



OUT SICK, OR SICK OF WORK?

MANAGING EMPLOYEE MEDICAL ISSUES

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HYPOTHETICAL EMPLOYEE

- Lolly Gagger hurts her back at work lifting a box while not wearing a weight belt, in violation of safety rules. Her doctor says she can't work for the foreseeable future.



WORKER'S COMP & SAFETY VIOLATION

Two Competing Issues:

1. The Employee Has the Right to File a Worker's Comp Claim
 - Retaliation is unlawful

2. The Employer Has the Right to Punish Safety Violations
 - Is it a uniform practice?



KEY ASPECTS OF FMLA

- The Family and Medical Leave Act (FMLA):
 - Guarantees eligible employees time off from work for covered circumstances
 - Gives employees who take protected leave the right to return to work in the same or similar job
 - Requires employers to maintain medical benefits in place while an employee is out on FMLA leave
 - Protects employees from retaliation for using FMLA leave
- Medical Reasons for FMLA Leave
 - Birth, adoption, foster care
 - Employee's own medical condition
 - Immediate family member's medical condition
 - Child, spouse, or parent
 - Care for family member injured in active military service in combat zone
 - Child, spouse, parent or "next of kin"



QUALIFYING MEDICAL REASONS FOR FMLA

- FMLA is Not Intended for Temporary Illnesses Which Don't Require Medical Care

- FMLA Qualifying Conditions:
 - Illnesses of a serious and long-term nature, resulting in lengthy and/or repeated absences
 - Chronic or long-term health condition
 - For chronic conditions requiring periodic health care visits, such visits must take place at least twice a year



DATA RELATING TO TIME OFF FOR MEDICAL

- Employees requesting FMLA leave must provide verbal or written notice of the need
 - Can be to a manager or HR
- Within five business days after the employee has provided notice of need for leave, the Company will need to provide the employee with notice of eligibility and rights.
 - Failure to designate may waive FMLA coverage
 - Company can require certification of medical need for FMLA leave
- HR should handle follow-up on medical certifications – NOT MANAGERS!
- HR needs managers to notify them when an employee asks for or takes leave for a medical reason
- Can enforce call-in and absence reporting policies/procedures



LOLLY'S "RETURN" TO WORK

- Lolly has been out for twelve weeks, and her doctor now says she can come back to work with the following restrictions:
 - She has to take pain meds and muscle relaxants
 - She will need to stay home whenever she has back spasms (. . . frequently on Mondays and Fridays?)
 - She will need to take a five minute stretching break after each hour of work



THE AMERICANS WITH DISABILITIES ACT (ADA)

- Who Does it Protect?
 - Qualified individuals with disabilities:
 - “Physical or mental condition”
 - “Substantially limits” one or more “major life activities”
 - Qualified for the job
 - Job requirements (education, skills, etc.)
 - Can perform essential functions w/ or w/o accommodation
 - Individuals with “record of” disability
 - Individuals “regarded as” disabled



ADA ACCOMMODATION ISSUES

- Duty to reasonably accommodate:
 - Employers must provide reasonable accommodation to qualified individuals with disabilities UNLESS doing so would impose undue hardship
 - Undue hardship standard very hard to meet
- Reasonable accommodation depends on the circumstances
 - Leave time is one kind of accommodation
 - May be appropriate and required even when FMLA is unavailable or exhausted
 - Job modification
 - Special equipment or process change
- **The employer needs to document actions and events (!!!)**
- Safety issues related to disabilities
- HIPAA issues and misconceptions



IMPORTANCE OF JOB DESCRIPTIONS

- Essential Job Functions
 - Should be clearly defined
 - Quantitative or objective standards for physical and mental
 - Examples:
 - Lift 40 pounds ten or more times per shift
 - Ability to grasp and hold specific tools
 - Stand for 4 to 6 hours per shift
 - Sit for 6 to 8 hours per shift
 - Perform tasks in designated sequence
 - Include requirements regarding attendance and safety compliance
 - Job postings, advertisements, and job description should be consistent



HANDLING EMPLOYEES WITH MEDICAL ISSUES THAT MAY POSE A *SAFETY RISK*

- Can the Employee Perform Essential Job Functions?
 - What does the job description say?
 - Is there a way to reasonably accommodate the employee that will alleviate the problem?
 - (Did you do pre-employment physical, or should you have done one for this job?)
- Employee Can Perform Essential Functions, But Does the Employee Pose a Safety Risk?
 - The company may be able to reassign or terminate the employee
 - Must be able to establish employee posed a “direct threat”
 - “Significant risk of substantial harm” to self or others which “cannot be eliminated or reduced by reasonable accommodation”
 - “Individualized assessment” of the “present ability to safely perform the essential functions”
 - Based on current, informed medical assessment and objective evidence



INDIVIDUALIZED ASSESSMENT OF DIRECT THREAT

- Four EEOC Factors:
 - Duration of risk
 - Nature and severity of potential harm
 - Likelihood the harm will occur
 - Imminence of the potential harm
- Sources of Information:
 - Individual
 - Past employers (if recurring)
 - Job description
 - Individual's doctors
 - Independent experts



CASE STUDY

Good Employer Facts

- Joe hired to work graveyard shift, alone, in gas station
- Joe did not disclose epilepsy when hired
- Joe not taking epilepsy medicine b/c couldn't afford it
- Joe had seizure at work, found writhing on floor at 2:00 a.m. by police
- Joe's doctors documented he "can't work alone"
- Company sent letters to Joe informing him no day shift positions available and asking if any way he can work graveyard with accommodation

Not-So-Good Employer Facts

- Joe in hospital when letter was sent
- Joe submitted doctor's note saying no working alone
- Company did not ask day shift employees if they would switch to graveyard
- Company filled Joe's position immediately after the incident (out of necessity)
- Company terminated Joe after a few weeks of absence
- Company did not contact him when day shift positions opened up months later

Outcome: EEOC Cause Finding



LESSONS LEARNED FROM EEOC

- EEOC's Idea of *Reasonable* is Different Than Yours
- It is Very Important to Document Your Efforts to Work With the Employee's Unique Situation
- Job Descriptions Matter (and Should Be Accurate)



MANAGING ISSUES RELATED TO EMPLOYEE ABSENCES DUE TO MEDICAL

- Reasons for Employee Absences for Medical:
 - Employee is sick or hurt
 - Employee's family member is sick or hurt
- Manager's Role in Managing Absences Due to Medical
 - Communicating with HR about absences and work performance
 - Accurate job descriptions and requirements
- HR's Role in Managing Absences due to Medical
 - Make sure employee is informed of FMLA and on it as soon as eligible
 - Information provided to benefits provider for STD or LTD does not always = info to HR for FMLA and/or ADA purposes
 - Need to document efforts to get employee back to work and/or to accommodate the employee's need for more leave or work restriction
 - HR may need to communicate with doctors



ABOUT THE SPEAKER

Larry Stuart is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. In addition to counseling clients in workplace matters and conducting training for HR professionals and managers, Larry has litigated cases through trial and appeal in state and federal court and before administrative agencies.

Larry is a past-President and former General Counsel of HR Houston and served on a SHRM labor relations special advisory panel and as an instructor for the EEOC's Technical Assistance Program. Larry teaches as an Adjunct Professor in Management in the Jones Graduate School of Business and is a frequent speaker at regional and national HR conferences, including the 2013 SHRM Annual Conference in Chicago.



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HANDLING EMPLOYEES WITH MEDICAL ISSUES THAT MAY IMPACT SAFETY Considerations for Employers

An employee who cannot perform essential job functions with or without a reasonable accommodation is clearly not a “qualified individual with a disability” as contemplated by the ADA, as amended. When an individual is otherwise qualified but has a medical condition which may impact his or her ability to safely perform the duties of the job, can the employer deny employment based on the safety concern? The answer depends on whether the employee’s medical condition constitutes a “direct threat.”

“NOT SURPRISINGLY, DETERMINING WHETHER AN INDIVIDUAL CAN BE DENIED EMPLOYMENT BECAUSE HE OR SHE POSES A DIRECT THREAT WILL RARELY BE QUICK OR EASY.”

What is a “Direct Threat”?

It is not enough for an employee to pose a theoretical or slight safety risk. It may not even be enough that the employee’s medical condition has caused a safety incident. To deny employment opportunities to an individual based on a safety risk created by a medical condition, the company will need to assess whether the employee poses a “direct threat” as defined by the Americans with Disabilities Act, as amended.

“Direct Threat” is defined at 29 C.F.R. §1630.2(r) (2011), which provides:

Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

Consistent with this standard, an employer may legitimately require as a qualification standard that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, it must apply to all applicants or employees and not just to individuals with disabilities. If an individual poses a direct threat because of a disability, the employer should determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no reasonable accommodation exists that would eliminate or reduce the risk to an acceptable level, the employer may refuse to hire or discharge the individual.

Not surprisingly, determining whether an individual can be denied employment because he or she poses a direct threat will rarely be quick or easy. An employer cannot deny an employment opportunity to an individual with a disability merely because of a slightly increased risk of harm to himself or others. The individual's disability must pose a "significant risk." So what is a "significant risk"?

"High Probability" of "Substantial Harm"

According to the EEOC's Interpretive Guidance, published as an Appendix to 29 C.F.R. Part 1630 (the text of which is incorporated and quoted herein without specific attribution), the individual's disability must present a "high probability" of "substantial harm." A speculative or remote risk will not be sufficient to deny employment.

Determining whether an individual poses a highly probable risk of substantial harm to himself or others must be made on a case-by-case basis, and the employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer should identify the specific behavior of the individual that would pose the direct threat. For individuals with physical disabilities, the employer should identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in 29 C.F.R. § 1630.2(r) discussed below.

The employer should rely on objective, factual information, not on "subjective perceptions, irrational fears, patronizing attitudes, or stereotypes" about the nature or effect of the particular disability or disability generally. Relevant information may include input from the individual with the disability, the individual's specific experience with the

disability in prior jobs, and the opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise with the specific disability involved and/or direct knowledge of the individual with the disability.

According to the EEOC's interpretive guidance, generalized fear about risks associated with the work environment or position, such as the effects of stress, cannot be used by the employer to disqualify an individual with a disability. "Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability."

Whose Burden Is It to Prove Direct Threat? Assume It Is Yours.

Most courts have held that the employer bears the burden of proving the individual poses a direct threat to his/her own safety or the safety of others. Other courts have found the employee bears the burden of proving he/she can perform the essential job functions and is otherwise qualified. For some courts, the party bearing the burden varies depending on the type of job and whether "essential functions necessarily implicate safety." In all cases, the employer should affirmatively assert direct threat as a defense to an individual's claim under the ADA (or Texas Commission on Human Rights Act) to avoid waiving the defense.

Conducting an Individualized Assessment

What is an individualized assessment? The EEOC regulations and interpretive guidance contemplate consideration of the following four factors:

- The duration of the risk;
- The nature and severity of the

- potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm.

The employer's ability to demonstrate that it meaningfully considered all of these factors will be critical to defending a decision to deny employment because the individual poses a direct threat. In practice, the employer should consider doing the following:

1. Confirm the actual duties and physical/mental requirements of the position at issue.

This means going beyond the written job description and talking to people who know what the position actually requires now and in the foreseeable future. Too often, employers treat the existing job description as if it is carved in stone and true for all time, when it may not have been correct in the first instance or the job has changed in the interim. Employers should ask these questions about job descriptions before a direct threat issue is presented:

- Are the physical/mental requirements clearly and accurately described?
 - Do the job descriptions include language like the following: "safely perform the duties of the position without significant risk to self or others"?
2. Gather information about the individual's specific condition and how it may impact his or her ability to safely perform the job.
 - a. If the condition pre-dates this employment, learn whether the condition has caused any safety incident at work in the past and whether there has been an incident in the past outside of work. Some

questions:

- i. If there has been a safety incident before,
 - How recently?
 - How many times?
 - What actual (or threatened) injury, if any, to the individual or others?
 - ii. Is there any way to prevent the safety risk from occurring?
 - iii. Will there be any signs or symptoms which may serve as a warning or advance notice of an episode?
 - iv. Is the safety risk triggered by the use of a prescription drug or other treatment? Other events? Work conditions?
- b. If the condition pre-dates this employment, ask the individual to authorize past employers to communicate directly with you about the functions previously performed by the individual, whether there were any actual or near-miss safety incidents involving the individual, and whether specific accommodations were requested by or made for the individual.
 - c. Request specific information directly from the individual's treating physician regarding the individual's condition, any related past incidents involving the individual would implicate safety, the specific safety risks presented by the condition in light of the position, the likelihood of an incident implicating safety, and possible accommodations. In doing so:
 - i. Give the doctor an accurate description of the specific requirements of the job and identify the specific safety

- concern.
- ii. Ask relevant questions listed above.
 - iii. Note that the way you ask the questions matters; almost no doctor will state with certainty the numerical probability of a future episode.
3. In light of information from the individual and his or her doctor, and using accurate information about the actual job, solicit an opinion from an independent medical specialist or other expert regarding the safety implications of the condition and the likelihood of an event implicating safety.
 4. Evaluate whether it is possible to accommodate the individual's condition and minimize the likelihood (and/or theoretical impact) of a safety event occurring which will put the individual or others at significant risk of substantial harm, including use of protective gear, monitoring, medication, and work or schedule modifications.
 5. Make your decision, and be prepared to defend it.

Importance of Documentation

Now that the ADA has been amended and new regulations are in place interpreting it, employers must be diligent in documenting their efforts to understand, evaluate, and accommodate issues flowing from employee medical conditions. Keeping a written record of steps taken by the employer will better enable the employer to make reasonable accommodations, evaluate legitimate safety and performance concerns, and defend against employee claims.

This article is a summary of recent legal developments and is provided for informational and educational purposes only. It is not intended as legal advice or to create an attorney-client relationship. For more information or assistance contact:

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