

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.”

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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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