

## ADA DEFENSES UPDATE

**Jane Makela  
Angelina LaPenotiere  
Carrington, Coleman, Sloman & Blumenthal, L.L.P.  
200 Crescent Court, Suite 1500  
Dallas, Texas 75201  
Telephone: (214) 855-3026**

Most employers facing a claim of employment discrimination on the basis of disability under the Americans With Disabilities Act ("ADA") will defend against the claim by presenting a legitimate, non-discriminatory reason for the employment action at issue, a standard defense in virtually all employment discrimination litigation. The ADA, however, specifically identifies four affirmative defenses that an employer may present in defending against a claim of disability discrimination, and notes two additional defenses in passing within its provisions. The recent cases and regulations discussed below outline the parameters of these defenses.

### I. THE AFFIRMATIVE DEFENSES OF § 12113.

#### A. Business Necessity Defense

Section 12113(a) of the ADA provides that an employer may apply qualification standards, tests, or selection criteria even if they screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability provided that the employer can establish that the standard, test, or criterion is *both* job-related *and* consistent with business necessity. 42 U.S.C. 12113(a). The employer must also show that there is no reasonable accommodation that would allow the employee to perform the essential functions of the job. 42 U.S.C. 12113(a).

- 1. "Job-related and consistent with business necessity" means relating to essential functions.** In its Technical Assistance Manual, the EEOC notes that an employer could not rule out a disabled person for a job if the person's disability makes it difficult or impossible to perform only a *non-essential* function of his or her job; the EEOC notes that such screening criteria would not be "job-related." EEOC Technical Assistance Manual, Ch. IC, 4.3 (1992). The Fifth Circuit observed that although the EEOC regulations did not define the type of requirements that may be job-related and consistent with business necessity, the EEOC's regulations allow functions to be defined as "essential" because *inter alia*, "the reason the position exists is to perform that function; [and] . . . because of the limited number of employees available among whom the performance of that job can be distributed." The Court thus concluded that requirements that are job-related and consistent with business necessity are those that relate to essential functions. *Burch v. City of Nacogdoches*, 174 F.3d 615 (5th Cir. 1999), *citing* 29 C.F.R. § 1630(n)(2). One district court found that having a security clearance was an essential function of being a nuclear power plant operator and

concluded that it therefore seemed to "go without saying that a security clearance is both job-related and consistent with business necessity." The employee's security clearance had been revoked because of his alcoholism. *McCoy v. Pennsylvania Power and Light Co.*, 933 F. Supp. 438 (M.D. Penn. 1996).

2. **Disqualification because an employee's disability prevents him from obtaining a necessary certification, license, or satisfying a safety regulation is job related and consistent with business necessity.** In *Albertsons Inc. v. Kirkingburg*, the United States Supreme Court held that an employer did not violate the ADA when it terminated a commercial truck driver who failed to meet the Department of Transportation's visual acuity standard in its safety regulations. The Court noted that failure to meet the standard was a disqualifying condition under the DOT regulations. *Albertson's Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999). Similarly, the Court upheld a transportation company's decision not to hire an applicant who failed the physical examination necessary to obtain the DOT certification required for his job. The employee's right leg was atrophied with very limited function as a result of polio, and the DOT found that he did not meet the minimum standards necessary for DOT certification. *Id. Prado v. Continental Air Transport Co., Inc.*, 982 F. Supp. 1304 (N.D. Ill., 1997). Employers should be wary, however, of blindly relying on a doctor's conclusions in these circumstances. One employer's decision to do so was found inappropriate by a district court when the reason the employee failed her examination -- obesity -- was not actually a disqualifying condition under the DOT regulations. The Court noted that the doctor who failed the employee on those grounds had no expertise concerning the duties of drivers, and apparently did not realize that obesity was not a disqualifying condition. The Court held that the employer could not rely on the doctor's erroneous conclusion to justify the employer's action as job related and consistent with business necessity. *EEOC v. Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996).

## **B. Direct Threat Defense.**

While qualifications relating to an individual's ability to perform the essential functions of a job (either with or without accommodation) will usually be considered job-related and consistent with business necessity, the ADA also allows an employer to define as a job qualification that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). The "direct threat" defense allows an employer to justify an employment decision based on the fact that an employee poses a direct threat where the threat cannot be reduced or eliminated by reasonable accommodation. The EEOC regulations require that the existence of a "direct threat" be evaluated "based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job." *Id.* The existence of a "direct threat" is also to be evaluated "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." *Id.* Of all the defenses

available under the ADA, this defense has by far been asserted the most and has received the most consideration in the courts.

- 1. What is included in the individualized assessment?** The EEOC regulations state that in conducting an individualized assessment, employers should consider factors including 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. 29 C.F.R. § 1630.2(r) (1996). One Court observed that the individualized assessment called for the employer to "gather 'substantial information' about the employee's work history and medical status," and "disallow[ed] reliance on subjective evaluations by the employer. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999). Another court noted that the administration (and results) of a physical and tests associated with obtaining a license did not constitute an individualized assessment. The employer placed significant restrictions on the employee when the tests revealed he had diabetes and a vision problem. The employer explained that there might be future manifestations of his symptoms and alleged the employee was a "direct threat." The Court disagreed, noting that the employer should first have obtained information regarding whether the employee actually displayed any symptoms which did or might affect his job performance. Had it done so, the Court noted, the employer would have learned that the employee had no problem performing his job. *Dipol v. New York City Transit Authority*, 999 F. Supp. 309 (E.D. N.Y. 1998).
- 2. The individualized assessment must reveal that the specific circumstances of the situation present a direct threat.** Explaining that recent developments in technology had provided for better maintenance of diabetes, the Fifth Circuit recently distanced itself from prior holdings that insulin-dependent diabetics were unqualified to fill jobs that required driving as a matter of law. The Court admitted that the opinions could not be squared with the requirement of an individualized assessment to determine whether the particular employee's circumstances created a "direct threat." *Kapche v. City of San Antonio*, 176 F.3d 840 (5th Cir. 1999). Another Court found that a surgical technician with HIV posed a direct threat to surgery patients in light of evidence indicated that the technician was occasionally required to insert his hand into patients' surgical cavities and he occasionally nicked or cut his hand during surgical procedures. *In re Estate of William C. Mauro v. Borgess Medical Center*, 137 F.3d 398 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 51 (1998). Another Court concluded that a school district may have been justified in moving a teacher with HIV from a special education classroom in light of evidence that the students' severe behavioral disorders frequently required the teacher to physically restrain the students while they were biting, hitting, scratching, and kicking the teacher and each other. Of special note to the Court was the fact that on at least one occasion a student had drawn blood during such behavior. *Doe v. DeKalb County School District*, 145 F.3d 1441 (11th Cir. 1998). The 5th Circuit found that an

employee's own testimony that he was concerned for his patients' safety as a result of his neurological disorder was sufficient to sustain a conclusion that the employee posed a "direct threat" to the health and safety of others in the workplace. *Robertson v. The Neuromedical Center*, 161 F.3d 292 (5th Cir. 1998), *cert. denied* 119 S. Ct. 1575 (1999). One Court noted that an employee whose diabetes-related symptoms had already caused him to seriously injure himself on two occasions "would be a walking time bomb and woe unto the employer who places an employee in that position." The Court found the employer acted properly in terminating the employee as a "direct threat." *Turco v. Hoechst Celanese Chemical Group, Inc.*, 101 F.3d 1090 (5th Cir. 1996). But one Court found a question of fact regarding whether an employer acted properly in concluding that an Assistant Fire Chief was a "direct threat" because of his physical inability to engage in active firefighting duties after an injury. The Court noted that the employer's evidence focused only on firefighters and not on line officers, and noted that the employer failed to present anything more than its own subjective belief that all line officers in the Fire Department did nothing other than directly fight fires. *Hamlin v. Charter Township of Flint*, 165 F.3d 426 (6th Cir. 1999). Similarly a Court rejected an employer's direct threat defense where the employer failed to present evidence about plaintiff's medical condition at the time it concluded she posed a "direct threat" and terminated her. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999).

3. **A possible exception to the individualized assessment?** A Texas court found that an individualized assessment was not necessary where the employer could prove that it was impossible or impractical to individually assess each employee affected by the policy. The employer established criteria for identifying "safety-sensitive" positions and prohibited employees with a substance abuse problem or a history of substance abuse from working in safety-sensitive positions; it maintained that individualized assessments were impractical because of the nature of addiction and the unpredictability of relapse. The Court agreed, noting that the express language of the Act did not require an individualized assessment of job applicants. But the Court also noted that the employer still bore the burden of establishing that the group affected by the policy constituted a significant risk of substantial harm to themselves or others that could not be reduced or eliminated by reasonable accommodation. *EEOC v. Exxon Corp.*, 967 F. Supp. 208 (N.D. Tex. 1997).
  
4. **What is reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence?** One Court found a question of fact regarding whether the employer used the best available objective evidence available where the initial results of a test showed a job applicant to be suffering from possible hypertension and a serious kidney condition. Later tests revealed that the applicant suffered from a less serious kidney condition only; the Court noted that the case would turn on whether the employer had received notice of

the later results at the time it elected not to hire the employee. *EEOC v. Blue Cross Blue Shield of Connecticut*, 30 F. Supp. 2d 296 (D. Conn. 1998).

5. **Where a Plaintiff suffers from a known disability, an employer may require a medical examination to obtain current, objective information to determine whether a Plaintiff is a direct threat.** One Court found that an employer did not act improperly by terminating an employee who, after informing his employer that he was HIV positive, refused to undergo a medical examination to determine whether he could safely perform the functions of his job as produce manager without exposing others to HIV infection. The Court noted that the employee's actions prevented the employer from confirming the employee's HIV status and from deciding what, if any, measures were necessary to protect the health of the employee, his co-workers, and customers. *EEOC v. Prevo's Family Market*, 135 F.3d 1089 (6th Cir. 1998).
  
6. **Some courts have extended the "direct threat" to situations beyond those in which the employee poses a risk of harm to others.** One court upheld a defendant's "direct threat" defense where continued employment posed a "direct threat" only to the employee himself. The Plaintiff was willing to accept the danger associated with climbing poles, an essential function of his position, after he was diagnosed with multiple sclerosis. Two doctors, however, confirmed that it was unsafe for Plaintiff to climb and work at heights, and the court found that it was not a reasonable accommodation to simply reduce the amount of climbing required of plaintiff since any amount of climbing presented a risk of harm. *Lodderhous v. Viacom Cable, Inc.*, 1998 WL 57025 (N.D. Cal. 1998). In another case a Court upheld an employer's use of the direct threat defense to justify its termination of a non-disabled employee whose son suffered from bipolar disorder. The court noted undisputed facts that the son repeatedly issued threats to members of the community and demonstrated his propensity to carry out the threats, including breaking the ribs of a former schoolmate and engaging in other violent behavior. The Court also noted that the employer's conclusions about the "direct threat" the son posed were based on the employer's individualized assessment of the son's behavior as opposed to stereotypes about people with bipolar disorder. *Hartog v. Wasatch Academy*, 129 F.3d 1076 (10th Cir. 1997).

### **C. Infectious and Communicable Diseases.**

Another affirmative defense set out under the ADA permits an entity to refuse to assign or refuse to continue to assign an individual to a job involving food handling when the individual has an infectious or communicable disease that is transmitted to others through the handling of food and where the potential for transmission cannot be avoided through reasonable accommodation. 42 U.S.C. 12113(d)(2). The statute provides that the Secretary of Health and Human Services shall publish a list of such diseases. 42 U.S.C. 12113(d)(1). The list is published in the Federal Register every year; the most recent version, dated September 21, 1999, can be found at 64 FR 51127-01.

Although set forth in its own provision within the ADA, the "food-handling employees" defense really boils down to a sub-set of the direct threat defense. If an individual has one of the diseases identified in the Secretary of Health and Human Services' list, the employer must still conduct an individualized assessment to determine whether the risk can be eliminated by reasonable accommodation. Essentially, the list merely serves to avoid the need to determine whether there is a disability and instead move to the question of whether a reasonable accommodation exists.

**D. Defenses Available to Religious Organizations.**

Under the ADA, religious organizations may avail themselves of two defenses not available to other employers: the religious preference defense, and the religious belief defense. Where religious preferences or beliefs are not at issue, however, these defenses are unavailable and an organization, even if religious, may not discriminate on the basis of disability.

1. **Religious preference defense.** Section 12113 provides that the ADA "shall not prohibit a religious corporation, association, educational institution or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or educational institution, or society of its activities." 42 U.S.C. § 12113. Although there are no cases interpreting this provision, it closely mirrors the religious entity defense set forth in Title VII. The fundamental issues an employer must prove in applying this defense are 1) that the employer is a religious organization; and 2) that the position is connected with the carrying on by the religious organization in its activities. A few recent cases in Title VII law offer some insight into how these determinations will be made.

**a. A religious corporation, association, educational institution, or society is one whose purposes are permeated by religion.** In noting that it must "weigh all significant religious and secular characteristics to determine whether an entity's purpose and character are primarily religious," one Court found that a college was a religious educational institution in light of evidence that the college's purposes and programs were permeated with a conviction to adhere to Christian principles while providing education and that the college had a clear relationship with the Baptist Church. The Court noted that the college did "not have to hire only Baptists or follow a strict policy of religious discrimination to be eligible" for the religious exemption under Title VII. *Hall v. Baptist Memorial Health Care Corp.*, 27 F. Supp. 2d 1029 (W.D. Tenn. 1998).

**b. When is work "connected with the carrying on by such corporation, association, educational institution, or society of its activities"?** In *Killinger v. Samford University*, the Court had a fairly easy call, noting that

a teaching job in a divinity school of a religious educational institution was clearly connected with carrying out the institution's activities. *Killinger v. Samford University*, 113 F.3d 196 (11th Cir. 1997).

2. **Religious belief defense.** This defense is not mirrored in Title VII, and permits a religious organization to "require that all applicants and employees conform to the religious tenets of the organization." 42 U.S.C. 12113(c)(2). Once again, there is no case law interpreting this defense. As an example of a situation in which this defense would apply, however, one treatise suggests a situation in which a church refuses to "hire an alcoholic who currently uses alcohol if it feels that drinking alcohol is a sin." 9 Larson's Employment Discrimination, 2nd Edition, § 155.04. Another speculative example "might derive from an institution holding the belief that AIDS is God's punishment for sin, or that certain mental disorders constitute being possessed by the devil." *Id.* The employer must establish, of course, that such a theory is genuinely a religious tenet.

## II. OTHER DEFENSES WITHIN THE ADA.

In addition to the affirmative defenses set out at § 12113, the ADA notes two additional defenses in passing that may be useful to an employer facing an ADA claim. The "undue hardship" defense allows an employer to establish that a proposed accommodation is not reasonable because it imposes an undue hardship on the company. The "good faith" defense protects an employer from compensatory and punitive damages if the employer can show that he or she made a good faith effort to provide a reasonable accommodation.

### A. Undue Hardship.

Section 12112(5)(A) of the ADA defines "discriminate" as failing to provide a reasonable accommodation unless the employer "can demonstrate that the accommodation would impose an undue hardship" on the employer's operations. 42 U.S.C. 12112(5)(A). "Undue hardship" is defined as "an action requiring significant difficulty or expense." 42 U.S.C. 12111(10)(A). One court summed up the definition by noting that "'undue hardship' is generally equated to 'unduly costly,'" although the court noted that the cost must be analyzed in relation to both the benefits of the accommodation to the disabled worker and to the employer's resources. *Garza v. Abbott Laboratories*, 940 F. Supp. 1227 (N.D. Ill. 1996)

1. **How will courts assess undue hardship?** Among factors to consider in determining whether a proposed accommodation constitutes an undue hardship are (i) the nature and cost of the accommodation; (ii) the overall financial and personnel resources of the facility or facilities involved and the effect of the accommodation on the operations of the facility or facilities; (iii) the overall financial and personnel resources of the employer; and (iv) the type of operation or operations of the employer. *Worthington v. City of New Haven*, 1999 WL 958627 (D. Conn. 1999); 42 U.S.C.

12111(10)(B). One court noted that showing that an accommodation is unreasonable and demonstrating that it is an undue burden will often amount to essentially the same thing. *Walton v. Mental Health Association of Southeastern Pennsylvania*, 168 F.3d 661 (3rd Cir. 1999).

2. **Examples of undue hardship.** One court found that an employee's request for continued unpaid leave after nearly three months of leave and a history of attendance issues was an undue burden, noting that such a request exceeded the scope of the ADA when the absent employee simply would not be performing the essential functions of her position. The Court was careful to limit its holding to the facts before it, however, and noted that supplementing sick days and personal days might, under other facts, represent a reasonable accommodation. *Walton v. Mental Health Association of Southeastern Pennsylvania*, 168 F.3d 661 (3rd Cir. 1999). Another court found that an employee's requests for an "irritant-free work environment" and additional unpaid sick time to accommodate his rhinosinusitis would create an undue financial and administrative burden on the employer, noting that the ADA does not require an employer to create a wholly isolated work space for an employee that is free from numerous possible irritants and to provide an unlimited absentee policy. The Court noted that the employer had made great efforts to provide other accommodations to the employee. *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098 (8th Cir. 1999). But one court found that it would not have been an undue hardship for an employer to provide an employee with a \$1043 ergonomic chair, noting that the cost of providing the accommodation would have been small in light of the employer's resources. The employer appeared to have done little in terms of providing alternative accommodations. The Court noted that an accommodation could not be considered unreasonable simply because it required an employer to absorb more than a de minimis cost or because it would cost less for the employer to obtain the same level of performance from a nondisabled employee. *Worthington v. City of New Haven*, 1999 WL 958627 (D. Conn. 1999).
3. **It takes more than good faith to be an undue hardship.** In responding to an employee's request for a voice activated computer when her disability left her unable to type for more than one and one half minutes at a time, the employer concluded that installing the system would cost around 1.4 million dollars to install; the employee's expert, however, presented evidence that the system would cost only \$9500 to install. The employer argued that as long as it had an honest belief that the proposed accommodation was an undue burden, it should win; the court rejected the argument, finding a question of fact regarding the existence of an undue burden and sending the issue to a factfinder. *Garza v. Abbott Laboratories*, 940 F. Supp. 1227 (N.D. Ill. 1996).

**B. "Good Faith" Defense.**

An employer who engages in the give and take of finding a reasonable accommodation is rewarded with the possibility of one final defense to an award of damages in an ADA suit. Section 1981a(a)(3) provides that "damages may not be awarded under this section where the covered entity demonstrated good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." 42 U.S.C. 1981a(a)(3).

- 1. Past accommodations aren't enough.** One employer pointed to its actions in providing an employee with posttraumatic stress disorder with anger management classes and allowing him leave to attend an outpatient treatment program as evidence of its good faith efforts to accommodate the employee's disability. The Court rejected the argument, however, noting that the issue in the case involved the employee's current request for time to attend an intensive treatment program, which the employer failed to accommodate despite the availability of several different types of leave for which the employee qualified. *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998).
- 2. Last-minute efforts won't help, either.** Although the employer finally gave in and purchased an ergonomically correct chair for a disabled employee, the court found the effort too little too late in light of evidence that the employer's delay in providing the accommodation was a substantial factor in causing the employee's total disability for work purposes and found that the employer did not qualify for the protection of the "good faith" defense. The court noted that the employee had unsuccessfully sought accommodation for three years. *Worthington v. City of New Haven*, 1999 WL 958627 (D. Conn. 1999).