



# Threat Assessments in the Workplace: ADA, FMLA, Workplace Violence and Everything Else

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# Agenda

Undue Hardship  
Direct Threat  
Leaves of Absence  
Case Studies



## What would you do?

Sandra, a forklift driver in your warehouse, had a seizure while at work. You were in the warehouse that day and saw it. Understandably, it was frightening. EMS came and took Sandra to the hospital. She has been out on a medical leave for six weeks and just provided a doctor's note clearing her to return to work without restrictions. She wants to come back to work tomorrow!



## Medical Inquiries and Exams of Current Employees Under the ADA

- During employment, medical exams or inquiries are only permitted if they are job-related and consistent with business necessity.
- When are exams job-related and consistent with business necessity:
  - Medical certification required by other law (OSHA, DOT, etc.)
  - Employee requests accommodation
  - Employee's performance of essential functions is impaired
  - Reason to believe employee poses direct threat to safety of self or others



# The ADA Interactive Process

- The Company is obligated under the ADA to engage in an interactive process by working with the employee/applicant to:
  - Determine the limitation
  - Assess the need for an accommodation
  - Provide a reasonable and effective accommodation
- The Company must discuss with a disabled person what reasonable accommodation(s) will allow them to perform the essential job functions
- Both the Company and employee are required to engage in the interactive process in good faith





## The Interactive Process

- IMPORTANT – Failure to engage in the interactive process may result in legal liability
- Discuss available alternatives
- Document the entire process IN WRITING
- Avoid using legal terms – “disability,” “reasonable accommodation,” and “disabled”
- Don’t make assumptions – utilize the interactive process



## ADA Defenses

- Accommodations that result in **undue hardship** are not “reasonable” and do not have to be provided
- An employer need not hire or employ individuals if they pose a “**direct threat**” to the safety of the employee or others in the workplace



# Undue Hardship





## Undue Hardship

- An employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business
- Undue hardship is defined as an "action requiring significant difficulty or expense" when considered in light of a number of factors
- Undue hardship is determined on a case-by-case basis
- A large employer with greater resources is expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources



# Undue Hardship Analysis



Factors:

1. Cost
2. Financial resources of company
3. Type of business
4. Impact on operation



## Undue Hardship - Cost

- Proving financial hardship is unlikely
- Factors considered
- The nature and cost of the accommodation needed
  - i. The overall financial resources of the facility/facilities involved; the number of persons employed at such facility; the effect on expenses and resources or the impact on the operation of the facility
  - ii. The overall financial resources of the company; the overall size of the business; the number, type and location of company facilities
  - iii. The type of operation of the company, including the composition, structure and functions of the workforce; the geographic separateness; administrative or fiscal relation of the facility/facilities in question



## Undue Hardship

- High burden on employer to demonstrate undue hardship
- Generalized conclusions will not suffice to support a claim of undue hardship
  - Make sure you understand WHY it is an undue hardship
  - Simply stating an accommodation is an undue hardship is not enough
- Requires an individualized assessment of current circumstances
- Specific reasonable accommodation would cause significant difficulty or expense



## Proving Undue Hardship

- Focus on operational hardship, not cost
  - Gather and present facts to make it “real”
  - For example:
    - Employees working harder, longer, different hours
    - Customer dissatisfaction
    - Lost or diminished productivity
- Interview managers, supervisors
- Managers must be able to explain the undue hardship
  - Don't just rely on conclusions



# Direct Threat



## What is a direct threat?

“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

*29 C.F.R. § 1630.2(r)*



## Direct Threat

- An employer may exclude someone from a job if that person would pose a "direct threat" to health or safety
- Company must be able to show that the individual poses a "significant risk" of "substantial harm" to the individual or others, and that there is no reasonable accommodation that would reduce the risk of harm below that level
- Direct threat situations often deal with "hidden" disabilities (e.g., back impairments, mental illness, HIV, epilepsy, etc.)





## The Direct Threat Defense

- An employer's good-faith belief that an employee poses a safety threat is generally not enough to establish the direct threat defense
- Even the opinions of medical experts may be discounted if they do not have expertise with the employee's specific disability
- The determination that an individual poses a "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job
- This assessment must be based on reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence



## Direct Threat Factors

In determining whether an individual would pose a direct threat, the factors to consider include:

- 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



## Direct Threat Individualized Assessment

- Even if the company determines that the person poses a significant risk of substantial harm, it should analyze whether a reasonable accommodation is available so the individual would not pose a direct threat
- The company should document all of the efforts it took to seek such reasonable accommodations
- Courts rely on whether the employer based its decision, at least in part, on medical experts' advice – DON'T MAKE ASSUMPTIONS!



## The Direct Threat Defense

- The EEOC Interpretive Guidance recommends seeking out opinions of “medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.”



## Direct Threat - The DO's and DON'Ts

- Do consult medical experts who have significant experience treating the employee's disability, and if possible, who have direct experience with the employee
- Do make decisions that are objectively reasonable and supported by medical evidence
- Do make decisions based on an individualized assessment of the employee's ability to safely perform the essential functions of the job



## Direct Threat - The DO's and DON'Ts

- Do provide the medical experts with the employee's job description/essential job functions as part of the individualized assessment
- Do have the medical experts assess the duration of the risk, the nature and severity of potential harm, the likelihood it will occur, and the imminence of its occurrence
- Do rely on the most current medical knowledge and/or on the best available objective evidence



## Direct Threat - The DO's and DON'Ts

- Do not make an assessment that an employee poses a “direct threat” without the help of experts
- Do not make a decision based upon a “direct threat” unless there is a significant risk – meaning there is a high probability that harm will occur, rather than just an abstract possibility
- Do not make a decision based upon a “direct threat” unless that risk is likely to cause substantial harm



## Direct Threat - The DO's and DON'Ts

- Do not make a decision based upon a “direct threat” if the risk can be eliminated or reduced to acceptable levels by reasonable accommodation
- Do not have a "no-exception" blanket exclusion or rely on generalizations or stereotypes about particular conditions
- Do not skip the interactive process that is required to identify whether you can reasonably accommodate without undue hardship





## Medical Exams

- The ADA regulates when an employer may request medical information or require an employee to undergo a medical exam
- During employment, medical exams or inquiries are only permitted if they are job-related and consistent with business necessity
- When medical exams are job-related:
  - Employee requests accommodation
  - Employee's performance of essential functions is impaired
  - Reason to believe employee poses direct threat to safety of self or others
  - Medical certification required by other law (OSHA, DOT, etc.)
- Employers must maintain confidentiality and narrowly tailor medical exams or medical inquiries



## Fitness for Duty Exams – Safety Concerns

- Make sure you have the facts to justify a fitness for duty exam
- If you have enough risk to justify a fitness for duty exam, you have enough risk to remove an employee from the workplace or at least the position pending the fitness for duty exam
- Employer should pay/reimburse employee for out of pocket cost of medical exam (e.g., insurance co-pay)
- The EEOC would prefer you work with the employee's treating physician first
- If necessary, then request an independent examination by a healthcare provider chosen by the Company



## Taking Action Based On Employee's Ability To Safely Perform the Job

- Risks of harm that are present for a disabled employee in every day life are not enough
- The risk of harm need not be eliminated as long as it can be reduced to a reasonable level
  - Example: Evening security guard's risk of harm to self related to choking or dying from epileptic seizure could be reasonably reduced by using cameras at the security desk and panic buttons
- A good faith belief that an employee poses a risk of harm is not enough unless it is grounded in medical or other objective scientific information
  - Example: Forklift driver who experienced dangerously high blood pressure on post-conditional offer test and follow up test was properly suspended until employee got blood pressure under control



## Reassignment: Accommodation of Last Resort

- Reassignment to a vacant position can be a reasonable accommodation, but should be considered only when accommodation in the employee's current position is not possible
- Transfer is not a reasonable accommodation if the employee is not minimally qualified for the new position
- The EEOC takes the position that you cannot make a disabled employee compete for a vacant position – if the disabled employee meets the minimum qualifications, they should be reassigned to the new position



## How does one know whether a safety risk rises to a “direct threat”?

- Only when a court or jury decides a case!
- Until then, employers can only do their best to make informed, fact-based decisions that is based on objective medical evidence which relies on current medical knowledge
- In other words ... the process employers follow is critical in defending direct threat decisions



# Case Studies



## KEITH v. COUNTY OF OAKLAND (6TH CIR. 2013)

- Nicholas Keith sued County after not being hired as a lifeguard because he was deaf
- Keith was initially offered the position, subject to passing a medical examination
- The examining physician, however, refused to clear Keith stating, “He’s deaf; he can’t be a lifeguard”
- On appeal, the court held that questions of fact remained as to whether or not Keith was “otherwise qualified” under the ADA
- Case is a reminder to **always** engage in an interactive process



## MITCHELL v. UNITED STATES POSTAL SERVICE (6TH CIR. 2018)

- Mitchell took multiple unpaid leaves due to depression
- After his most recent leave, his doctor cleared him to return to work, but his wife contacted the employer and said he was mentally unstable, might suffer a breakdown at any time, and his doctor wasn't fully aware of the situation
- USPS placed Mitchell on leave and required his doctor to address the concerns outlined in his wife's letter
- Mitchell refused to comply and was terminated
- Court held employer's concern about workplace safety was a legitimate basis for requiring the medical exam





# At a Crossroads:

Performance Management and the Interactive  
Process





## DEWITT v. SOUTHWESTERN BELL TEL. CO. (10th CIR. 2017)

- Employee with diabetes regularly took breaks as needed and used FMLA.
- Employees given a final chance after she failed to remove service from an account as the customer requested. Two months later, she hung up on at least 2 customers during a severe drop in blood sugar.
- Company terminated her and she claimed disability discrimination and failure to accommodate.



## What Happened Next?

- Court found sufficient evidence supported managers' honest good faith belief that employee intentionally hung up on customers.
- Court rejected employee's argument that the company should have accommodated her by excusing the disconnected calls that she claimed were caused by her disability.
  - Summary judgment for employer affirmed



## Misconduct

- An employer may discipline an employee with a disability for violating a conduct standard, even if an employee's disability causes violation of a conduct rule.
- Reasonable accommodations may be required going forward if the employee is retained.



## WILLS v. SUPERIOR COURT (CAL. APP. 2011)

- Employee is diagnosed with bipolar disorder. She takes numerous medical leaves but does not disclose reason.
- One day, employee has to wait outside for several minutes before being admitted to a secure facility. After being admitted, she swears and yells at employees, accusing them of intentionally leaving her outside. She also tells an employee she has added him to her “Kill Bill” list.
- During investigation, employee discloses bi-polar disorder. Employee is terminated for threatening comments. Employee sues.



## What Happened Next?

- The Court looked at employee's specific conduct and held that under California State law, an employer may distinguish between disability-caused misconduct and the disability in the limited circumstance of threats or violence against coworkers.
- Summary judgment for employer affirmed



# Is there an Obligation to Accommodate if Misconduct is Directly Caused by Disability?



## When a Disability Contributes to Misconduct

- Is there an accommodation that would be reasonable and allow the employee to meet the expectations?
- Direct threat?
- Undue hardship?
- Lower production standards?
- Excuse from all time and attendance requirements?





# Fitness for Duty vs. Investigation for Misconduct

Path 1: Would the conduct ordinarily result in discipline?

Investigate fully.

If you determine the threats were made, consider comparators to ensure consistent discipline.

Issue discipline.

Ignore medical issues.

Path 2: Does the conduct only involve whether the employee can safely perform the job?

Remove employee from safety sensitive position/duties.

Consider temporary transfer or, if no vacant positions available, place on leave of absence.

Require evaluation by healthcare provider and possible second opinion, if necessary.

If you choose the fitness for duty path, you cannot practically go back to termination if the employee passes the evaluation.





## What would you do?

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## Don't Forget Other Entitlements

- If a fitness for duty results in an employee taking leave, apply applicable state/local laws, benefits entitlements
  - FMLA
  - PSL
  - Short-term disability
  - Etc.



Questions?



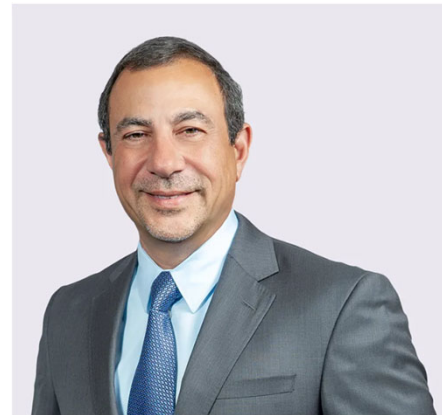


# Thank You!



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