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Is Employer-Ordered Counseling a Medical Exam Covered By The ADA?

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The recent decision of the **Sixth Circuit U.S. Court of Appeals** (covering Ohio, Michigan, Kentucky, and Tennessee) reminds employers of the caution that must be exercised when dealing with employee behavioral problems. Specifically in the case of ***Kroll v. White Lake Ambulance Authority***, employer-ordered counseling may constitute a medical exam that, under the **Americans with Disabilities Act (ADA)**, is permissible only if it is job-related and consistent with business necessity.

Kroll was an EMT for WLAA, the employer in the case. A manager requested that she receive psychological counseling when other employees expressed concern for her well-being in light of recent unusual behavior. WLAA required Kroll to provide a release of her records so WLAA could monitor her attendance.

Referencing a multi-part test in EEOC guidance for what constitutes a medical exam for ADA purposes, a majority of the three-judge panel relied heavily on their conclusion that the counseling was designed to diagnose a mental illness. The court recognized that some counseling would not be for diagnostic purposes and therefore not be a medical exam. But based on the inconclusive evidence before it about the nature of this exam, the court reversed the lower court's grant of summary judgment to the employer in the case and send the case backto determine whether the testing was job-related and consistent with business necessity.

This case is a good occasion to review best practices when dealing with employee behavioral issues:

- Often it is advisable to treat unusual conduct as a conduct issue, not a medical issue. The ADA prohibits discrimination on the basis of "known" disabilities. The case law shows that employers must use common sense and cannot pretend there is no medical issue when it is reasonable certain there is one, but employers should always consider dealing with inappropriate behavior as a conduct issue first.
- Documentation of steps to assist an employee should normally make clear the purpose of the direction the employer is giving the employee. In Kroll the court seemed to be searching for more information about the purpose of Ms. Kroll's test.
- The ADA is fraught with tricky grey areas and judgment calls; it will often be cost-effective to consult with counsel on the front end.

Given the split 2-1 in *Kroll*, it will be interesting to see if the employer seeks review by the full Sixth Circuit.

A PDF of the *Kroll* decision can be accessed here.

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