



Employee with MS not a direct threat in the workplace

OEDCA regularly issues decisions interpreting the Rehabilitation Act, a Federal law prohibiting discrimination against qualified individuals with disabilities. The Rehabilitation Act requires more than just non-discrimination against disabled individuals; it also requires affirmative action on the part of VA supervisors and managers to provide reasonable accommodation to qualified individuals with disabilities. Reasonable accommodations may include, but are not limited to, making existing facilities easily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, modification of equipment or devices, or the provision of qualified readers or interpreters.

When making hiring and/or promotion decisions, it is important for VA supervisors and managers to understand that even if they have a good faith belief that an individual's impairment poses a risk of harm or injury to his own health or safety, or the health or safety of others (Direct Threat), the VA may not deny employment to a qualified disabled individual without first determining if a reasonable accommodation would either eliminate the risk, or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the VA may refuse to hire an applicant or may discharge an employee who poses a direct threat.

Ms. P was employed as a Clinical Pharmacist at a VA hospital. She suffers from MS and sometimes relies on a cane and/or scooter when she walks long distances. In early 2007, Ms. P's MS flared up and she took a disability retirement from the VA. Her condition stabilized and in early 2008 she reapplied for a position as a VA Clinical Pharmacist.

Ms. P was tentatively selected for the position pending results of a pre-employment physical. The physical revealed that Ms. P had some limitations impacting her fingers and hands, her balance, coordination, and ability to walk and that she may require the use of a scooter at times, may tire more easily, and may need more frequent rest breaks. As a result of the physical, Ms. P's job offer was rescinded.

The VA argued that if hired, Ms. P would be a "direct threat" to herself and others because she could fall and hurt herself and that patient safety would be impacted because Ms. P may not be "100 percent".

OEDCA found, based on case law, that the direct threat argument requires an individualized risk assessment and such an assessment was not conducted in this case. Individualized risk assessments typically include substantial information regarding both the individual's work history and medical history. Relevant information may include a review of the actual duties of the position (as opposed to a general position description) and the experience of the individual in previous similar job situations.

In this case, OEDCA found that the reasons proffered by management---that Ms. P was a direct threat---were insufficient because there was no showing that there was a high likelihood that harm would occur to Ms. P or others if she was hired.

PRACTICE POINTER: Legally, the burden is on the employer to prove that an individual with a disability poses a direct threat in the workplace. To meet its burden, the employer must show more than simply an "elevated risk" of future injury. Speculative or remote risks (the employee could have a seizure in the workplace, fall, and hit his head) are not sufficient to establish the existence of a direct threat.

Rather, the employer must identify the specific risk posed by the individual and make an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The employer should gather relevant information to determine whether an individual poses a significant risk of substantial harm to himself/herself and/or others. For example, relevant information includes current medical documentation, medical opinions, input from the individual with the disability, review of the actual duties of the position (as opposed to a general position description) and the experience of the individual in previous similar job situations. In determining whether an individual with a disability poses a direct threat, the employer should consider the following four factors: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm.

For further information, See Equal Employment Opportunity Commission regulation 29 C.F.R. 1630.2(r) Direct Threat.