

## Establishing Direct Threat: How to Leverage the “Individualized Assessment”

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Successfully asserting the Americans with Disabilities Act’s (ADA) direct threat affirmative defense is difficult. It is disfavored because of the fear that well-intentioned concerns of injury will otherwise result in qualified disabled individuals being excluded from work. A recent federal trial court decision, involving an operator at an ExxonMobil chemical plant shows how an employer can establish a direct threat disqualification in the face of conflicting medical opinions. The case is *Spencer-Martin v ExxonMobil Corp.*, M.D. La., No. 16-789 (June 15, 2018).

The ADA’s direct threat affirmative defense requires showing that “a significant risk of substantial harm to the health or safety of the individual or others cannot be eliminated or reduced by reasonable accommodation.” Employers must conduct an individualized assessment of the employee’s present ability to perform the essential functions of the job considering the duration of the risk, the nature and severity of the potential harm, the likelihood of the harm, and the imminence of any potential harm. A direct threat showing must be objectively reasonable and supported by medical evidence and/or the best available objective evidence; a good faith belief that the employee poses a safety risk is not enough to establish a direct threat.

In the ExxonMobil case, the plaintiff was released by her treating neurologist to return to work without restrictions to her safety-sensitive position as a control room operator at a chemical plant. Six months had passed without a seizure episode. Previously, the plaintiff had suffered a seizure while working alone operating one of the chemical plant’s control boards.

ExxonMobil’s occupational health staff physician undertook the required individualized assessment that ultimately overcame the opinion of the plaintiff’s treating neurologist. To make the showing, ExxonMobil’s physician:

- Toured the unit where the plaintiff worked and interviewed her supervisor who confirmed the requirements of the plaintiff’s job to climb ladders, process information on 12 to 14 displays, make decisions rapidly and frequently, and respond immediately to unexpected developments.
- Consulted with two other doctors employed by ExxonMobil as well as conducting an interview with the Plaintiff’s neurologist.

- Obtained the plaintiff's own admissions, contrary to her doctor's opinion, that others could be in danger if she suddenly became incapacitated due to a seizure.

To compare, the plaintiff offered no evidence to dispute that as long as she suffers from epilepsy, she is at risk of seizure; six months with no seizures did not render her condition "cured" or unlikely to intermittently relapse. Additionally, the court found that the plaintiff's physician, while a neurologist, did not have first-hand knowledge of the risk. Finally, the court was persuaded that ExxonMobil did not apply a "zero risk" policy related to seizure conditions, but rather undertook a detailed individualized assessment of plaintiff's job responsibilities and her medical conditions that supported a conclusion that the risk of another event of sudden incapacitation (no matter how small) was unacceptable given the potential adverse consequences. ExxonMobil also looked for available positions that the plaintiff was qualified to perform that did not pose the same level of risk.

For employers, the ExxonMobil decision demonstrates the ability to overcome conflicting medical opinions with a detailed and fact-specific individualized assessment that is reasonable and supported by competent medical evidence – even if another reasonable conclusion could have been made. ExxonMobil distinguished itself by not making a snap judgment with regard to the plaintiff's condition, but rather a detailed assessment of her medical condition as compared to the specific detailed needs of her position to disqualify her from work.

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