

Avoiding ADA Lawsuits And Keeping Workers Safe

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 coworkers?

Managers in the construction industry increasingly face this dilemma. What action, if any, can the employer take? If the employer decides to terminate the employee (or move him to another, safer job), it runs the risk of violating the ADA. If the employer does nothing, it could jeopardize the employee's health and safety and that of other workers. How can a company avoid lawsuits?

THE 'DIRECT THREAT' EXCEPTION TO THE ADA

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 safety, and/or the health and safety of their coworkers. This determination must be based on a reasonable medical judgment that relies on 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:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and

- the eminence of the potential harm.

THE EMPLOYEE WHO 'BLACKS OUT'

In a case involving a "direct threat," an epileptic worker's condition and actions contributed to his termination. In the 2004 U.S. District Court case of *Dark v. Curry*, the plaintiff, Robert Dark, worked for the county as a maintenance and construction worker with duties that included operating heavy equipment (such as bulldozers, dump trucks, graders, loaders and backhoes), and performing blasting for minor road maintenance projects.

While taking medication to lessen the effects of his condition, Dark experienced a sensation about an hour prior to having an epileptic seizure that provided him an opportunity to avoid harm to himself and others.

However, in an incident giving rise to his termination, Dark ignored a warning sensation and proceeded to work, and he suffered a seizure on the job. While operating a county vehicle, Dark lost consciousness. While no

damage occurred, the accident necessitated an investigation.

After Dark submitted to a medical evaluation, a physician concluded he could not safely perform all the essential functions and duties of his job. Dark also told the county that he had recently experienced a "flurry" of seizures, all of which were preceded with a sensation about one hour before the onset.

After the county terminated Dark because he could not perform the essential functions and duties of his job and because of his decision to drive a company

vehicle knowing the likelihood of a seizure, Dark sued the county. Dark alleged the employer discriminated against him violating the ADA.

The county prevailed on summary judgment when 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 others in the workplace. The court found the evidence established:

- a significant risk of a seizure while operating heavy equipment;
- the likelihood of potential harm as a result of the seizure was great;
- the risk would exist for the duration of employment because of the nature of disease; and
- the nature and severity of the harm from a vehicle accident could be substantial.

THE APPLICANT WITH BACK PROBLEMS

In another case, an employer rescinded its conditional job offer to a disabled applicant because of the nature of the applicant's disabilities. The fused vertebrae and metal rods that stabilized the applicant's spine placed him at significant risk that he would cause himself further injury as well as potentially cause injury to those around him.

In the 2003 U.S. District Court case of *Collins v. Raytheon Aircraft Company*, the plaintiff, Robert Collins, applied to Raytheon Aircraft Company for a position that entailed frequent bending at the knees, stooping, working in a bent-over position and lifting more than 25 pounds at a time. Raytheon made Collins an offer conditioned on, among other things, 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

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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 could 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 the fact that Collins posed a direct threat to himself. The court agreed. The court concluded that the potential for additional injury was significant based on Collins' 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' physical condition posed a direct threat to his health.

USE CAUTION WITH THE 'DIRECT THREAT' EXCEPTION

The "direct threat" exception to the ADA has very narrow applications. 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 come to the conclusion 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 coworkers.

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