



**“Direct Threat” Employees and the ADA**

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An employer's guide to avoiding potential pitfalls while protecting employees

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**Introductions**



- New Pre-Loss Attorney
- Employment and Education Law Practice
- Native Oregonian

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**Agenda**

- Legal Principles Behind Direct Threat Assessments
- Cases & Real Life Examples
- Best Practices for Employers Dealing with Safety Threats
- Questions

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## Legal Principles Behind Direct Threat Assessments



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**ADA Standard and Definition**

- To be protected by the ADA (and Oregon disability law), an employee must be a “qualified individual with a disability.”
- To be “qualified,” the employee must be able to perform the essential functions of the position with or without reasonable accommodation.



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**Job Descriptions Matter!**

- The law allows employers to create a qualification standard that says employee won’t pose a “direct threat” to health and safety.
  - Statute says direct threat to others
  - EEOC regulations and case law expand coverage to direct threat to self



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### What Does THAT Mean?

An employer may exclude someone from a job for safety-related reasons resulting from a disability if that person poses a “direct threat.”




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### What Kind of Threats?

Where does this arise?

- Disability creates safety issues
- Misconduct related to disability




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### Mysterious Voices, Poison, and Scalding Coffee

The direct threat assessment doesn't just apply to government employers.

Here are some examples from my life in private practice.




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## What does it mean to *pose a direct threat*?

It means that the employee poses a **significant risk** of **substantial harm** to the health or safety of others that cannot be eliminated by reasonable accommodation.



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## A Multi-Factor Determination

### Some issues to consider:

Risk to self or risk to others?

Is the risk significant?

Is the harm substantial?

Legally, employer has the burden of showing that an individual posed a direct threat. *What does this mean, practically speaking?*



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## Direct Threat Assessment

Factors to be considered include:

The duration of the risk;

The nature and severity of the potential harm;

The likelihood that the potential harm will occur; and

The imminence of the potential harm.



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## Direct Threat Assessment

Must:

- Be individualized.
- Gauge the individual's present ability to safely perform the essential functions.
- Base on reasonable medical judgment that relies on objective evidence.




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## Common Employer Mistakes

- Failing to get an objective assessment.
- Requesting an expansive scope of assessment.
- Failing to identify the specific behavior that would pose a direct threat.
- Forgetting to consider whether there is an accommodation that can eliminate or reduce the risk of threat.




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## Recent Illustrative Cases



*Mayo v. PCC Structurals* (9<sup>th</sup> Cir 2015)

*Walton v. Spherion Staff* (ED Pa 2015)




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**Mayo v. PCC Structural (9<sup>th</sup> Cir 2015)**

- Plaintiff made threats to his co-workers:
  - He “fe[lt] like coming down [to PCC] with a shotgun and blowing off” the heads of the supervisor and another manager.
  - “All that [he] would have to do to shoot [the supervisor] is show up [at PCC] at 1:30 in the afternoon” because “that’s when all the supervisors would have their walk-through.”



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**The Facts**

- Co-workers reported these threats and the HR manager questioned plaintiff.
- When asked if he planned to carry out his threats, he said, “he couldn’t guarantee that he wouldn’t do that.”
- PCC Structural immediately suspended plaintiff, barred him from the property, and called the police.



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**The Facts**

- Police questioned him and ultimately he was admitted to the hospital for six days.
- He took two months of OFLA/FMLA at the end of which, his treating psychologist cleared him to return to work, but recommended a new supervisor assignment.
- PCC Structural fired plaintiff and he sued.



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### The Court's Holding

- Even if plaintiff was disabled, he was not qualified at the time of discharge.
- "An essential function of almost every job is the ability to appropriately handle stress and interact with others."




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### Helpful Authority for Employers

- "[A]n employee can be qualified despite adverse reactions to stress, [but] he is not qualified when that stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions."




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### Helpful Authority for Employers

- "[T]he ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability."
- The opposite rule would place employers in an impossible position.




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### But, what about the direct threat assessment?

The Court's response:

- Not fired because of risk of future violence; fired because he presently could not handle stress and interact with others.
- Individualized assessment was not needed.



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### But, what about accommodations?

The Court answered:

Plaintiff couldn't show what reasonable accommodation would reduce the threat.

"Giving [plaintiff] a different supervisor, therefore, would not have changed his inappropriate response to stress – it would have just removed one potential stressor and possibly added another name to the hit list."



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### What about accommodations? (cont'd)

"Depression and mental illness are serious problems that affect millions of Americans...we do not minimize the struggles of those who suffer from these ailments or suggest that all such individuals are incapable of working. But we disagree with [plaintiff] that employers must simply cross their fingers and hope that violent threats ring hollow."



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## What about accommodations? (cont'd)

"All too often Americans suffer the tragic consequences of disgruntled employees targeting and killing their co-workers. While the ADA and Oregon disability law protect important individual rights, *they do not require employers to play dice with the lives of their workforce.*"




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## Walton v. Spherion Staff (ED Pa 2015)

- Spherion Staffing is a staffing agency.
- In October, employee had suicidal ideations.
- Next day, suicidal thoughts turned to homicidal thoughts.




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## The Facts

- Notified supervisor through email:

"Lizelle, Please Help Call [telephone number provided] Mom [telephone number provided] Dad The police I'm scared and angry. I don't know why but I wanna kill someone/anyone. Please have security accompany you if you want to talk to me. Make sure, please. I'm unstable. I'm sorry Taj."




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## The Facts

- Security called police, escorted him out of building, and waited for police.
- Employee diagnosed with depression and needed treatment. Over the next few weeks, the employee notified employer multiple times of diagnosis and need for medical care.
- After months of trying to reach his supervisor, he finally got a hold of her on December 12 and she immediately terminated his employment.



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## The Facts

- Employee sued under the ADA and state disability law, alleging failure to accommodate his disability.
- Employer argued:
  - Employee wasn't qualified. "Employee who is a direct threat to the safety of himself or others is not a qualified individual with a disability."



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## Consider

- Employee's side:
  - He wasn't a threat. He was trying to warn his supervisor that he was experiencing a "compromised mental state."
- Court asked:
  - What exactly was the misconduct?  
Threatening violence or asking for assistance?



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## The Court's Holding

- Court declined to dismiss plaintiff's case because
  - A jury could "reasonably conclude that [the plaintiff] did not engaged in 'wrongdoing'. . . , but rather acted appropriately when facing a mental health episode."
  - Most troubling: Three weeks passed before the employer decided to fire the employee. During this time, the employer learned about the employee's diagnosis and potentially expensive treatment.



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## Other Important Points

- Stigma about mental illness can "skew an objective evaluation of the risk"
  - No history of violence with this employee
- Termination of employment may not be the safest option
  - "failing to provide treatment to someone such as the Plaintiff..., would create a greater risk of violence..."



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## Best Practices for Employers Dealing with Safety Threats



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### Best Practices (and What Not To Do)

- Determine whether it is a conduct issue or a direct threat issue.
- Don't rely on generalizations or stereotypes about particular conditions.
- If it is really dangerous, don't delay in taking action.
- Document, document, document!!!




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### Best Practices

- For Individualized Assessment:
  - Must rely on objective, scientific information
  - Involve the correct provider
  - Give the provider the list of factors to consider and answer in writing
  - Have a detailed, up-to-date job description
  - Consider what to do in the interim while you wait for the assessment results.




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### Best Practices

- Even if there is a significant risk of substantial harm, consider the possible reasonable accommodations.
  - A leave of absence?
  - A different position?
  - Other?




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## Other Overlapping Issues

- Involving law enforcement?
- Addressing co-worker concerns?



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## Questions?



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## Thank you!

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## Upcoming Events

- Next Month's Webinars (10:00-11:00 AM)
  - **August 9 - Small Cities: OSHA Requirements**, presented by Adrian Albrich, Risk Management Consultant
  - **August 25 - Adventures in Coaching, Pt 2: Coaching in Difficult Situations**, presented by Kurt Chapman, Senior HR Consultant



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