State Bar of Texas

THE AMERICANS WITH DISABILITIES ACT :

DIRECT THREAT AND ENFORCING CONDUCT RULES

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THE DIRECT THREAT DEFENSE

- What is it?
- What is the ultimate question when evaluating a direct threat defense?
- Who bears the burden of proof?
- How hard is it to win summary judgment on direct threat defenses?
- What can an employer do if they reasonably believe an employee is a direct threat, but they don't know for sure?
- Lessons learned from other cases.
- Advice for Employers

ENFORCING CONDUCT RULES

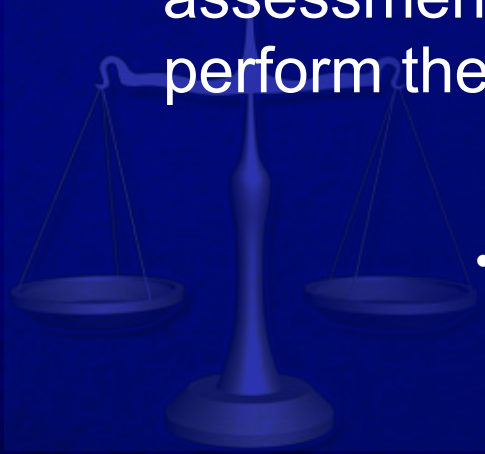
- Drug and Alcohol Policies
- Policies Prohibiting Violence
- Policies Against Lying, Dishonesty, Theft, or Other Intentional Gross Misconduct
- Policies Requiring Courtesy Towards Co-Workers, Neat Dress, or Completely "Normal" or Non-Frightening Behavior
- Policies Regarding Tardiness or Absenteeism
- Must Discipline be Withheld If Violation of Policy was Because of Disability?

What is the Direct Threat Defense?

- When an individual's disability poses a direct threat to health and safety.

- "The direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job."

  - *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002)



Factors to consider

1. Duration of risk;
2. Nature and severity of potential harm;
3. Likelihood that potential harm will occur; and
4. Imminence of the potential harm.

What is the ultimate question in evaluating a Direct Threat Defense?

- The fact-finder does not determine whether the plaintiff posed a threat.
- The fact-finder determines the reasonableness of the employer's actions based upon "reasonable medical judgments of public health authorities."
  - *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287–88 (1987)

Which party has the burden of proof on the Direct Threat Defense?

- "The ADA is not a paragon of legislative drafting. Particularly impenetrable is the statutory allocation of burden of proof regarding an employee's qualifications and the threat that disabled employees might pose to health and safety."
  - *Rizzo v. Children's World Learning Ctrs.*, 213 F.3d 209, 223 (5th Cir. 2000)

This has led to three possible answers to this question…

Which party has the burden of proof on the Direct Threat Defense?

- EMPLOYER
  - *EEOC v. Wal–Mart Stores, Inc.*, 477 F.3d 561, 571–72 (8th Cir. 2007)
  - *Branham v. Snow*, 392 F.3d 896, 906 (7th Cir. 2004)
- EMPLOYEE
  - *LaChance v. Duffy's Draft House, Inc.,* 146 F.3d 832, 835 (11th Cir. 1998)
- MIDDLE GROUND
  - *McKenzie v. Benton*, 388 F.3d 1342, 1354 (10th Cir. 2004)
  - *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997)

Currently the trend seems to be leaning towards imposing the burden on the employer, or applying the middle ground approach.

Is it easy for employers to win summary judgment on the basis of the Direct Threat Defense?

- A defendant "asserting a 'direct threat' as a basis for excluding an individual bears a heavy burden of demonstrating that the individual poses a significant risk to the health and safety of others."
  - *Lockett v. Catalina Channel Express, Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007)

- However, difficult does not mean impossible.

What can an employer do if it reasonably fears an employee is a Direct Threat, but does not know for sure?

- CASE LAW
  - “Fitness for duty test”
  - Use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims
  - Mere convenience is insufficient to support a viable business necessity defense and a medical examination or inquiry that furthers a business necessity without playing a role in consummating it will transgress the ADA.

What can an employer do if it reasonably fears an employee is a Direct Threat, but does not know for sure? (continued)

- Relevant EEOC Guidance
  - A disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."

Additional EEOC Guidance

- May an employer require that an employee, who it reasonably believes will pose a direct threat, be examined by an appropriate health care professional of the employer's choice?
  - The determination that an employee poses a direct threat must be based on an individualized assessment of the employee's present ability to safely perform the essential functions of the job.

A 2013 District Court Case Permitting Medical Testing That Goes Beyond What The EEOC Guidance Would Permit

- *E.E.O.C. v. U.S. Steel Corp.*, NO. CIV.A. 10-1284, 2013 WL 625315 (W.D. Pa. Feb 20, 2013)

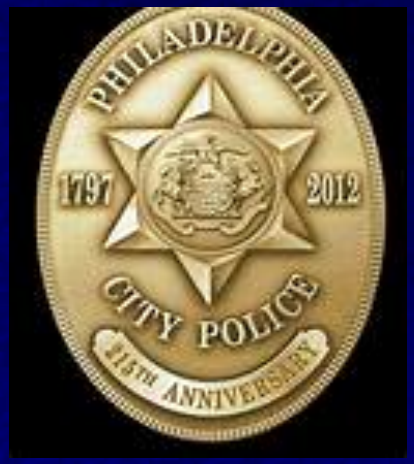
  - Company decides to randomly test "probationary employees" for alcohol
  - Based primarily on the dangerous, safety-sensitive positions they held, district court held that such testing was "job-related and consistent with business necessity."
  - The court also found "no issue with limiting the scope of the random testing program only to probationary employees."

A Title VII Case Strongly Encouraging Employers To Use Fitness For Duty Examinations

- *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012)
  - Employer was taken to task for not seeking a fitness for duty examination and instead choosing to terminate plaintiff based on fear she was homicidal.
  - One of the many reasons the court gave for finding fault with the Postal Service's decision to terminate Coleman was the fact that the Postal Service admittedly had options short of termination to gauge the plaintiff's propensity for violence, such as seeking a "fitness for duty" certificate.

UNITED STATES POSTAL SERVICE®

Public Safety Positions and Psychological Fitness for Duty



- We are satisfied that when dealing with the unique situation of police officers and issues related to their mental health it would be ill-advised to second-guess the personnel decisions of a police department when it is deciding how it can use a police officer who suffers from mental health problems. The police department, not a jury, is uniquely qualified to make such sensitive decisions.
  - *Diaz v. City of Philadelphia*, 2012 WL 1657866 *13 (E.D. Pa. 2012).

A Dozen Lessons from “Direct Threat” Cases

1. The Direct Threat Defense Applies To Threats To The Employee's Own Health And Safety

- The EEOC passed a regulation carrying the defense one step further, and allowing an employer to screen out a potential worker with a disability for risks on the job to his *own* health or safety.

- The Court gave a number of reasons why the EEOC's regulation was a legitimate decision to fill a gap in the statutory text, rather than (as the plaintiff argued) a contradiction of the statute.

- The Court also rejected the plaintiff's argument that the EEOC's regulation was "the kind of workplace paternalism the ADA was meant to outlaw."
  - *Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002)

2. But, Relying Heavily On The "Threat To Oneself" Defense Is Often A Tough Sell, And Juries May Not Buy It

- In *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007), DuPont argued that the employee presented a direct threat to herself and other employees because she allegedly was unable to safely evacuate the plant where she worked. The jury rejected this argument, found for the plaintiff, and awarded actual and punitive damages. On appeal, the Fifth Circuit found that the jury's verdict was supported by sufficient evidence. Specifically, despite her medical restrictions on walking, Barrios (the employee on whose behalf the EEOC sued) safely ambulated the evacuation route without assistance in 2003, and testimony at trial supported that she could safely evacuate without threatening the safety of herself or others.

3. Relying On The Direct Threat Defense Often Essentially Concedes That The Employee Was "Regarded As" Disabled Under The ADA

- To win on the direct threat defense, the employer usually must demonstrate significant medical problems with the employee. Putting on such evidence usually results in a finding that the employer regarded the employee to be disabled – one of the definitions of "disabled" under the ADA, and one of the required elements of a successful ADA case.
  - *See E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007).

4. When An Employee Makes Threats, And Makes Unwelcome Contact With Coworkers, Courts Are Inclined To Find For The Employer On The Direct Threat Defense

Jarvis v. Potter, 500 F.3d 1113 (10th Cir. 2007)

- Jarvis was a Vietnam veteran who had worked for the U.S. Postal Service and in 2002 he began to have difficulties at his workplace due to PTSD.

- Jarvis sued the USPS alleging that it had violated the Vocational Rehabilitation Act (VRA) and had retaliated against him for his complaints to the EEO. The Postal Service moved for summary judgment, which was granted on both the discrimination and retaliation claims. On the discrimination claim, the district court agreed with the USPS that Jarvis posed a direct threat that could not be reasonably accommodated by the Postal Service and that he was therefore not a "qualified individual" under the VRA.

- The court's decision appears to reflect the courts' and the public's growing concern regarding violence in institutions and by employees, postal workers being a notable example

5. On The Other Hand, Pure Speculation That An Employee Is Dangerous Does Not Support A Direct Threat Defense, Even If The Speculation Is Understandable

Josephs v. Pacific Bell, 443 F.3d 1050 (9th Cir. 2006)

- The Court upheld a jury verdict that found an employer violated the ADA for terminating an employee, and refusing to rehire him, after learning that he previously had been found not guilty by reason of insanity for attempted murder.

- The jury apparently concluded that Pacific Bell was not acting on any specific concerns related to Josephs' job performance when it terminated his employment. Pacific Bell appealed the jury finding and the Ninth Circuit affirmed, holding that Pacific Bell had improperly relied on stereotypes of mental illness – thus not proving Josephs was a "direct threat" – while ignoring other evidence that Josephs was safe and otherwise qualified to perform his job.

6. At Least One Court Of Appeals Has Held That Safety-Based Blanket Exclusions Of Employees With Certain Medical Conditions Are Sometimes Allowed, So Long As The Employer Can Prove "Business Necessity"

E.E.O.C. v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000)

- In July 1989, Exxon adopted a policy that precludes all employees who currently have substance abuse problems and all employees with a history of substance abuse from working in designated "safety sensitive" position. "Safety sensitive" positions constitute about ten percent of all jobs at Exxon. The EEOC challenged this blanket exclusion of rehabilitated substance abusers under the ADA. The question for the Fifth Circuit was whether Exxon could defend its blanket exclusion based upon "business necessity" or was required to demonstrate that a "direct threat" was presented by each affected employee. The district court concluded that Exxon had to prove that each individual presented a "direct threat." The Fifth Circuit reversed.

7. Changes In The Law And Medical Developments Can Alter The Analysis Of Whether Certain Conditions Constitute A Direct Threat

Kapche v. City of San Antonio, 176 F.3d 840 (5th Cir. 1999)

- Kapche applied for a position as a police officer for the City of San Antonio. He was rejected because he is an insulin-dependent diabetic.
- The district court granted the city's motion for summary judgment on the ground that Kapche posed a "direct threat" as a matter of law.
- On appeal, the Fifth Circuit noted that, as a police officer, driving would be an essential function of Kapche's job.

The court held that a *per se* rule should no longer be applied because the Department of Transportation amended its highway safety regulations to abolish its prohibition of insulin-dependent diabetics from the operation of noncommercial motor vehicles.

In addition, the court observed that there have been technological improvements that have significantly increased the ability of diabetics to monitor blood sugar levels and thereby prevent hypoglycemic reactions.

As a result, the court reversed summary judgment for the City of San Antonio, to allow for an individualized assessment of whether or not Kapche's condition posed a "direct threat" to himself or others.

8. When Patient Or Public Safety Is Involved, Courts Are Somewhat More Likely To Find A Direct Threat Exists

a. Patient Safety

Robertson v. The Neuromedical Ctr., 161 F.3d 292 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1575 (1999)

- Robertson was a neurologist with Attention Deficit Hyperactivity Disorder ("ADHD"). His ADHD caused short-term memory loss. Robertson admitted that these problems caused him to pose a threat to his patients' safety, stating that "it was only a matter of time before he seriously hurt someone." *Id.* at 296. The Fifth Circuit found that this evidence demonstrated that Robertson was a "direct threat" to his patients' "basic medical safety," and thus affirmed summary judgment for the employer.

8. When Patient Or Public Safety Is Involved, Courts Are Somewhat More Likely To Find A Direct Threat Exists

b. Public Safety

McKenzie v. Benton, 388 F.3d 1342 (10th Cir. 2004);
Burroughs v. City of Springfield, 163 F.3d 505 (8th Cir. 1998);
Fussell v. Georgia Ports Authority, 906 F. Supp. 1561 (S.D. Ga. 1995)

- The direct threat defense tends to apply somewhat more robustly when the case concerns a police officer, or other public safety position that involves a special risk to others, co-workers and the public, who are exposed to the danger of a firearm in the control of the plaintiff.

There are limits however:

Krocka v. Bransfield, 969 F. Supp. 1073 (N.D. Ill. 1997);
Hoback v. City of Chattanooga, NO. 1:10-CV-74,
2012 WL 3834828 (E.D. Tenn. Sept. 4, 2012)

9. If An Employee Has Been Doing Their Job Safely For Twelve Years, And Nothing Has Changed In Their Medical Condition, Then They Probably Are Not A Direct Threat

Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758 (5th Cir. 1996)

- Rizzo was a teacher's aide for Children's World Learning Centers, which operates a daycare center. Her duties included driving children in the Children's World van.
- In 1993, after working for the company approximately twelve years, a parent complained to Rizzo's boss about her being left alone with children. Because of Rizzo's hearing impairment, the parent was concerned about whether she would be able to hear a choking child in the back of the van.
- The district court granted Children's World's motion for summary judgment on the grounds that Rizzo posed a direct threat to the children, in that she may not be able to hear a choking child due to her disability. The Fifth Circuit reversed the summary judgment, concluding that, "[w]hether a person who can hear emergency vehicles, but cannot hear a choking child, is a direct threat is question of fact."

10. Customer Concerns Cannot Support A Direct Threat Defense

Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758 (5th Cir. 1996)

- Another lesson from *Rizzo* is that employers cannot rely on their customers' unfounded speculation to support a direct threat defense. In that case, several concerned parents were behind the company's decision to have Rizzo tested, and then ultimately removed from her bus-driving position. While it is certainly understandable that the company would want to be responsive to its customers' concerns about their childrens' safety, those concerns alone could not support a direct threat defense.

11. In Assessing Whether An Employee Is A Direct Threat, Employers Should Not "Slavishly Defer To A Physician's Opinion Without First Pausing To Assess The Objective Reasonableness Of The Physician's Conclusions"

Rodriguez v. ConAgra Grocery Products Co., 436 F.3d 468 (5th Cir. 2006)

- The plaintiff alleged that ConAgra refused to hire him after a doctor wrongly declared him "unfit for duty." The district court determined there was no disability discrimination because ConAgra withdrew the job offer based on the physician's assessment that plaintiff had "uncontrolled diabetes" that prevented him from performing the job safely. The Fifth Circuit reversed, and rendered judgment for the plaintiff, because: (1) the physician did not have enough information to find that the plaintiff's diabetes was uncontrolled; and (2) ConAgra did not have enough information to conclude he was unable to perform the job.

12. Sometimes, You Know Direct Threat When You See It

Turco v. Hoechst Celanese Chemical Group, Inc., 101 F.3d 1090 (5th Cir. 1996)

Hoechst Celanese

Hoechst

- "Turco's position at Hoechst Celanese required him to work with complicated machinery and dangerous chemicals. Any diabetic episode or loss of concentration occurring while operating any of this machinery or chemicals had the potential to harm not only himself, but also others. This would be a walking time bomb and woe unto the employer who places an employee in that position."

13. Baker's Dozen Bonus Case: Following The Process Leads To Winning Cases

Wurzel v. Whirlpool Corp., No. 10–3629, 2012 WL 1449683 (6th Cir. Apr. 27, 2012)

- The Court concluded the employer had utilized the most current medical knowledge to reach a reasonable medical judgment that Wurzel posed a direct threat to workplace safety. While the employer was not required to reasonably accommodate Wurzel (since his claims of "being regarded" as disabled did not carry such an obligation), the Court concluded that the employer had engaged in a non-discriminatory process to determine the threat that Wurzel posed and, based on the best data available, had made an objective decision regarding Wurzel's job-related abilities. The Court found no reasonable juror could disagree with the defendant's determination that its employee posed a direct threat to his own safety and that of others in the plant.

Advice for Employers

- Be cautious – Good faith belief is not enough, objective proof is necessary.
- If safety requirements screen out individual or class of individuals, be prepared to shoulder the burden of proving that an individual in fact posed a direct threat.
- Before taking adverse employment action against an employee because of a perceived “direct threat,” an employer should take advantage of its right to make reasonable and limited medical inquiries.

Advice for Employers (continued)

- Focus on employee conduct—not labels or stereotypes.
- If you suspect an employee of having a mental illness that may pose a threat to others in the workplace, direct the employee to complete a medical examination.
- Individualized assessment before making any adverse decision is key (*see, e.g., Fahey* 2014 case).
- Train managers and supervisors.

Advice for Employers (continued)

- Be prepared to prove:
  1. What the specific risk is;
  2. A significant current risk of substantial harm;
  3. That the risk is documented by objective medical or other factual evidence regarding the particular individual; and
  4. That the risk cannot by eliminated or reduced below the level of a “direct threat” by reasonable accommodation.

Advice for Employers (continued)

- Unless mandated by law, be very careful before imposing a blanket policy that discriminates against disabled employees because of an alleged “direct threat.

- Review qualification standards, to ensure that they are, in fact, job-related and consistent with business necessity.

ENFORCING CONDUCT RULES

Drug and Alcohol Policies

- The term “qualified individual with a disability” under the ADA shall not include illegal drug users when the covered entity acts on that basis.
  - 42 U.S.C. § 12114(a) (1994)

ENFORCING CONDUCT RULES

Policies Prohibiting Violence

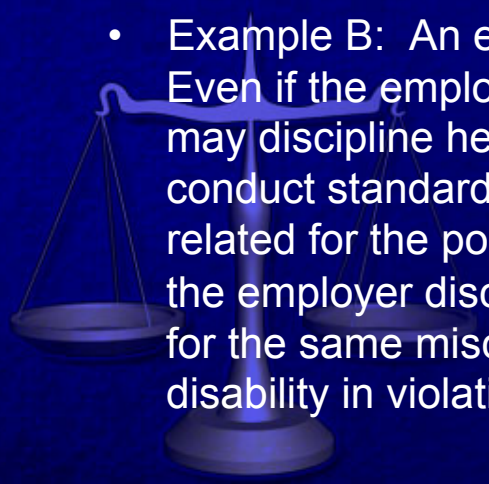
Nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability, even if the misconduct was caused by a disability.

- *Hamilton v. Southwestern Bell Telephone Co.*, 136 F. 3d 1047 (5th Cir. 1998);
- *Seaman v. CSPH, Inc.*, 179 F.3d 297 (5th Cir. 1999); and
- *Palmer v. Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997).

ENFORCING CONDUCT RULES

Policies Against Lying, Dishonesty, Theft, or Other Gross Misconduct

- The EEOC gives examples of employees who claim they stole or intentionally tampered with equipment because of their disabilities:
  - Example A: An employee steals money from his employer. Even if he asserts that his misconduct was caused by a disability, the employer may discipline him consistent with its uniform disciplinary policies because the individual violated a conduct standard -- a prohibition against employee theft -- that is job-related for the position in question and consistent with business necessity.
  - Example B: An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard -- a rule prohibiting intentional damage to equipment -- that is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.



ENFORCING CONDUCT RULES

Policies Requiring Courtesy Towards Co-Workers, Neat Dress, or Completely "Normal" or Non-Frightening Behavior

- The clear lines regarding an employer's right to discipline employees for acts of violence, threats of violence, intentional destruction of property, and lying – even if the conduct is caused by a disability – start to break down somewhat when it comes to other, less egregious situations, such as policies requiring courtesy towards coworkers or customers, neat dress, or completely "normal" behavior.

Den Hartog v. Wasatch Acad., 129 F.3d 1076 (10th Cir. 1997)

Chandler v. Specialty Tires of America (Tennessee), Inc., 134 Fed. Appx. 921, 929 (6th Cir. June 17, 2005)

Walsted v. Woodbury County, 113 F. Supp. 2d 1318, 1340-42 (N.D. Iowa 2000)

Policies Requiring Courtesy Towards Co-Workers, Neat Dress, or Completely "Normal" or Non-Frightening Behavior (continued)

- Examples:
  - Warehouse employee with psychiatric disability and disheveled appearance?
  - Bank teller with Tourette Syndrome (barks, shouts, and loud noises)?
  - Bank teller with Tourette Syndrome (throat clearing and eye blinks)?
  - Employee with Tourette Syndrome (barks, shouts, loud noises) works in noisy environment with no customers?

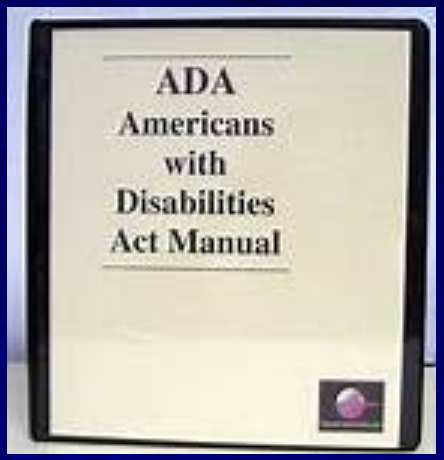
ENFORCING CONDUCT RULES

Policies Regarding Tardiness and Absenteeism

- Tardiness or absenteeism caused by a disability is not subject to the same sort of treatment under the ADA as acts of violence, threats, or lies that are caused by a disability.
- Employers may be required to modify attendance policies as a reasonable accommodation.
  - *See EEOC v. Convergys Customer Management Group, Inc.*, 491 F.3d 790 (8th Cir. 2007);
  - *Humphrey v. Memorial Hospital Assoc.*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1592 (2002)

ENFORCING CONDUCT RULES

Must Discipline Be Rescinded If An Employee Breaks A Conduct Rule Because Of A Disability? No.



- If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.
- An employer must make reasonable accommodation to enable an otherwise qualified individual with a disability to meet such a conduct standard in the future, barring undue hardship. Because reasonable accommodation is always prospective, however, an employer is not required to excuse past misconduct.

Must Discipline Be Rescinded If An Employee Breaks A Conduct Rule Because Of A Disability? (continued)

- Examples:
  - Reference librarian with a temper?
  - Company telephone contact who is constantly late because of the side-effects of hit medication?
  - Hostile altercation with supervisor followed by request for a month off for treatment?

Because of this rule, the EEOC advises *employees* that, "it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur."

State Bar of Texas

The End

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