

Fitness for Duty, ADA and Direct Threat Assessments

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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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Inclusion Within The Protected Class

- Determined on a case-by-case basis
 - Qualified individual
 - Disability
 - 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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Job Descriptions Risk Management Caveat

- 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 Definition of Disability

- A physical or mental impairment that substantially limits one or more of the major life activities, or
- A record of such impairment, or
- Being regarded as having such an impairment, or
- Association with an individual with a disability

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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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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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Responsibilities in FFD Determinations and the Hiring Decision

- Clinician: only makes a *medical assessment*
 - FFD: functional abilities and limitations
 - 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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Medical Clearance Risk Management Caveat

- 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 Fitness Determinations: Communication to the Employer

- Medically fit to perform the essential functions
- Medically fit to perform the essential functions 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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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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Chevron U.S.A. Inc. v. Echazabal 122 S.Ct. 2045 (2002)

- Between 1972-1996 Mario Echazabal worked for a maintenance contractor at a Chevron oil refinery
- Worked primarily within the coker unit
- 1992: Chevron extended contingent job offer in same coker unit
- Chevron rescinded offer due to elevated LFTs on PPE, but M.E. continued to work for contractor at the Chevron refinery
- M.E. eventually dx'd by private doctors with asymptomatic, chronic active hepatitis C
- 1995: Chevron again extended contingent job offer
- Feb 1996: Chevron again rescinded offer, and this time also asked contractor to remove M.E. from the refinery

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Chevron U.S.A. Inc. v. Echazabal 122 S.Ct. 2045 (2002)

- Qualification standards
 - Must be job-related and consistent with business necessity
 - May consider "direct threat" assessments to self as well as to others
- Employer burden to establish this affirmative defense

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Echazabal v. Chevron USA, Inc. 336 F.3d 1023 (9th Cir. 2003)

Direct Threat means:

- Significant risk of substantial harm to health & safety of self or others
- Reasonable accommodation cannot eliminate or reduce risk below level of direct threat.

Determination based on:

- "Individualized assessment" based on reasonable medical judgment that relies on:
 - The most current medical knowledge and/or
 - The best available objective evidence

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Echazabal v. Chevron USA, Inc. 336 F.3d 1023 (9th Cir. 2003) Deficiencies in Individualized Risk Assessment

- Generalized statements of potential harm
- Blanket recommendation to avoid all exposure to hepatotoxins
- No identification of types of hydrocarbons or routes of exposure
- No quantification of exposure levels
- No indication of levels at which exposures would become harmful
- No knowledge if regulatory levels would be exceeded
- No consultation with Industrial Hygiene

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Echazabal v. Chevron USA, Inc. 336 F.3d 1023 (9th Cir. 2003) Deficiencies in Individualized Risk Assessment (Cont'd)

- Chevron MDs: one occ doc and one non-board certified generalist
- Inadequate knowledge of or experience with liver disease
- No consultation with a hepatologist (liver specialist)
- ?Scope of consultation with treating specialists
- No consideration of employee's past work history
- No consideration of likelihood or imminence of risk
- No certainty that employee's risk was > that of a healthy individual
- No consideration by Chevron of its duty to accommodate

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Direct Threat: Factors to be Considered

- Specific risk identified
 - Duration of the risk
 - Nature and severity of potential harm
 - Likelihood that the potential harm will occur
 - Imminence of the potential harm
- Current risk—not remote, speculative or future.
- Based on *objective* medical or other factual evidence re: this *particular* individual.

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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/exposures

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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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