. Work responded, "Well, I have to. I have a house and three sons to think about. If something happens, they're not going to sue you, they're not going to sue the county, they're going to come after me." In his report, Dr. Work described Keith as "physically sound except for his deafness." Dr. Work did not believe that Keith could function independently as a lifeguard, but he thought that he could be a valuable member of a team if properly integrated and monitored. Dr. Work approved Keith's employment as a lifeguard if his deafness was "*constantly* accommodated." However, he did not say whether Keith could, in fact, be safely accommodated, and he expressed doubt that accommodation would always be adequate.

Having learned the results of the physical, Stavale placed Keith's employment on hold and contacted Wayne Crokus, the client manager at Ellis & Associates. Ellis is a group of aquatic safety and risk management consultants that provides guidance to Oakland County regarding its water park facilities and lifeguard training program. * * *

Crokus expressed concern about whether a deaf individual could perform effectively as a lifeguard. He suggested to Stavale that a job-task analysis be done to determine whether Keith could perform the job with or without accommodation. Crokus has a background in aquatic safety and lifeguard training, but he has no education or experience regarding the ability of deaf people to work as lifeguards, and he did not conduct any research into the issue upon learning about Keith. He never communicated with Keith, never observed Keith during training, and never spoke with Dr. Work.

Stavale also corresponded with Richard Carroll, Ellis's senior vice president. Carroll suggested that Stavale find out the type of hearing device that Keith used and assess his ability to detect a distressed swimmer. He suggested that Stavale determine, under the standards used for all candidates, whether Keith could perform in the actual work environment at the level outlined in the job description, but he could not provide a definitive answer without a familiarity with Keith or the facility. Like Crokus, Carroll has no education, training, or experience regarding the ability of deaf people to work as lifeguards, and he did not research the issue. At the time of his response, Carroll had visited Oakland County's wave pool once during the off season.

After these discussions, Stavale prepared a six-page outline setting forth the accommodations that she believed could successfully integrate Keith, and she sent it to Crokus for feedback. Stavale explained:

1. Keith will carry laminated note cards in the pocket of his swim trunks to communicate with guests in non-emergency situations.
2. Keith does not need to hear to recognize and rescue a distressed swimmer; experience reveals that distressed swimmers do not cry out for help.
3. Keith will use his whistle and shake his head "no" to enforce pool rules.
4. Keith will briefly look at other lifeguards on duty when scanning his zone to see if they enter the pool for a save.
5. Because Keith cannot use the megaphone or radio, another lifeguard will have this responsibility when Keith is working.
6. Keith will not work the slide rotation, which should not be a problem because this is one of the favorite rotations and many lifeguards like to work more than one slide rotation.
7. The Emergency Action Plan ("EAP") will be modified, regardless of whether Keith is scheduled. To initiate the EAP, lifeguards will be required to signal with a fist in the air, opening and closing it like a siren. This will accommodate Keith and improve the effectiveness of the EAP for the entire team.

Crokus questioned Stavale on several of these accommodations and remained concerned about Keith's ability to function effectively as a lifeguard. He stated, "without 100 percent certainty that [the proposed accommodations] would always be effective, I don't think you could safely have [Keith] on the stand by himself."

Ultimately, Stavale and her supervisors decided to revoke the offer of employment.

In 2008, Keith applied for another lifeguard opening. . . . He was not hired. . . . According to Oakland County, Keith was disqualified from consideration as a lifeguard based on his pre-employment physical in 2007. . . . Keith filed a complaint in the district court. . . . Oakland County moved for summary judgment, arguing that Keith is not "otherwise qualified" to be a lifeguard at its wave pool because he cannot effectively communicate with other lifeguards, patrons, emergency personnel, and injured persons. Further, Oakland County argued that hiring an additional lifeguard as an interpreter is an unreasonable accommodation.

Keith responded that he is "otherwise qualified" for the position and Oakland County revoked the offer of employment based on unfounded fear and speculation. * * * As evidence of his qualifications for the position, Keith provided the testimony of several experts. Anita Marchitelli has worked with deaf people in the area of lifeguarding and aquatics for more than thirty years. She is a certified lifeguard training instructor with the American Red Cross in the areas of lifeguarding, water safety, and CPR. She is also an associate professor in the physical education and recreation department at Gallaudet University, the only liberal arts university in the world dedicated to serving the needs of deaf individuals. She has certified more than 1,000 deaf lifeguards through the American Red Cross programs. According to Marchitelli, there have been no reported incidents of drowning or near drowning of any individuals over whom a deaf lifeguard was responsible. It is her professional opinion that the ability to hear is unnecessary to enable a person to perform the essential functions of a lifeguard. In her affidavit, Marchitelli notes that the world record for most lives saved is held by a deaf man, Leroy Colombo, who saved over 900 lives in his lifeguarding career.

Sheri Garnand is a deaf lifeguard certified by the American Red Cross. It is her professional opinion that the ability to hear is unnecessary to enable a person to perform the essential functions of a lifeguard. According to Garnand, distressed swimmers exhibit visual signs of distress, which a deaf person scanning his or her assigned area can detect. She believes that deaf lifeguards do not require accommodation to perform the essential functions of a lifeguard; in her opinion, an ASL interpreter is unnecessary.

Dr. Colleen Noble is a physician specializing in pediatric neurodevelopmental disabilities and has worked with hearing impaired individuals for over thirty years. It is Dr. Noble's opinion that deaf individuals have the potential to be excellent lifeguards. She stated that, in a noisy swimming area, recognizing a potential problem is almost completely visually based. Further, she said that individuals who become deaf before age three have better peripheral vision than hearing individuals. It is her opinion that Keith meets the criteria to become a lifeguard and his deafness should neither disqualify him nor require constant accommodation.

* * * The ADA makes it unlawful for an employer to "discriminate against a qualified individual on the basis of disability." The ADA defines "discriminate" to include the failure to provide reasonable accommodation to an otherwise qualified individual with a disability, unless doing so would impose an undue hardship on the employer's business. To establish a prima facie case, a plaintiff must show that he is disabled and otherwise qualified for the position, either with or without reasonable accommodation. Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to show that accommodating the plaintiff would impose an undue hardship on the operation of its business.

The parties do not dispute that Keith is disabled within the meaning of the ADA or that Oakland County rescinded the offer of employment because of his disability. The issues in dispute are whether Oakland County made an individualized inquiry, whether Keith is otherwise qualified for the position in question with or without reasonable accommodation, and whether Oakland County engaged in the interactive process.

A. INDIVIDUALIZED INQUIRY

As a threshold matter, "[t]he ADA mandates an individualized inquiry in determining whether an [applicant's] disability or other condition disqualifies him from a particular position." A proper evaluation involves consideration of the applicant's personal characteristics, his actual medical condition, and the effect, if any, the condition may have on his ability to perform the job in question. This follows from the ADA's underlying objective: "people with disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged on the relevant medical evidence and the abilities they have." * * *

The district court properly determined that Dr. Work failed to make an individualized inquiry. After Dr. Work entered the examination room and briefly reviewed Keith's file, he declared, "He's

deaf; he can't be a lifeguard." Dr. Work made no effort to determine whether, despite his deafness, Keith could nonetheless perform the essential functions of the position, either with or without reasonable accommodation. Indeed, Dr. Work has no education, training, or experience in assessing the ability of deaf individuals to work as lifeguards. Dr. Work's cursory medical examination is precisely the type that the ADA was designed to prohibit.

In addition, although not addressed by the district court, we question whether Ellis, through its representatives, made an individualized inquiry regarding Keith's ability to perform the job. Ellis's representatives never spoke with Dr. Work, they never met Keith, and they never allowed Keith an opportunity to demonstrate his abilities. Although knowledgeable in aquatic safety, they have no education, training, or experience regarding the ability of deaf individuals to work as lifeguards. * * * It is also concerning that, when corresponding with Stavale about ways to incorporate Keith into the lifeguard team, an Ellis representative asked whether Keith would be able to perform perfectly "100 percent of the time." As Stavale acknowledged, that is an impossible standard to expect of any lifeguard. Individuals with disabilities cannot be held to a higher standard of performance than non-disabled individuals.

Nonetheless, the district court concluded that Oakland County, the ultimate decisionmaker, made an individualized inquiry. We do not disagree with this conclusion. Keith's abilities were observed during lifeguard training, accommodations were proposed to integrate Keith into the lifeguard team, and both staff and management were on board with the plan to hire Keith. That being the case, we question what changed? Did Oakland County alter its assessment based on Dr. Work's report and the advice of Ellis's representatives? If so, did Oakland County's individualized inquiry satisfy the ADA's mandate? Because it strikes us as incongruent with the underlying objective of the ADA for an employer to make an individualized inquiry only to defer to the opinions and advice of those who have not, we direct the district court to consider these questions on remand.

B. "OTHERWISE QUALIFIED"

* * *As defined in the statute, an individual is "otherwise qualified" if he or she can perform the "essential functions" of the job with or without reasonable accommodation. * * * In this case, Stavale testified regarding the need for lifeguards to effectively communicate while on the job. As Oakland County's representative, her judgment is entitled to deference. Further, the job announcement indicates that summer lifeguards are required to supervise water activities, enforce safety rules, maintain water areas, and teach swim lessons. To the extent that these job duties necessarily require communication, the description provides evidence that communicating is an essential function of being a lifeguard at Oakland County's wave pool. For the purposes of our analysis, this much can be presumed.

With regard to supervising water activities and lifesaving, Keith has presented evidence from which a jury could reasonably find that he can communicate effectively despite his deafness. Like other lifeguards, Keith can adhere to the "10/20 standard of zone protection," a scanning technique taught to lifeguards in which they must scan their entire zone every ten seconds and be able to reach any part of their zone within twenty seconds. This method is purely visual. Further, by passing Oakland County's lifeguard training program and earning his lifeguard certification, Keith demonstrated his ability to detect distressed swimmers, which several experts testified is almost completely visually based.

In addition to communicating with distressed swimmers, there is evidence that Keith can effectively communicate with other lifeguards during lifesaving. Because he cannot hear another lifeguard's whistle blow before going in for a save, as a modest modification, he could briefly look at the other lifeguards when scanning his zone. Likewise, Keith has presented evidence that he can enforce safety rules. Verbal enforcement is usually impractical in a noisy water park, and most lifeguards rely on their whistle and various physical gestures, including shaking their head "no" for patrons to stop engaging in horseplay, motioning their hand backward for a patron to get behind the red line, and signaling the number one with their finger for "one person per tube." Keith can use these same methods of enforcement.

Keith has also presented evidence that he can communicate effectively during emergencies with a modification to the EAP. To activate the EAP, lifeguards would signal with a fist in the air, opening and closing their fist in repetition. According to Stavale, this would improve the EAP for everyone, not just Keith. It would allow other lifeguards and staff to see the EAP visually if they are not in a position to hear it. Once activated, other lifeguards who are required to maintain their position would put their fist in the air and make the same signal.

Further, Keith has presented evidence that he can respond to patrons who approach him, at least at a level that may be considered *essential* for a lifeguard. He would carry a few laminated note cards in the pocket of

his swim trunks with basic phrases such as, "I am deaf. I will get someone to assist you. Wait here." He can also provide first aid in situations in which he can see the ailment requiring attention. Although there may be situations in which verbal communication is necessary, attendants are posted throughout the water park to assist patrons with basic needs and inquiries, suggesting that this is not an essential function of lifeguards, or at least reasonable minds could differ on this point. In addition, staff members are required to respond whenever a whistle is blown to signal a save.

Perhaps the most compelling evidence that Keith is "otherwise qualified" comes from his experts who have knowledge, education, and experience regarding the ability of deaf individuals to serve as lifeguards. They all opine that the ability to hear is unnecessary to enable a person to perform the essential functions of a lifeguard. * * * One also cannot ignore that the American Red Cross certifies deaf lifeguards, and Gallaudet University, the only liberal arts university in the world dedicated to serving the needs of deaf individuals, has a lifeguard certification program.

In light of this evidence, we hold that reasonable minds could differ regarding whether Keith is "otherwise qualified" because he can perform the essential communication functions of a lifeguard. The district court erred when it decided that Keith's deafness disqualified him from the position as a matter of law.

C. "WITH OR WITHOUT REASONABLE ACCOMMODATION"

When accommodation is necessary to enable a plaintiff to perform the essential functions of the position in question, it is the plaintiff's burden to propose an accommodation that is "objectively reasonable." * * * [T]he reasonable accommodation inquiry asks whether an accommodation "is reasonable in the run of cases, whereas the undue hardship inquiry focuses on the hardships imposed by the plaintiff's preferred accommodation in the context of the particular [employer's] operations." * * *

Keith argues the modifications to Oakland County's policies, as outlined above, are objectively reasonable. There is evidence that such modifications would allow Keith to effectively communicate while on duty (*i.e.*, the accommodation is efficacious) at little or no cost to Oakland County (*i.e.*, the accommodation is proportional to costs). Oakland County raises the valid concern that other employees may have to shoulder extra duties because of Keith's disability, such as following through with certain patron inquiries or first aid needs. But this does not, standing alone, entitle Oakland County to summary judgment. The ADA includes "job restructuring" among its enumeration of reasonable accommodations. And although the ADA does not require the shifting of *essential* functions, the ADA "require[s] an employer to restructure the marginal functions of a job as a reasonable accommodation." * * *

Keith also presented evidence that providing an interpreter during staff meetings and further classroom instruction is objectively reasonable. His successful completion of Oakland County's junior lifeguard and lifeguard training courses demonstrates that providing an ASL interpreter is efficacious during classroom instruction and similar settings, and considering that he would require an interpreter only on occasion and could function independently while on duty, the benefit of the interpreter would appear to be proportional to costs.

Moreover, the ADA provides that "reasonable accommodation" may include "the provision of qualified readers or interpreters." The inclusion of interpreters among the list of enumerated reasonable accommodations suggests to us that the provision of an interpreter will often be reasonable, particularly when the interpreter is needed only on occasion, in this instance, just for staff meetings and training. In fact, there are numerous cases in which courts have found that the provision of an interpreter during staff meetings and training sessions presented a question of fact for the jury on the issue of reasonableness.

Viewing the evidence in the light most favorable to Keith, a reasonable jury could find that providing an ASL interpreter during staff meetings and further classroom instruction is objectively reasonable. And because Oakland County has not argued, much less conclusively shown, that providing the accommodation would impose an undue hardship on the operation of its business, summary judgment was inappropriate.

D. INTERACTIVE PROCESS

Finally, we turn to the ADA's requirement that an employer engage in the interactive process. The duty to engage in the interactive process with a disabled employee is mandatory and "requires communication and good-faith exploration of possible accommodations." "The purpose of this process is to 'identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.' "

Keith argues that Oakland County failed to contact or otherwise interact with him before revoking the offer of employment, despite its knowledge that his deafness would require accommodation. According to Keith, had Oakland County engaged in the interactive process, it would have learned that Keith can detect loud noises through his cochlear implant if he wears an external sound transmitter while on duty, which may have alleviated some of its concerns. In addition, had Oakland County communicated with Keith, he could have referred Oakland County to various individuals with expertise regarding the ability of deaf individuals to work as lifeguards, which may have dispelled unfounded fears and resulted in a more informed decision. Finally, Keith could have clarified his limited need for an ASL interpreter during staff meetings and further classroom instruction. Essentially, Keith complains that Oakland County failed to give him a fair opportunity to respond to the concerns surrounding his employment.

The district court did not reach the merits of this argument because "[t]he Sixth Circuit follows the view that a failure to engage in the interactive process is not an independent violation of the ADA." * * * According to the district court, because Keith failed, as a matter of law, to propose an accommodation that was objectively reasonable, any failure by Oakland County to engage in the interactive process did not constitute a violation of the ADA. This conclusion is erroneous because it rests on an incorrect premise. Because we conclude that Keith has met his burden to show that a reasonable accommodation was possible, at least sufficient to survive summary judgment, we ask the district court to address the merits of this argument on remand. * * *

CASE QUESTIONS

1. What are the legal issues in this case? What did the appeals court decide?
2. Does it appear that the type of "individualized inquiry" required by the ADA occurred in this case? Why or why not?
3. Was the plaintiff "otherwise qualified" for this lifeguard position? Why or why not?
4. What accommodations was the plaintiff requesting? Are they reasonable? Why or why not? Would they likely impose an undue hardship? Why or why not?
5. What did the county do well in this case? What things should it have done differently?

Employers are under no obligation to create new positions for, promote, or displace ("bump") other employees to accommodate disabled employees, but reassignment to a vacant position is a reasonable accommodation. *Reassignment to a vacant position should be considered only if the individual cannot be accommodated in her present job.* Reassignment is "plan B" if it proves to not be possible to provide accommodations that will enable employees to perform the essential functions of their current jobs. There is some ambiguity surrounding the meaning of "vacant," but at least one court has held that a position is not vacant if it is currently staffed by temporary workers. Only if the status of the position is such that "it would be available for a similarly situated nondisabled employee to apply for and obtain" will the position be deemed "vacant."[39] Courts have differed in their views of how far employers must go when using reassignment as an accommodation. Must employers award vacant positions to disabled employees who need them—provided that those employees have at least the minimum qualifications—or do employers meet their legal obligations simply by considering disabled employees for vacant positions while adhering to established policies of hiring the most qualified candidate? The weight of judicial opinion seems to be in favor of the view that accommodation requires more than just considering disabled persons for vacant positions.[40] The Supreme Court has not yet squarely addressed this question, but it has ruled on whether exceptions must be made to

[39] *Duvall v. Georgia-Pacific Consumer Products*, 607 F.3d 1255, 1263 (10th Cir. 2010).

[40] *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013); Smith *v. Midland Brake*, 180 F.3d 1154 (10th Cir. 1999).