

Establishing “Direct Threat” under the ADA Requires an Individualized Assessment

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The Americans with Disabilities Act (ADA) generally prohibits covered employers from discriminating against individuals on the basis of a qualifying disability, subject to certain exceptions. One of those exceptions permits employers to refuse to hire or allows them to terminate a disabled employee if the condition at issue would pose a “direct threat” to the employee or other employees in the workplace. It is the employer’s burden to prove an employee’s disability poses a “direct threat.”

Under federal law, an employee’s disability poses a “direct threat” when the condition poses “a significant risk of substantial harm ... that cannot be eliminated or reduced by reasonable accommodation.” To establish the existence of a direct threat, employers must conduct an “individualized assessment of the individual’s present ability to safely perform the essential functions of the job.” Individualized assessments must consider: (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. Generalized suspicion of the risk of employing an individual is not sufficient. Moreover, an employer’s determination of direct threat must generally be objectively reasonable and supported by medical evidence.

In *Pontinen v. United States Steel Corporation*, the U.S. Court of Appeals for the Seventh Circuit (which covers Wisconsin, Illinois, and Indiana) held that an applicant with a history of seizure episodes would pose a direct threat in the workplace because of the hazardous job tasks he would be required to perform. Therefore, the United States Steel Corporation’s (USS) decision to rescind a contingent job offer after conducting a careful individualized assessment of the applicant’s condition was not unlawful discrimination under the ADA.

Russell Pontinen applied to work as a Utility Person at USS and received a contingent job offer. This position would have required him to, among other things: use torches, operate heavy machinery, and work in close contact with molten metal. The job posed risks of burn injuries, falls, and being struck by equipment. After making the contingent offer, USS learned that Pontinen suffered from an uncontrolled seizure disorder which required certain work restrictions. Pontinen's condition was well controlled with medication but, after taking medication for some time, he decided to discontinue taking it against his doctor's recommendations. USS determined that the requisite work requirements made it impossible for Pontinen to perform the essential functions of the job, and they also determined federal Department of Transportation (DOT) regulations restricted him from performing the job. Therefore, USS rescinded the job offer.

Pontinen sued USS and claimed he was subject to discrimination on the basis of his disability. The district court rejected his claim, and the Seventh Circuit affirmed that decision. The Seventh Circuit explained that each factor of the direct threat analysis supported USS's decision to rescind the job offer. Specifically, the court agreed that Pontinen's decision to discontinue his medication without his doctor's approval made the duration of the threat indefinite and that the dangerous nature of his position in operating heavy equipment and being around highly hazardous materials made it likely that severe harm would occur if he had a seizure.

Taken as a whole, the court agreed that Pontinen's condition posed a direct threat to himself and others in the workplace, and therefore USS was entitled to rescind its job offer. The court declined to address whether USS's decision would have been permissible if it had been based exclusively on the DOT regulations, because USS had gone beyond merely relying upon those regulations and conducted an individualized assessment of the risk. Employers should be cautious and avoid relying exclusively on guidelines or recommendations from federal agencies when making a direct threat decision.

The *Pontinen* case serves as a reminder to employers that an individualized assessment of the actual duties of the job is necessary when seeking to declare an employee's condition as a direct threat in the workplace. Employers are encouraged to review their policies to ensure compliance with federal law and to reach out to a member of the [Boardman Clark Labor & Employment Practice Group](#) with any questions.

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

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