THREATENED OR NOT? RECENT DEVELOPMENTS UNDER THE AMERICANS WITH DISABILITIES ACT'S DIRECT THREAT DOCTRINE

By: Matthew A. Moeller

If you serve as an in-house counsel or serve in the capacity of corporate or general counsel in private practice, sooner or later you're going to be asked by your employer or your client if they can fire someone with disabilities, known or unknown, without putting the company in legal jeopardy. By the same token, you're also at another time likely to be asked if the company can refuse to hire an apparently qualified employee with disabilities. That determination can be difficult and certainly becomes even more complicated when the employee or prospective employee is covered by the Americans with Disabilities Act ("ADA"). It is important for in house or outside general counsel to understand the different standards for acting under the direct threat doctrine when advising the company of taking action that could violate the ADA.

The ADA prohibits discrimination in employment resulting from a disability and requires employers to provide reasonable accommodations to individuals with disabilities. The statute defines "disability" as a physical or mental impairment that substantially limits one or more major life activities. However, even when an applicant or employee appears to be physically and mentally qualified to perform the job, the ADA allows employers to act without violating the law when the applicant or employee poses a direct threat to the health or safety of others that cannot be addressed through reasonable accommodations. Furthermore, the Equal Employment Opportunity Commission ("EEOC") provides that employers must determine whether an individual poses a "direct threat" by making a specific assessment of that employee's ability to safely perform the essential functions of the job based on a reasonable medical judgment that relied on the most current medical knowledge and/or on the best available objective evidence. Factors to be considered in the assessment include: (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.

Businesses often find themselves engaged in a balancing act of divergent interests. Companies certainly want to be sensitive to those with disabilities, project an inclusionary employment policy as well as diverse work force and not run afoul of employment laws protecting disabled individuals. However, organizations must take all actions necessary to protect the health, safety and well-being of their most valuable asset – their people. An applicant or employee that poses a direct threat may put that asset in jeopardy. These conflicting interests can sometimes make it difficult or impossible to hire the best person based on pure qualifications and can also mandate discharge of otherwise talented employees.

Two recent decisions from the 10th Circuit shed light on the standard (or lack thereof) for employers in *proving* that an employee poses a direct threat as well as the timing for determining that an individual poses a direct threat. In *E.E.O.C. v. Beverage Distributors Co., LLC*, 780 F.3d 1018 (10th Cir. 2015), the 10th Circuit Court of Appeals addressed the threat-to-self defense in a case where an employee with impaired vision sought a warehouse position with a beverage distributor. The company physician determined that the prospective employee's disability created risks to his health on the job, and the company determined that it could not reasonably accommodate the individual. An ADA charge was brought by the individual, and EEOC followed with a suit on his behalf. The jury rendered a verdict in favor of the individual and rejected the company's argument that the individual posed a direct threat to his own health. However, the 10th Circuit reversed, finding that the jury instructions incorrectly stated the necessary standard for a direct threat because they required the company to prove that the individual posed an actual threat. However, Tenth Circuit precedent required only that an employer prove a reasonable belief that an individual poses a direct threat.

Similarly, In *Burns v. Dal-Italia*, No. CIV-13-528-KEW, 2016 WL 297459 (Jan. 22, 2016), plaintiff a plant worker, experienced seizures ranging from

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minor to significant over a period of seven years. Plaintiff typically recovered on the job shortly after a seizure, or he was provided time under the Family Medical Leave Act to go home and recuperate. In 2013, while working a lead position, plaintiff experienced a seizure. However, this time, management expressed concern about plaintiff's ability to safely work on the production line and required that plaintiff obtain a doctor's note confirming that he could safely perform his job duties. Plaintiff contended that his FMLA paperwork included notations clearing him for work and eventually considered himself fired based on the company's insistence on doctor's note.

Plaintiff filed suit under the FMLA and ADA; defendant sought summary judgment based partially on a direct threat defense. In denying summary judgment, the court articulated that it does not assess the "believability" of a direct threat but instead determines whether an employer's decision was objectively reasonable. The court noted the fact that while the seizures ranged in severity, they happened over a seven- year period under a consistent set of circumstances which should not have altered the employer's perception of the plaintiff's ability to safely perform his job. Moreover, factual issues existed regarding the reasonableness of defendant's action, the likelihood of harm and imminence of potential harm which all precluded summary judgment.

These two decisions emphasize the importance of the factual basis for the employer's direct threat belief. The important takeaway in these cases is that the key inquiry in direct threat analysis is whether the employer's belief about the direct threat relating to an employee's disability is reasonable, not whether the threat exists or can be proved. This subjective standard provides employers with a flexible analysis and a relatively low burden for validating their actions under the direct threat doctrine, provided they engage in a reasonable assessment of the employee/prospective employee's disability before making the decision.

Employers who anticipate the need to explain their decision under the direct threat doctrine should maintain detailed records and file materials and all pertinent medical information that provide a sound basis for a reasonable belief that a threat exists. Also, as explained by the Burns decision, the timing of such action could be scrutinized, so once there is a basis for such a belief action should be taken. The failure to take such action implies that the employer does not have a reasonable belief that a threat exists, and therefore, diminishes reliance upon the factors regarding the likelihood and imminence of a threat.

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selected which generation they belong to, the generational breakdown usually follows these parameters: baby boomers are born between 1946 and 1964, Gen Xers between the mid-1960s and early 1980s, and millennials between the early 1980s and the 2000s.

Of the respondents, 29 percent identified as baby boomers, 49 percent as Gen Xers and 22 percent as millennials. Respondents' roles in their legal department broke down as follows: 33 percent as assistant or deputy general counsel, 27 percent as counsel, 22 percent as attorneys, 9 percent as general counsel, 6 percent as legal department operations professionals (LDOs), 1 percent as chief legal officers, and 2 percent as others. Only 1 percent have been in their current role for less than one year; 42 percent for 1 to 2 years, 32 percent for 3 to 5 years, and 25 percent for more than 5 years.

Millennials bring new ideas and expectations to the workplace, as did the generations before them. Yet managers of millennials – like earlier generations – may not be open to accommodating the new generation's desired way of working.

This tension underlies many of the assumptions and generalizations about millennials as they start their careers. Millennials are often