

TERMIN

a Disabled Employee under the

BY MICHAEL PEPPERMAN AND
THOMAS HEARN

While the Americans with Disabilities Act (“ADA”) prohibits employers from discriminating against qualified individuals with a disability, what should a construction company do if an employee’s disability poses a threat to the health and safety of himself and his co-workers?

It’s a dilemma that is increasingly faced by management in the construction industry. What action, if any, can the employer take? If management decides to terminate the employee (or move him to another, safer job), it runs the risk of violating the ADA. If management does nothing, it could jeopardize the employee’s health and safety and/or the health and safety of his co-workers. That could make one vulnerable to a series of law suits. What’s management to do?

THE “DIRECT THREAT” EXCEPTION TO THE ADA

Fortunately, the ADA contains an exception that allows employers to transfer or even terminate employees whose disabilities pose a direct threat to their own health and/or safety and/or to the health and safety of their co-workers. The determination that an employee is a direct threat to the health and safety of himself and/or others must be based upon a reasonable medical judgment that relies on the most current medical knowledge and/or the best objective evidence. In addition, the determination must be based on an expressly individualized assessment of the employees’ (or applicants’) present ability to safely perform the essential functions of the job. The assessment should take into account:

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The eminence of the potential harm.

THE EMPLOYEE WHO “BLACKS OUT”

The following case helps illustrate the applicability of the “direct threat” exception to the ADA. In *Dark v. Curry County*, 2004 U.S. Dist. (D. Or., Nov. 2, 2004), the plaintiff, Robert Dark had worked for the Curry County Road Department for seven years;

his most recent position was as a Maintenance and Construction Worker III. As such, Dark’s duties included operating heavy equipment (such as, bulldozers, dump trucks, graders, loaders and back-hoes), and the performance of “blasting” for minor road maintenance projects.

Dark suffered from epilepsy for which he took medication that lessened the effects of his epileptic seizures, but the medication did not prevent symptoms from occurring. Dark typically experienced a sensation about an hour prior to having an epileptic seizure, but he admitted that he sometimes ignored this sign. When Dark suffered an epileptic seizure, he would fall into a state of unconsciousness.

One morning before going to work, Dark experienced one of his sensations. He ignored the sensation, went to work, suffered a seizure while working and fell into unconsciousness while he was operating a Curry County vehicle. Fortunately, a co-worker — who was riding as a passenger in the vehicle — was able to regain control of the vehicle before it crashed or caused injury to Dark, co-workers or other commuters on the road.

Shortly after the incident, Curry County required Dark to submit to a medical evaluation. It was the physician’s opinion that Dark could not safely perform all the essential functions and duties of his job with the County. Dark told the County that he had recently experienced a “flurry” of seizures but that he could always tell, usually at least an hour ahead of time, when he was going to have one because he would experience a sensation. Dark admitted, however, that even though he had experienced such a sensation on the morning of the day he had a seizure at work, he came to work anyway and operated a company vehicle. Based upon the physician’s medical evaluation, and Dark’s statements to the County, the County terminated Dark’s employment because he could not safely perform the essential functions and duties of his job; in addition, he was terminated for driving a company vehicle after knowing that he would have an attack.

Dark filed a lawsuit against Curry County, alleging that it discriminated against him in violation of the ADA. In granting Curry County’s motion for summary judgment, the court ruled that Dark was not qualified to perform the essential functions of the job because he posed a “direct threat” to the health and safety of himself and of the other individuals in the workplace. The court concluded that the evidence established that Dark’s uncontrolled

ATE



“Direct Threat” Exception to the ADA

seizures and his disregard for the sensation which alerted him that a seizure would occur constituted a direct threat to the safety of others (and himself). The court opined that there was a significant risk that Dark could have a seizure while operating a piece of heavy equipment and that could result in injury to himself, his co-workers and/or members of the public, and that the risk would exist for as long as Dark was employed at his former position. The nature and severity of the harm could be substantial. The likelihood of the potential harm was great, considering it had happened before and it was certainly imminent given that Dark had been suffering a “flurry” of seizures.

THE APPLICANT WITH BACK PROBLEMS

In another illustrative case, an employer was able to rescind its conditional job offer to a disabled applicant because of the nature of the applicant's disabilities. The fused vertebrae and metal rodding that stabilized his spine placed him at significant risk that he would cause himself further injury as well as potentially cause injury to those around him. In *Collins v. Raytheon Aircraft Company*, 2003 U.S. Dist., the plaintiff, Robert Collins applied to Raytheon Aircraft Company for a position as an aircraft line assembler, working on one of the smallest aircrafts assembled by Raytheon. The job entailed frequent bending at the knees, stooping, working in a bent-over position and lifting more than 25 pounds. Raytheon made Collins an offer conditioned upon, among other things, his passing a physical examination.

Collins physical examination revealed that he suffered from herniated disks and degenerative disk disease. He had a metal rod instated in his vertebrae to stabilize his spine, and he suffered from nerve damage, which caused him to experience persistent tingling and numbness in his hands and wrists. After reviewing the medical records, Raytheon's ergonomist concluded that Collins could not safely perform the essential functions of the job because it required frequent bending and stooping which would further damage his back. As a result, Raytheon withdrew its conditional offer of employment and advised Collins that he could be considered for other job openings; however, Collins never applied for any other position.

Instead, Collins filed a lawsuit against Raytheon for violating the ADA. In response, Raytheon filed a motion for summary judgment based, in part, on that fact that Collins posed a “direct

threat” to himself. The Court agreed. The Court concluded that the potential harm from additional injury to Collins was significant based on his back condition and the nature of the job. The Court opined that Collins would face an increased and constant risk of further injuring his back if he were required to perform the duties of the position he sought. Accordingly, the Court agreed with Raytheon that it acted legally in withdrawing its conditional offer of employment because Collins's physical condition posed a “direct threat” to his health.

USE CAUTION WITH THE “DIRECT THREAT” EXCEPTION

One should note that the “direct threat” exception is a very narrow exception to the ADA. In addition, any “direct threat” assessment must be based solely on the facts of each employee's situation. An employer cannot use assumptions or stereotypes; for example, an employer cannot make a conclusionary deduction that if an employee is an epileptic, he must be a “direct threat.” It is advisable, in such cases, to consult a legal advisor before taking any hiring or firing action regarding a disabled employee who is perceived to be a “direct threat” either to himself or to his co-workers. ■

Michael S. Pepperman, Esq. is a partner at the Philadelphia law firm of Obermayer Rebmann Maxwell & Hippel LLP. His exclusively represents management in all aspects of labor relations and employment law. His e-mail is msp@obermayer.com. Thomas Hearn, Esq. is an associate at the firm and he, too, exclusively represents management in all aspects of labor relations and employment law. His e-mail is thomas.hearn@obermayer.com. The firm's web address is www.obermayer.com.