

The ADA Bares Its Teeth

In the past year, it has been startling to see the number of Americans with Disabilities actions brought against employers that implicate both *safety concerns and the use of powerful drugs*. For example, last May, a lawsuit was reinstated against a South Carolina company that hauls gasoline, diesel fuel, and ethanol because the company refused to hire a narcoleptic driver who tested positive for amphetamines.

In September 2016, the Equal Employment Opportunity Commission sued two Atlanta physicians' groups after they terminated the employment of one of their doctors who was taking narcotics, albeit, legally prescribed. Finally, at the end of November 2016, the EEOC sued Stevens Transport, one of the top four largest temperature-controlled carriers in the United States, because it denied employment to a driver who was taking medications for his bipolar disorder.

Common to every single ADA case is the allegation that the employer failed to make an individualized assessment. Consequently, businesses cannot rely on blanket rules or across-the-board policies. Instead, employers must be able to articulate how this employee's drug use implicates public safety under these particular circumstances.

LESSON NO. 1: A COMPANY'S SAFETY CONCERNS MAY NOT TRUMP THE ADA

Presumably, trucking companies and hospitals know more about protecting the general public with respect to their industries than the EEOC does. That common-sense notion, however, may not prevent a business from suit. Whether that business is disposing of nuclear fuel rods or testing for viruses, the EEOC has made it clear that it will afford employers *no deference* with respect to safety concerns. While the EEOC has no power to award money damages, it does have the power to sue a private employer and force it to pay mammoth legal fees defending itself.

LESSON NO. 2: AN EMPLOYEE'S DRUG USE DOES NOT TRUMP THE ADA

Although an employer may have a free hand under state and federal laws to test its employees for legal and illegal drug use; that doesn't mean the

employer automatically can act once it obtains positive test results. Put another way, merely learning that an employee or job applicant is taking powerful narcotics is not enough to disqualify that applicant or terminate her employment. The employer must go one more step under the ADA.

LESSON NO. 3: EMPLOYERS MUST ENGAGE IN INDIVIDUALIZED ASSESSMENTS

Common to every single ADA case is the allegation that the employer failed to make an individualized assessment. Consequently, businesses cannot rely on blanket rules or across-the-board policies. Instead, employers must be able to articulate how this employee's drug use implicates public safety under these particular circumstances.

If you have any questions about the matters addressed in this *CCM Alert*, please contact the following CCM author or your regular CCM contact.

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