

# Sixth Circuit Discusses ADA and Work Related Medical Exams Involving Psychological Issues

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At some point in time, most employers or managers face a situation where an employee exhibits odd or off-putting behaviors, or behaviors that suggest the possibility that an employee could harm herself or other persons at the workplace. Navigating the maze of potential proactive and reactive measures to take has never been easy, and not much case law on the topic exists, especially outside the sphere of public safety positions in fire and police departments. Moreover, the EEOC has not specifically updated its March 25, 1997 Guidance on the Americans with Disabilities Act (“ADA”) and Psychiatric Disabilities, other than noting that the 2008 amendments to the ADA change how the Act defines “disability.” This state of affairs provides little direction or comfort to employers. Those who review the cited EEOC Guidance can also fairly say that the discussions contained in the Guidance can at times raise more questions than they answer.

On August 19, 2014, the Sixth Circuit of the U.S. Court of Appeals [reversed a trial court’s order](#) granting an employer summary judgment on the grounds that an issue of fact remained over whether an emergency medical technician was properly ordered to have psychological counseling by her employer due to reasons that were “job-related and consistent with business necessity.” *Kroll v. White Lake Ambulance Authority*, No. 13-1774 at p.12 (6th Cir. Aug. 19, 2014). The plaintiff employee sued her employer under the ADA. That recited facts trace a course of conduct by the employee that included a “tumultuous affair with her married coworker,” followed by an altercation that plaintiff had with a coworker. The supervisor had described the employee’s conduct as “immoral,” and demanded that plaintiff receive psychological counseling. (*Id.* at 1-2). The employer discharged the employee upon her refusal to receive such counseling. The employee based her ADA claim upon the contention that the demanded examination did not satisfy the condition, specified under 42 U.S.C. sec. 12112(d) (4)(A) of being “job-related and consistent with business necessity.” (*Id.* at 2). Earlier in the same course of litigation, the Sixth Circuit previously held that the employer ordered psychological exam constituted a “medical examination.” (*Kroll I*, 691 F.3d 809 (6th Cir. 2012)).

On this second appeal, the appellate court focused on the issue of whether or not the counseling the employer required of the employee was “job-related and consistent with business necessity.” The governing factorial analysis requires an employer to show one of the following: (1) the employee requested an accommodation; (2) the employee’s ability to perform the essential functions of the job is impaired; or (3) the employee poses a direct threat to herself or others. (Id. at 6). An employer will not satisfy the business-necessity standard by simply declaring that a medical exam of the employee is suitable or practical. (Id.). Instead, the employer must cite some objective evidence which signals that an employee’s conduct endangers an essential function of the employer’s business. (Id.).

The problem for the employer in Kroll was the thinness of its evidence that the employee’s conduct threatened a vital function of the EMT service it provided. The supervisor had limited data about the employee’s emotional outbursts or disobedience of safety rules. (Id. at 7). While the employer could substantiate one episode of the employee providing substandard care to a patient, and the record as discussed by the court does not clarify whether that event was linked to the employee’s believed emotional or mental state. (Id.). The likelihood of a jury issue existing was also enhanced by the employee not requesting psychological counseling or seeking any form of medical accommodation from her employer. (Id. at 8). Therefore, the employer had to establish that the employee was either unable to perform a core function of her job or that her presence created a direct threat to the safety of other persons or herself. (Id.). The Court found that the one safety violation the employee committed, along with the limited evidence of her emotional outbursts at work, were few enough in number to create a jury issue over whether the supervisor and employer had enough objective knowledge to decide that the plaintiff’s job performance was impaired by her supposed psychological state. (Id. at 8-9).

The “direct threat” prong of the analysis compelled the employer to alternatively show that the employee was “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. sec. 12111(3). (Id. at 9). The governing regulations require that employers perform an individualized assessment of the threat analysis that weighs the employee’s abilities and job duties “based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” (Id. at 9, citing 29 C.F.R. sec. 1630.2(r)). The cited regulation calls for an evaluation of the duration of the risk, the nature and severity of the possible harm, the likelihood of potential harm occurring, and whether the potential harm is about to occur. (Id. at 9-10). The employer could only identify two isolated events where the employee’s conduct could have harmed another person. Furthermore, the decision to require psychological counseling was made based upon personal assessments without consulting a medical professional. As a result, a jury must decide whether the employer properly decided that the employee was impaired or that her conduct posed a significant risk to others based upon “reasonable medical judgment.” (Id. at 10-12). The holding in the Kroll opinion provides a reminder to employers not to hastily terminate employees who exhibit strange or unusual behaviors without first assembling and compiling supporting objective evidence from medical professionals.

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## **Topics**

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