ADA “Direct Threat” Defense Just Got a Little Easier

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The rights and protections afforded to those with disabilities by the Americans with Disabilities Act ("ADA") are not without limitations. Accommodations for disabled employees must be reasonable, and the employee must still be able to perform essential job functions with an accommodation. Additionally, the employee’s disability cannot pose a risk to her- or himself or others in the course of job functions if that risk cannot be eliminated or reduced by a reasonable accommodation. This is known as the “direct threat” defense – adverse employment or hiring actions taken against an employee or applicant were done so to mitigate a direct threat to the safety of the employee or others.

Direct threat analysis under the ADA begins with the language of the law itself - “The term ‘direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”[1] This language speaks to provisions that allow employers to impose certain qualification standards as to disabled employees as a defense to a charge of discrimination. EEOC regulations broadened this classification to include risk to oneself as well, and provided guidance that included a four-factor test to employers as to how to conduct direct threat assessment in decision-making:

“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. In determining whether an individual would pose a direct threat, the factors to be considered include: (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 imminence of the potential harm.”[2]

At issue in a recent case before the Tenth Circuit Court of Appeals, EEOC v. Beverage Distributors Co,[3], is whether this “direct threat” must be proven by the defendant employer by a preponderance of the evidence, or whether the employer merely had to have held a reasonable belief about the risk posed. Jury instructions in that case suggested that, to establish a direct-threat defense, the employer would have had to prove that the employee’s disability posed the risk of harm it claimed. The Tenth Circuit ruled that these instructions were reversible error, suggesting that the employer merely had to reasonably believe the disability would pose a significant risk of substantial harm.

The important takeaway in this case is that the key inquiry in direct threat analysis is whether the employer’s belief about the direct threat imposed by an employee’s disability is reasonable, not whether the threat actually exists and can be proven. This should provide a sigh of relief for employers, as it keeps the bar for a direct threat defense to ADA claims low, provided an employer conducted a reasonable assessment of the employee/applicant’s disability before making the decision.

[2] 29 C.F.R. § 1630.2(r)

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