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October 28, 2008

Performance/Conduct Issues and an overview/update on the
ADA Amendments Act of 2008

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Direct Threat and Safety in the Workplace

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Equip for Equality

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Overview of Direct Threat

- Foundations of Direct Threat – the *Arline* Case
- ADA Text and Regulations
- Scope of Direct Threat: Who and Where?
- Individualized assessment of the present ability to safely perform the essential functions of the job
- Reasonable medical judgment - relies on current medical knowledge and/or on best available objective evidence.
- When can Reasonable Accommodations Reduce or Eliminate a Direct Threat?
- Emerging Issues in the Direct Threat Caselaw



Foundations of ADA's Direct Threat *School Board of Nassau County v. Arline*

- **Section 504 case** - teacher with tuberculosis
- **Supreme Court:**
 - ❖ Fact that *some* persons who have contagious diseases may pose health threat does *not* justify excluding all persons with actual or perceived contagious diseases.
 - ❖ Courts must conduct individual inquiry
 - ❖ Balance rights of person with disability to be free from discrimination with the legitimate concerns of avoiding exposing others to significant health and safety risks.



Foundations of ADA's Direct Threat *School Board of Nassau County v. Arline*

Supreme Court identified four factors in direct threat cases:

- ❖ the nature of the risk;
- ❖ the duration of the risk;
- ❖ the severity of the risk; and
- ❖ the probability of the risk and likelihood of the harm

Supreme Court's analysis was incorporated into ADA's text, regulations, and court decisions.

Direct Threat Definitions in ADA Text and Regulations

- **ADA Definition of Direct Threat:** “A significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”
42 USC § 12111(3)
- **ADA Regulations Definition of Direct Threat:**
“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).

Regulations on Direct Threat (cont'd)

ADA Regulations Adopt *Arline* Factors:

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

ADA Regulations also make clear:

- direct threat decision should be based on a reasonable medical judgment
- relies on most current medical knowledge, or
- the best available objective evidence



EEOC Interpretive Guidance of Direct Threat Regulations

EEOC Guidance to Employers on Implementing Factors from *Arline*:

- Employer should identify the *specific risk* posed by the individual.
- For individuals with mental or emotional disabilities, employer must identify the *specific behavior* on the part of the individual that would pose the direct threat.
- For individuals with physical disabilities, employer must identify the *aspect of the disability* that would pose the direct threat.

EEOC Interpretive Guidance of Direct Threat Regulations (cont'd)

Employer's Direct Threat Determination:

- based on individualized factual data
- not based on fears, generalizations or stereotype
- must consider potential reasonable accommodations

Relevant Evidence May Include:

- input from the person with disability
- prior experience of the person in similar positions
- opinions of medical professionals with expertise in the disability involved and/or direct knowledge of the individual with the disability

Common Disabilities in Direct Threat Cases

HIV, Epilepsy, Mental Illness and Diabetes –

A significant number of direct threat cases involve these disabilities.

Why?

Stigma, fear and ignorance about these disabilities

- **ADA seeks to remedy by requiring individualized assessment/objective evidence**
- **Courts don't necessarily follow ADA standard (significant risk of substantial harm) in these cases. See *Estate of Mauro v. Borgess*, 137 F.3d 398 (6th Cir. 1998).**

The Scope of Direct Threat: Who and Where?

Cases have expanded Direct Threat beyond what some thought was the original scope contemplated by the ADA.

WHO?

Does Direct Threat include a threat to self or is it limited to threats to others?

WHERE?

Does Direct Threat include off-duty conduct?

Who?

Direct Threat to Self and Others

A Conflict Existed Between the Text of ADA and the EEOC's Regulations

Text of ADA:

Direct threat limited to threat to others

EEOC Regulations:

Direct threat includes threat to self and others



Who?

Supreme Court Resolves the Conflict

Chevron U.S.A., Inc. v. Echazabal,

122 S. Ct. 2045 (2002)

- **Facts:** Person with Hepatitis C not hired. Employer considered danger to self.
- **Supreme Court:** An employer may refuse to hire applicants if performing their job may endanger their own health
- **Implication:** Expands Direct Threat Defense
- **Concerns of Disability Community**

Where?

Direct Threat Based on Off-Duty Actions

Issue: Does Direct Threat apply to actions outside the employment setting?

Courts: Yes - courts have found that employees who pose a direct threat to the public—not just co-workers or customers—may be deemed a direct threat.

Common Facts: Off-duty alcohol related incidents

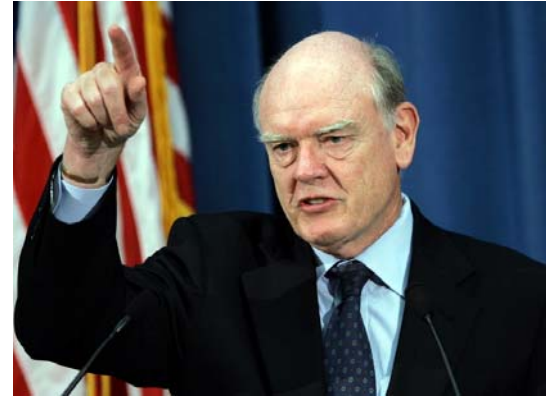
Direct Threat Issues



**Assessing the
Potential for Harm**

Assessing Direct Threat – The Individualized Assessment

- **Significant risk of substantial harm**
 - (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.
- Based on a **reasonable medical judgment** that
 - ❖ Relies on the most current medical knowledge, or
 - ❖ The best available objective evidence
- **Reasonable Accommodations** must be examined



Branham v. Snow – Assessing the Risk

Branham v. Snow, 392 F.3d 896 (7th Cir. 2005)

- Employee with depression frequently missed work.
- **Issue:** Was he qualified to be an IRS criminal investigator, or did he pose a direct threat?
- **Duration of the risk – IRS:** Mr. Branham had experienced significant long term and short term changes in his blood glucose levels that could affect his performance.
- **Mr. Branham & Physician:** Diabetes cannot be cured but he can control the condition so effectively that there is no “real ... duration of risk.”
- **Court:** Duration of Risk Not Significant



Branham v. Snow – Nature and Severity of the Risk

- **Nature and Severity of the Risk – IRS:** Drastic changes in blood sugar level could "significantly degrade his abilities to function as a special agent, potentially endangering Mr. Branham, his colleagues and the public."
- **Mr. Branham:** Although the risks of severe hypoglycemia can include incapacitation, confusion, coma and death, he never has lost consciousness and he never has experienced physical or mental incapacitation as a result of mild hypoglycemia.
- **Court:** A reasonable trier of fact could conclude that any hypoglycemia experienced by Mr. Branham will not impair him in the performance of his duties.



Branham v. Snow – Likelihood of Potential Harm

- **Likelihood of Potential Harm - IRS Endocrinologist:** Employee's program of intensive treatment was "associated with increased risk" of severe hypoglycemia.
 - ❖ Some job responsibilities "may increase" Mr. Branham's risk of experiencing severe hypoglycemia.
- Employee's Dr: The risk of Mr. Branham suffering a severe hypoglycemic reaction was 0.2% per year.
- **Court:** IRS has not presented any statistical evidence of the likelihood that the harm it fears will occur... [A] reasonable jury could conclude that the likelihood of the harm that the IRS fears is quite low.



Branham v. Snow – Imminence of Potential Harm

- **Imminence of Potential Harm** - Mr. Branham: He "has never suffered any period of incapacitation or other hypoglycemic episode [at work or elsewhere] & there is no medical evidence ... that he will do so in the future."
- **IRS:** "Such an assertion is not supported by logic."
- **Court:** A reasonable trier of fact could conclude that Mr. Branham can prevent severe hypoglycemia ... and eliminate any imminence with respect to the risk of harm.
- **Court:** Genuine issue of material fact as to whether Mr. B. can perform the essential functions of the position of without becoming a threat to the safety of himself or others.

Direct Threat Case – *Darnell* - Uncontrolled Diabetes

***Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005)**

- Summary judgment affirmed for employer who did not rehire employee with insulin-dependent, Type 1 diabetes
- Pre-employment physical - diabetes not under control.
- Court held that an employee is not qualified for a position if his disability poses a direct threat to his safety or the safety of others.
- Court found uncontrolled diabetes in a manufacturing plant with dangerous machinery could cause serious injury.

But See, Rodriguez v. ConAgra Grocery Product Co., 436 F.3d 468 (5th Cir. 2006), (Employer must conduct an independent, individualized assessment, not base decisions on generalizations and false beliefs)



Direct Threat Case - *Hatzakos* - Significant Risk / Substantial Harm

Hatzakos v. Acme American Refrigeration, Inc., 2007 WL 2020182 (E.D.N.Y. Jul. 6, 2007)

- Employee with depression frequently missed work.
- Upon disclosure, her manager put her on leave pending a medical review of whether she was safe in the workplace.
- Dr. indicated the employee was stable and was not dangerous, although he could not assure the employer that absolutely no threat existed.
- The manager then discharged the employee for poor attendance and posing a safety risk.
 - ❖ No safety-related complaints from co-workers.



Direct Threat Case - *Hatzakos* - Significant Risk / Substantial Harm

- **Court:** Defendants have failed to provide any evidence that plaintiff posed a significant risk of substantial harm.
- “Nowhere in defendants' briefs have they identified the nature of the risk posed by plaintiff's psychological disorders or medications, much less the likelihood or imminence of the potential harm.”
- ADA requires analysis on a case-by-case basis.
- The probability of significant harm must be substantial, constituting more than a remote or slightly increased risk.

Medical Information

**A Reasonable Medical
Judgment Based on
the Best Available
Objective Evidence**





Medical Evidence

The nature of medical evidence is important.

- Employers are on strong ground if there is medical substantiation for the conclusion that the employee poses a direct threat to health and safety.
- However, when employers rely on the opinion of company doctors or on stereotypes, and ignore contrary medical opinions, especially those of treating physicians, courts are less likely to find for the employer.

EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), <http://www.eeoc.gov/policy/docs/guidance-inquiries/html>.



Direct Threat Case - Medical Information

Ward v. Merck & Co., 2007 WL 760391 (3d Cir. Mar. 14, 2007)

- Employee with mental illness, including anxiety & panic disorders), was stressed & experiencing problems at work.
- Problems continued after receiving reduced work schedule.
- Co-workers & supervisors became concerned about his performance and behavior.
 - ❖ “Ward began to engage in strange behavior” including “an unexplained episode in Merck's cafeteria” resulting from a “brief psychotic disorder.”
 - ❖ After this episode, he was taken to the hospital, evaluated, and released.
 - ❖ Also, there were claims he walked around like a “zombie” and had a temper tantrum.



Direct Threat Case - Medical Information

Ward v. Merck & Co., 2007 WL 760391 (3d Cir. Mar. 14, 2007)

- As a result, his employer requested that he undergo a fitness-for-work evaluation with the company's physician.
- The employee refused, was suspended without pay, and terminated when he did not respond to a follow-up letter.
- **ADA:** Employers cannot require medical examinations or make medical inquiries of an employee unless they are job-related and consistent with business necessity. (42 USC § 12112(d)(4))
- **Court:** Merck has the burden of showing a “direct threat.”
- Possible “threats to employee safety ... were sufficient to meet the business necessity element...”



Medical Information – *Taylor*

Taylor v. USF-Red Star Exp. Inc., 2006 WL 3749598 (3rd Cir. 2006).

- Employee, a fork-lift driver, experienced two seizures.
- A neurologist determined that his medical tests were consistent with seizure disorder.
- Employee told employer that he had “infantile epilepsy.”
- Employer did not let employee RTW for > 18 months.
- During this time, employee was examined by 2 physicians who cleared him for work, but reversed their opinions after speaking to the a physician retained by the employer.



Medical Information – *Taylor*

Court's Ruling

- Employer's refusal to let the employee return to work was based on the assessment of doctors who were reporting to, and retained by, the employer.
 - ❖ Clearly, employer used the company doctor to get the other doctors to change their medical opinions.
- Thus, the court found that the employer regarded the employee as disabled and held that it violated the ADA.

Analysis

- It's dangerous for employers to rely solely on company physicians and ignoring contrary opinions.

Medical Information – *Justice*

Justice v. Crown Cork and Seal Co., 527 F.3d 1080 (10th Cir. 2008)

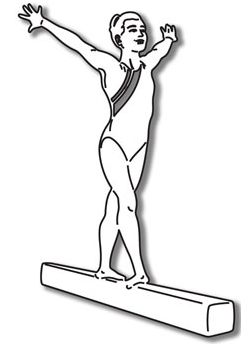
- Electrician had a stroke resulting in vertigo.
- He appeared unsteady to others, but had no difficulty walking or standing.
- Essential job functions included climbing ladders, walking on catwalks, and using power presses and cutters.
- Medical reports: No work at unprotected heights.
- He was able to work as an electrician with no problems until a new supervisor came on board and had concerns.
- Employer then requested several medical evaluations.



Medical Information – *Justice*

Justice v. Crown Cork and Seal Co., 527 F.3d 1080 (10th Cir. 2008)

- A physical therapist retained by the company initially cleared employee to work with safety equipment.
- However, after visiting work site, with the new supervisor, the PT recommended that employee find a new safer job.
- Final evaluation from Crown’s medical director restricted Justice from jobs that “require[d] him to maintain balance, work at heights, [or] work near moving equipment.”
- Employer then reassigned employee to a janitorial position (where he worked around moving equipment).
- Employee then filed at EEOC.



Medical Information – *Justice*

Court's Ruling

- “Crown believed Justice's balance problems significantly restricted his ability to perform a broad range of jobs.”
Therefore, he was “regarded as” disabled in working.
- **Issue of fact:** Was he qualified to work as an electrician?
- Justice was able to work safely with the unprotected height restriction, leading to the inference that he was able to do the electrician job despite this restriction.”
- “There is ... evidence that these hazards were imagined or exaggerated, and that Crown's purported reliance on Justice's medical restrictions was a pretext masking Crown's irrational fears about Justice's condition.

Direct Threat & Reasonable Accommodations





EEOC v. Wal-Mart - Individualized Assessment / Reasonable Accommodation

EEOC v. Wal-Mart Stores, 477 F.3d 561 (8th Cir. 2007)

- Wal-Mart claimed an applicant with cerebral palsy would pose a direct threat if hired as a greeter or cashier.
- Wal-Mart's Dr. cited “many safety risks.”
 - ❖ “Biggest risk is the fact that [Bradley's] legs are not capable of holding him without arm support” as employee often falls on floors that have impediments.”
 - ❖ Bradley is “very wide when he uses his crutches ... twice the width of a normal person depending on the area where he is,” posing an “obstacle” to customers.
 - ❖ Standing for an entire shift would “place [Bradley] at great risk” for “recurrent back and knee pain” that would “make it difficult to tolerate these tasks” over time.



***EEOC v. Wal-Mart* - Individualized Assessment / Reasonable Accommodation**

- Wal-Mart's Dr. admitted his opinion assumes that Bradley would be using crutches, not a wheelchair.
- Wal-Mart's Dr. admitted applicant was "very ... stable in a wheelchair" and would be "much less of a threat to himself and to coworkers" when he is not on crutches.
- **Court:** Wal-Mart did not explain how he poses more of a threat than Wal-Mart customers who use [mobility aids].
- **Holding:** "Wal-Mart has failed to prove that Bradley, using a wheelchair or other reasonable accommodation, would pose a direct threat to the safety of himself or others."



Direct Threat & Accommodations

Taylor v. Rice

Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006)

- Plaintiff's application to be an officer with the Foreign Service was rejected because of his HIV status.
- State Department has a policy prohibiting the hiring of people with HIV for these positions, claiming that they may require medical treatment that is not available in less-developed countries where they might be stationed.



Direct Threat & Accommodations

Taylor v. Rice

- Relying on *Echazabal*, the trial court held plaintiff would potentially be a direct threat to himself if he were hired and deployed to a place that could not meet his medical needs.
- The D.C. Circuit Court reversed finding that there may be reasonable accommodations that would be able to reduce the alleged direct threat so that there was not a substantial risk of significant harm to the plaintiff 's health.



Direct Threat & Accommodations *Taylor v. Rice*

- Taylor proposed 2 accommodations:
 - (1) granting him Class 2 clearance and only placing him at overseas posts “where he can access local HIV physicians and diagnostic laboratories,”
(**Issue:** Does this require waiving an essential job function?), or,
 - (2) sending him to any overseas post, but “permit[ting] him to use his allotted leave time to access routine medical care.”
- In February 2008, the State Dept. announced it was lifting its ban on hiring people with HIV in the Foreign Service.



Direct Threat & Accommodations – *Dark v. Curry*

Dark v. Curry County,

451 F.3d 1078 (9th Cir. 2006)

- Heavy equipment operator with epilepsy had an aura before work but worked anyway
- He had a seizure while driving though no one was hurt
- Employer claimed that employee was not qualified and posed a direct threat



Direct Threat Case - *Dark v. Curry*

- Court ruled that there was a genuine material issue of fact as to whether an employee with epilepsy was a direct threat in the workplace following a seizure while driving.
- Employer needed to explore whether a reasonable accommodation, such as job reassignment or temporary medical leave, would be available to eliminate the alleged threat in the workplace.



Direct Threat Case + Accommodations

Jarvis v. Potter

Jarvis v. Potter, 500 F.3d 1113 (10th Cir. 2007) (Rehab Act)

- A U.S. Postal Service employee with PTSD had previously punched a co-worker who startled him.
- He requested that his co-workers be instructed, “not to startle him or approach him from behind.”
- Employee told employer that his, “PTSD was getting worse and that he could no longer stop at the first blow, that if he hit someone in the right place he could kill him, and that he could not return to the workplace and be safe.”
- Employee was placed on leave and then terminated.



Direct Threat + Accommodations – Jarvis

- Courts generally have held that the existence of a direct threat is a defense to be proved by the employer.
 - ❖ Exception to the general rule: “[W]here the essential job duties necessarily implicate the safety of others, then the burden may be on the plaintiff to show that she can perform those functions without endangering others.”
 - ❖ That exception is inappropriate in this case because the essential duties of a Postal Service custodian do not “necessarily implicate the safety of others.”

Reasonable Modifications of the Work Environment and/or Policies – *Jarvis*

The court stated:

- “[T]he fact-finder does not independently assess whether it believes that the employee posed a direct threat.
- Nor must it accept the contention just because the employer acted in good faith in deciding that the employee posed such a threat.
- As we understand the fact-finder's role is to determine whether the employer's decision was objectively reasonable.”
- **Query:** Does it matter if the employer was wrong?

Jarvis, 500 F.3d at 1121-23, citing
Bragdon v. Abbott, 524 U.S. 624 (1998).

Reasonable Modifications of the Work Environment and/or Policies – *Jarvis*

Holding

- The employer met this standard and that the employee posed a direct threat that could not be eliminated or reduced by a reasonable accommodation.
- Court pointed to prior incidences of violence and the employee's own incriminating statements quoted above.
- Court also noted that Mr. Jarvis' "symptoms would last indefinitely, he could erupt at any moment if startled, and it was highly likely that someone would startle him, even if inadvertently."

Reasonable Modifications of the Work Environment and/or Policies – *Jarvis*

- “[T]he law does not require the Postal Service to wait for a serious injury before eliminating such a threat.”
- The request in this case was unreasonable as it would not be effective in assisting the employee act appropriately in the workplace.



Emerging Issues in Direct Threat Cases: Burden of Proof

Issue: Who has the burden of proof in direct threat cases?

Courts Split: Although the majority of courts that have looked at this have found that direct threat is a defense and therefore something the employer has to prove, some courts have found that direct threat is part of the employee's requirement of showing he/she is "qualified"

Why does it Matter? More likely to prevail when the other party has the burden of proof.

Emerging Issues in Direct Threat Cases: Blanket Exclusions

General Rule: Blanket exclusions of particular disabilities from particular jobs have been found to run afoul of the individualized assessment requirement for direct threat

Diabetes cases: Many employers used to exclude people with insulin-dependent diabetes from jobs involving driving. Courts have consistently struck down these blanket exclusions.

Exception: *EEOC v. Exxon* - exclusion of applicants with history of substance abuse upheld as business necessity.



Resources

- **DBTAC: Great Lakes ADA Center**
www.adagreatlakes.org; 800/949 – 4232(V/TTY)
- **Equip For Equality**
www.equipforequality.org; 800/610-2779 (V);
800/610-2779 (TTY)
- **Illinois ADA Project**
www.ada-il.org; 877/ADA-3601 (V); 800/610-2779
(TTY)



More Resources

- **Job Accommodation Network**
www.jan.wvu.edu
- **Equal Employment Opportunity Commission**
www.eeoc.gov
- **ADA Disability and Business Tech. Asst. Ctr.**
www.adata.org/dbtac.html

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THE END



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