



Making Medical Inquiries and Assessing Your Employee's Fitness for Duty

Jeff Nowak
August 2024

Fitness for Duty

- Ida Wannawerk is a nurse technician at General Hospital who takes FMLA leave due to chronic anxiety and depression. Co-workers recently found her crying in a supply closet, and she regularly mumbles to herself that her boss is a tyrant.
- After periods of intermittent FMLA leave, Ida ultimately needs to take continuous leave because her mental health condition worsens
- As her 12 weeks of FMLA leave nears the end, Ida reports that she has received a “clean bill of health” from her physician and can return to work immediately upon expiration of her FMLA leave

Fitness for Duty

- Let's assume that while Ida is on leave, her boss, Sue Menaut, reports to HR the following:
 - Several of Ida's co-workers have reported that she acted erratically before taking leave
 - Ida contacted Sue twice in the two weeks leading up to her return to work and stated the following:
 - Inquired whether "Walter" is still a patient in her unit, as she didn't want to deal with him (there was no Walter)
 - Made incoherent statements about medication she provided to patients, clearly incorrect


Fitness for Duty

- Sue tells Ida that she is not allowed to return to work until she is 100% healed from “whatever crazy potion she’s taking right now”
- Sue then reports to HR her conversations with Ida
- Philip Morepaper, the HR Director, is concerned and wants to seek a fitness for duty exam on Ida because she’s in a “safety-sensitive” position
- Phil insists that General Hospital obtain medical paperwork on Ida from “our own doctor” to ensure she is safe to return
- Is this legal?

Enforcement Guidance



**U.S. Equal Employment
Opportunity Commission**

 Languages ▾

Search



[About EEOC](#) ▾

[Employees & Job Applicants](#) ▾

[Employers / Small Business](#) ▾

[Federal Sector](#) ▾

[Contact Us](#) ▾

[Home](#) » [laws](#) » [guidance](#) »

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA



Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA

Fitness for Duty: Legal Framework

- Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and during employment
 - At the first stage (prior to an offer), the ADA prohibits all disability-related inquiries and medical examinations
 - At the second stage (after conditional job offer but before s/he starts work), disability-related inquiries and conduct medical examinations acceptable, whether or not they are related to job, if it does so for all entering employees in same job category
 - At the third stage (after employment begins), *an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity*

Fitness for Duty: Inquiries/Medical Exams

- Disability-related inquiries: A question (or series of questions) that is likely to elicit information about a disability so as to assess an employee's fitness to perform the job
- Medical Examination: A “medical examination” is a procedure or test that seeks information about an individual's physical or mental impairments or health



Job-Related, Consistent with Business Necessity

Disability-related inquiry or medical examination is *Job-related* and Consistent with *Business Necessity* if:



Employee's ability to perform essential job functions will be impaired by a medical condition

OR

Employee's medical condition will pose a direct threat

OR

Employee requests an ADA accommodation



Reasonable belief, based on objective evidence

EEOC, Tell Us What This Means?

- EEOC Guidance:
 - This standard may be met when:
 1. The employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition
 2. The employer observes symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat
 - Can the employer rely on reliable information by a credible third party that an employee ability to perform functions is impaired? **YES**

Direct Threat

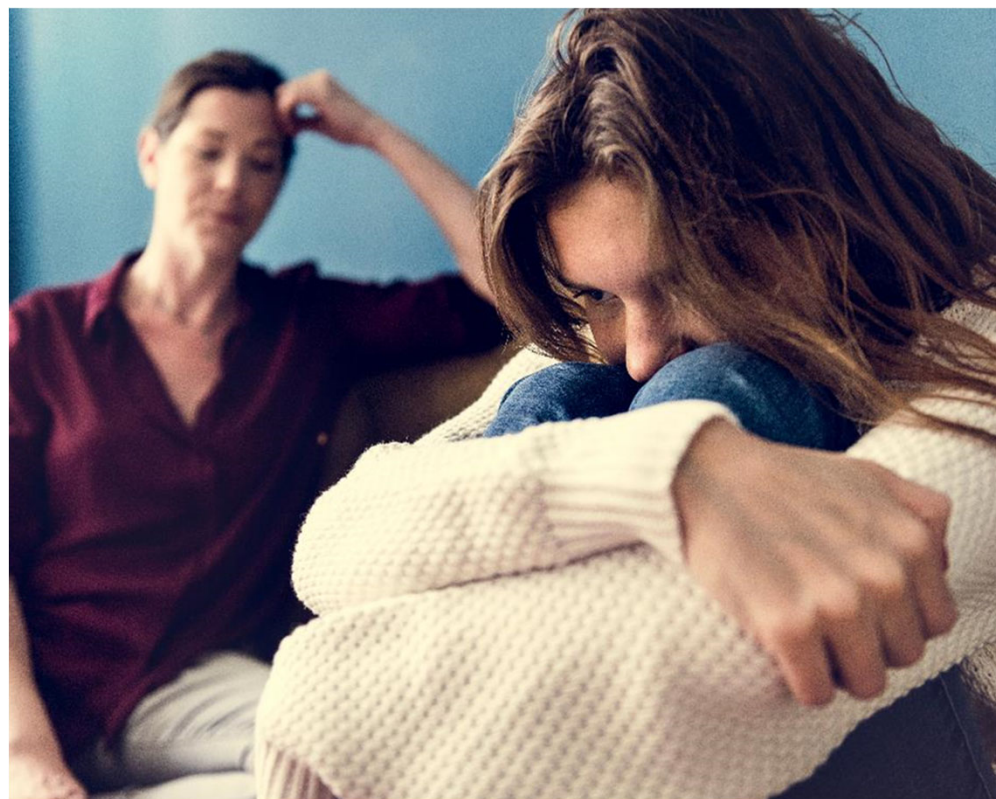
- Direct threat: Significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation
 - *Painter v. IDOT* (7th Cir. 2017): Threat must be “based solely on medical or other objective evidence”
 - *Owusu-Ansah v. Coca Cola* (11th Cir. 2013):
 - Employee banged fist on table and yelled “someone is going to pay for this”
 - Fitness for duty warranted; no ADA violation

Direct Threat

- The employer must be prepared to show that there is:
 - Significant risk of substantial harm
 - The specific risk must be identified
 - It must be a current risk, not one that is speculative or remote
 - The assessment of risk must be based on objective medical or other factual evidence regarding a particular individual
- Still must consider whether the risk can be eliminated or reduced below the level of a "direct threat" by reasonable accommodation

Do We Have Enough to Make a Medical Inquiry?

- What do we know?
 - Crying in closet
 - Mumbling things about her supervisor
 - Comments to supervisor
 - Walter
 - Wrong medication
 - Others are reporting she is acting erratically



Medical Inquiry

- Cover letter to physician
- Attach medical certification to be completed by physician:
 - Medical facts? (Be careful about state law)
 - Limitations on ability to work?
 - Review job description: Is employee able to safely perform job duties? If not, which ones?
 - Are any accommodations necessary? Explain/describe effectiveness
 - Direct threat questions: Does employee pose threat to himself/others? Explain the risk? Nature and severity of harm to others, and how likely to occur? How long will the risk exist? Is it imminent?

Can We Choose our Own Physician?

- *Assumption:* Work with the Employee's Physician first
 - If employee provides insufficient information from treating physician to substantiate that s/he has an ADA disability and needs a reasonable accommodation
 - Before doing so, employer should:
 - Explain why the documentation is insufficient, and
 - Allow employee opportunity to provide the missing information in a timely manner
- If Direct Threat, Can Refer to Employer/Independent Physician

Employer-Friendly Case Law

- Keith: Machine operator, disciplined for causing unsafe conditions on assembly line
- Thereafter:
 - During multiple meetings, management observed Keith in an “upset state, using an escalated tone”
 - Keith expressed concerns about his safety at work, ability to safely return to work
- Placed on leave to obtain fitness for duty exam
- While on leave, Keith sent multiple emails to co-workers indicating that his supervisor and co-workers were “coordinating against him” and were likely to do so again in the future
- Second fitness for duty exam conducted based on emails
- Court: Multiple requests for a medical evaluation were job-related and consistent with business necessity under the ADA

Kreszowski v. FCA US, LLC (6th Cir. 2022)

Employer-Friendly Case Law

Owusu-Ansah v. Coca Cola (11th Cir. 2013): psychological fitness for duty allowed where employee banged his fist on a table during a meeting about discrimination and harassment and said (in a loud voice) that someone was “going to pay for this”

Barnum v. Ohio State Univ. Med. Cntr. (6th Cir. 2016): lawful to send nurse to psychological examination after several incidents at work – she was unable to concentrate when providing patient care, seemed unable to perform routine task and employees reported that she had made comments suggesting suicidal thoughts

Ward v. Merck & Co., Inc. (3rd Cir. 2007): employer had a right to require a medical examination where employee’s performance (including productivity) had significantly declined, he had become irritable, terse, and at times, seemingly catatonic

López-López v. Robinson School (1st Cir. 2020): acceptable for school to require a teacher to undergo a mental health examination after she suffered a “nervous breakdown” and threatened suicide

But Not All Cases Support the Employer

Kroll v. White Lake Ambulance Auth. (6th Cir. 2014): a single incident of employee using cell phone while driving ambulance (against policy), single incident of refusing to administer oxygen to a patient, along with co-workers who found employee crying outside of work about relationship with a co-worker not sufficient to support medical examination; “small number of isolated incidents” not enough

EEOC v. McLeod (4th Cir. 2019): employee born with condition with missing bones, causing her to fall occasionally; manager noticed a decline in performance involving missed deadlines, arriving late to work, lacking enthusiasm, looking sluggish, struggling to stay awake at times, and looking winded and flushed after moving short distances. Medical exam triggered after the employee had three falls – two outside of work and one at work.

Garrett v. CSX Transportation, Inc. (M.D. Tenn. July 10, 2018): Train engineer with heart implant; employer unaware. Doctors battle on whether he can return to work: Employee Cardiologist = very low risk; Company's physician = C'mon, he drives a train! Court refuses to dismiss ADA claims.

Best Practices for Seeking Fitness for Duty

- Reasonable, objective concern – job duties or direct threat
- Supported by actual, objective observations/knowledge
- No assumptions, stereotypes
- Limited in scope to facts/medical condition impacting job
- Assess for Reasonable Accommodation



Connect with Jeff

- Email: jnowak@littler.com
- FMLA Insights Blog: www.fmlainsights.com
- LinkedIn: www.linkedin.com/in/jeffnowak
- Twitter: [@jeffreysnowak](https://twitter.com/jeffreysnowak)

