

The ADA: Role of the Clinician in FFD and RTW Exams

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John M

- Mr. John M was a 58 year old truck driver referred for a FFD/RTW examination by his employer. Out of work for nine months with a back injury that occurred when his truck drove off the highway onto the shoulder in a snowstorm. Wearing a seat belt and jostled around, but the truck did not tip over or strike anything. Past history: out of work for 16 of the previous 24 months on worker's compensation with back pain, three lumbar spinal operations and two cervical disc operations.

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The Exam

- Orthopedist is clearing him to return to full duty, normal examination. We felt that his back history was strong enough to not accept the clearance by his orthopedist and requested a detailed job description from his employer and tried to contact his orthopedist. The patient was very upset from the beginning. The first job description was too vague, so we requested another, more explicit description, which indicated that he might have to load and unload an entire trailer.

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The Dispute

- The orthopedist sent another note of clearance. We then replied with a personal, detailed letter, including literature citations and a description of heavy exertion that would be considered essential job functions and asked for the specialist's medical rationale for clearing the patient without restrictions. He did not respond, even when telephoned, which was noted in his chart.
- The company kept him out of work, despite the letter from the orthopedist, based on our determination that we needed more information. We felt caught.

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Americans With Disabilities Act (ADA) 42 U.S.C. § 12101(a)(7)

Finding:

Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from **stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and contribute to society.**

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Myths, Fears, and Stereotypes

Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment.

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ADA Title I - Employment Discrimination

- Prohibits discrimination against qualified individuals with disabilities in virtually all employment contexts:
 - job application, hiring, discharge, promotion, compensation, job training, and other terms, conditions and privileges of employment.

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Inclusion Within The Protected Class

- Determined on a case-by-case basis
 - Disability
 - Qualified individual
 - Reasonable accommodation

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Who is Qualified?

- Meets qualification standards: productivity and quality standards
- Can perform the essential functions of a job with or without reasonable accommodation
- Requires accurate job descriptions

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Risk Management Caveats #1

- Job titles ≠ Job Description
- Employer's responsibility although clinician may draw upon personal knowledge of workplace or similar workplaces
- Hastily drafted job description written for specific employee/candidate
- Listed essential functions that are inaccurate, unrealistic or exaggerated

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ADA Scope of Medical Inquiries

- Pre-offer:
 - Not Legal
- Post-offer/Pre employment (Pre-placement):
 - Unrestricted
- Post-employment (Post-placement):
 - Job-related and consistent with business necessity

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Risk Management Caveat #2

- Ensure that the employer understands the scope and limitations of each phase
- E.g., If an employee has been on the job for even a day, it is no longer a pre-placement physical
- Clinician should consider how extensive the pre-placement should be
 - Interpretation, Follow-up, Communication of results

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Responsibilities in the Hiring Decision

- **Clinician:** only makes a *medical assessment*
 - All forms and documentation should carefully reflect this role; e.g., consent forms, work status forms, etc.
- **Employer:** makes all hiring and retention decisions

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The Suit

- The patient went to a lawyer, who filed suit against the employer, arguing that the patient was being discriminated against because of a "perception" of increased risk. A suit was also filed against the physician, arguing that the doctor was "aiding and abetting" discrimination by the employer. A judge ordered the patient back to work when the employer failed to show up in court to oppose the plaintiff's motion for an injunction.

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Risk Management Caveat #3

- Clinician's determination:
 - Objective
 - Based on job demands
 - Medical, not HR, focus
 - ◆ Poor: "Not qualified for job"
 - ◆ Fair: "Not medically qualified"
 - ◆ Best: "Not medically fit to perform Essen Functions"

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Medical Determinations: Communication to the Employer

- Medically fit to perform the essential functions
- Medically fit with the following restrictions
- Not medically fit to perform the essential functions
- Insufficient information to make determination of medical fitness at this time

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Responsibilities: Reasonable Accommodation

- ↳ **Employer:**
 - ↳ Undue Hardship
 - ↳ Feasibility of reasonable accommodation
- ↳ **Employee:** notify employer of need for accommodation.
- ↳ **Clinician:**
 - ↳ Recommend job restrictions
 - ↳ Ideally situated to identify need for accommodations

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Risk Management Caveat #4

- Always obtain release from patient
- Minimal disclosure
- Caution in recommending accommodations

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ADA

Three Defenses to Discrimination:

- Selection criteria are job-related and consistent with business necessity, and a disabled individual cannot perform essential job tasks even with reasonable accommodation.
- Reasonable accommodation would impose an undue hardship on the employer.
- A disabled individual poses a direct threat to the health and safety of self or others in the workplace.

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Direct Threat

- Significant risk of substantial harm.
- Specific risk identified
 - Duration
 - Nature and severity of potential harm
 - Likelihood of potential harm
 - Imminence of potential harm
- Current risk—not remote, speculative or future.
- Based on *objective* medical or other factual evidence re: a *particular* individual.
- Reasonable accommodation cannot eliminate or reduce risk below level of direct threat.

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Medical or Other Factual Evidence

- Input from the individual
 - Medical history
 - Symptoms
 - ADLs
 - Physical exam
 - Diagnostics
- Documentation from treating clinicians
 - Two-way contact often advisable
 - ◆ Difference of opinion
 - ◆ Ensure treating MD truly understands job demands

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Medical or Other Factual Evidence (Cont'd)

- Compliance with meds, PT, other treatment.
- Experience in previous jobs.
- Accidents, productivity, job performance.
- Job Demands
 - Detailed job description
 - Site visit

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Documentation

- Symptoms ongoing, resolved, remote
- Treatment (meds, surgery, PT) ongoing, recent or remote
- Objective findings on physical exam
- Imaging studies or other diagnostics
- Summary of physical job demands

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Documentation (Cont'd)

- Work/Disability History
 - Number of episodes OOW/modified duty
 - Precipitating factors of OOW (mechanism of injury)
 - Duration of periods of disability
 - Duration of periods on the job
 - Nature of work when RTW'd (full vs. modified duty)

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The Suit

- The suit proceeded against the employer, which had filed for bankruptcy, and the physician. The state malpractice tribunal found in favor of the physician, meaning that the patient had to put up a bond of \$6,000 to proceed, which would be non-refundable if the patient lost the suit. The case went to trial, and the physician was found not liable.

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The Suit

- Experts for the physician testified that he had followed the letter and the spirit of the ADA,
 - by making an individual determination of risk,
 - by referring specifically to medical literature,
 - by seeking detailed job descriptions, and
 - by requesting additional information from the treating orthopedist.

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The Suit

- A spine surgeon testified that the patient was indeed at high risk of recurrent, serious injury if assigned to heavy work.
- The patient alleged at trial that the job of a truck driver is relatively easy, only requiring sitting in a truck and driving. There were no expert witnesses for the plaintiff.
- The defense was complicated by the bankruptcy of the employer and its absence from the proceedings, which could have prejudiced the jury.

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Lessons Learned

- Document everything. Keep a paper trail.
- Be specific about job descriptions.
- Reading and interpret the medical literature carefully.
- Reach your own independent and honest opinion.
- If sued, don't panic. Prepare carefully.

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