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Technical Update

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Employer Must Prove the "Direct Threat" Defense Under the ADA

In Chevron v. Escobal, the Supreme Court determined that an employer may refuse to hire an applicant with a disability for a job that would significantly endanger the applicant's health. 36 U.S. 73 (2002). In that case, Chevron had submitted the results of a post-offer physical that showed the applicant had active Hepatitis C, which condition, according to the company doctor, would be seriously aggravated by exposure to toxic chemicals or solvents in the workplace.

Employers can't just rely on unfounded conclusions or unproven stereotypes, however. More recent federal circuit cases have continued to require employers to prove the defense of "direct threat" by a preponderance of the evidence.

Walmart determined that a man with cerebral palsy would be a "direct threat to himself or others" if hired as a greeter, and refused to hire him. Walmart tried to use the "direct threat" defense when sued, but failed to prove that an applicant with cerebral palsy would be a "direct threat" to himself or others if hired as a greeter. The Court held that Walmart simply had not met their burden of proof even though the EEOC had not presented any evidence to rebut the "direct threat" defense.

The Fifth Circuit Court of Appeals decided that firing an employee for an inability to evacuate the facility in an emergency violated the ADA. EEOC v. E.I.du Pont Nemours & Co., 480 F.3d. 724 (5th Cir. 2007). In that case, a lab operator had mobility related disabilities and worked in a chemical plant that limited her walking to less than ten minutes at a time without resting. The employer claimed that they required all employees to be able to "safely evacuate the plant during an emergency" and used an annual company physical as justification to put her on total disability leave. She was able to demonstrate she could walk an evacuation route, but the employer unilaterally decided that her inability to get herself out of the plant in an emergency was a "direct threat" to her and on that basis, terminated her. The jury decided that the ability to evacuate was not an essential function of the job. The Appeals Court also found that her successful use of the evacuation route would not jeopardize the safety of others either.

A different result was found in Martinson and EEOC v. Kinney Shoe Corp. In that case, the lower court upheld the termination of a shoe salesman after he had five epileptic seizures at work. The employer was able to show that he'd only bumped his head or scratched himself, and never hurt anyone else. The Fourth Circuit Court of Appeals agreed that an employer may not make decisions based on the symptoms of a person with a disability. However, they then determined that because he sometimes worked alone and without security guards, and he could not prevent theft, and would distract other salespeople from minding the store, that he was not qualified with or without accommodations for the essential duties of the job. Martinson and EEOC v. Kinney Shoe Corp, 104 F. 3d 683 (4th Cir. 1997). This case agrees with the "direct threat" legal requirement, yet found another way to disqualify the employee.

What This Means For Counties

Make sure you actually have the medical facts and can prove a direct threat, and don't just rely on assumptions, unsubstantiated conclusions, or the symptoms of a person with a disability.

For more information, contact CTSI at 303-861-0507.