Make Sure You’re On Target When Using Direct Threat Defense

10.2.17

An employer’s personnel decisions do not always have to be “correct” in order to avoid liability under most federal and state anti-discrimination laws. If you decide to terminate an employee for engaging in workplace misconduct, the fact the employee was actually innocent of the alleged misconduct should be deemed irrelevant in a subsequent discrimination lawsuit.

For example, in the 2009 case of Cervantez v. KMGP Servs., the 5th Circuit Court of Appeals said “a fired employee’s actual innocence of his employer’s proffered accusation is irrelevant as long as the employer reasonably believed it and acted on it in good faith.” This is because, as the 5th Circuit said in the 2010 Moss v. BMC Software, Inc. case, anti-discrimination laws do not protect employees “from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated.” As long as you genuinely believed the employee was guilty of misconduct and relied on that belief as the basis for the termination, you should not be held liable – even if the decision was flat-out unreasonable.

Direct Threat Is Different

The same is not true, however, when an employer invokes the “direct threat” defense under the Americans with Disabilities Act (ADA). Generally speaking, the ADA prohibits employers from terminating someone simply because they have a disability. The direct threat defense affords you with a limited defense to liability, permitting you to legally terminate an employee (or at least deem them unqualified) where their disability poses “a direct threat to the health or safety of other individuals in the workplace.” The phrase “direct threat” is
defined as “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.”

To determine whether an employee poses such a threat, you are required to conduct an individualized assessment of their present ability to safely perform the essential functions of the job when you take into consideration the duration of the risk and the nature, severity, likelihood, and imminence of any potential harm. Most importantly, the determination that a disabled employee poses a direct threat must be objectively reasonable and supported by medical evidence. Thus, your honest, good faith belief that an employee poses a safety threat is generally not enough to avoid liability for terminating that worker.

**Employer Learns Direct Threat Lesson The Hard Way**

A recent decision by the 7th Circuit Court of Appeals provides a good example of the risks employers face when attempting to invoke the direct threat defense to justify a termination. In *Stragapede v. City of Evanston*, Biagio Stragapede, an employee who worked in the City of Evanston’s water services department, suffered a traumatic brain injury during a non-work-related accident involving a nail gun. The employer placed Stragapede on medical leave for about nine months until he eventually recovered and felt able to begin working again. Before returning to work in the water services department, however, the city required that he undergo a fitness-for-duty exam. The neurologist who conducted the exam found that Stragapede had “mild residual cognitive deficits,” but ultimately concluded he was able to return to work.

Less than a month later, the city placed Stragapede on administrative leave as a result of issues with his job performance. In particular, the city cited concern over a series of incidents in which Stragapede seemed to be having trouble completing relatively simple tasks, such as changing a water meter and logging into his work computer. He also reported to the wrong locations for two work assignments after misreading street signs and other directional mishaps, and was observed by another city employee allegedly driving through an intersection while looking down at his lap.

The city reported these events to the neurologist, who indicated that they were most likely caused by Stragapede’s brain injury. The neurologist did not re-examine him, but drafted a letter stating that Stragapede was a direct threat and could not perform the essential functions of his job based solely on the city’s account of his performance issues. The city terminated him shortly thereafter, and Stragapede sued for disability discrimination.

After a weeklong trial, the jury found the city liable and awarded Stragapede over $575,000 on his ADA claims. On appeal, the city argued that it should not matter whether Stragapede actually posed a direct threat, but that it should be afforded a valid ADA defense because it honestly believed he did.
The 7th Circuit disagreed. In an opinion released July 31, 2017, the court found the city’s subjective belief that the employee would harm himself or others was insufficient to escape liability because the direct threat defense required “medical or other objective evidence.” The court explained that the jury could have reasonably determined the neurologist’s opinion to be unreliable since it was based entirely on information supplied by the city. The court also noted that just a few months earlier, the same neurologist had evaluated the employee and concluded he was capable of returning to work.

The other evidence the city offered to establish a safety threat – the two times Stragapede reported to the wrong location for work assignments and the incident in which he reportedly drove through an intersection without his eyes on the road – was either adequately explained in the employee’s testimony regarding those events or was not a safety issue in the first place. Thus, in the court’s view, it was reasonable for the jury to conclude that the employee did not pose a safety threat.

What Should Retailers Take From This Case?

As the Stragapede case demonstrates, determining whether an employee poses a direct threat is a process fraught with risk, and, without proper precautions, even well-meaning employers can find themselves on the wrong side of a jury verdict. Below are some tips to help ensure your company will withstand scrutiny the next time you face the difficult decision of whether to remove an employee because of safety concerns:

1. **Seek Out The Experts.** When choosing a medical provider to evaluate an employee’s ability to safely perform the essential functions of their job, seek out someone with specific expertise. Courts are more likely to allow a jury to second-guess the opinion of a primary care doctor or a company physician than the judgment of a doctor who specializes in the exact condition at issue in the case. For example, in the 2003 case of *Echazabal v. Chevron USA, Inc.*, the 9th Circuit discounted the opinions of company doctors who had no expertise and limited experience with chronic liver diseases, which was the basis of the plaintiff’s disability. Also, the Equal Employment Opportunity Commission (EEOC) has published Interpretive Guidance suggesting employers should specifically seek out the “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.”

2. **No Cherry Picking.** Always allow the doctor to conduct a complete, in-person examination of the employee, rather than requesting a medical opinion based solely on documents or cherry-picked information you provide to the doctor. One of the defendant’s biggest mistakes in the Stragapede case was not sending the employee back to the neurologist for a second evaluation. The court was obviously troubled by the fact that the neurologist was never given an opportunity to conduct a follow-up exam before rendering his last opinion. In fact, the neurologist himself seemed uncomfortable with this arrangement, given the caveat in his letter stating he was relying entirely on information from the city.
3. **Look To What *Did* Happen, Not What *Could* Happen.** The EEOC’s Interpretive Guidance states that you should “identify the specific risk posed by the individual,” or in the case of individuals with emotional or mental disabilities, “the specific behavior on the part of the individual that would pose the direct threat.” Therefore, you should document specific examples of the conduct creating the safety risk, avoiding speculation as to what *could* happen in the worst-case scenario. In *Stragapede*, the city’s assessment was based largely on a series of minor incidents, most of which were unlikely to create any kind of safety issue. Instead, the EEOC makes clear that there should be a “high probability of substantial harm” for an employer to establish the defense. Because Stragapede was able to offer a reasonable explanation for at least some of those incidents, there was enough to support the jury’s determination that he was not a direct threat.

4. **Provide Solid Information To The Doctor.** Be sure to provide the doctor with a current job description and any relevant information about your workplace and the employee’s work history. A physician cannot provide a meaningful “individualized assessment” of the employee’s ability to safely perform their job without access to accurate and up-to-date information about work duties and the environment. If an individual has worked with the same disability their entire career without causing any incidents or injuries, it will be difficult for you to show that the employee posed a serious safety threat. For example, in the *Echazabal* case cited above, the 9th Circuit ruled in favor of the employee in part because the company ignored his 20-year, injury-free work history.

5. **Consider Possible Reasonable Accommodations.** Don’t forget that determining whether an employee’s disability creates a safety risk is only step one in the direct threat analysis. You must also consider whether there are any reasonable accommodations that could eliminate or reduce the risk to an acceptable level without creating an undue hardship, so you should ask the examining physician to identify any such accommodations.

6. **When In Doubt, Call Your Employment Lawyer.** While this is applicable advice in just about any employment situation, it is especially true when dealing with the direct threat defense. Every direct threat case is different, so the safest approach is to consult with an employment attorney before making any decisions.

*For more information, contact the author at BLondon@fisherphillips.com or 504.592.3888.*