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An Employer Requiring Counseling Creates New Legal Risk

Employers should pause before requiring an employee to seek mental health counseling in order to address the employee's inappropriate or erratic behavior in the workplace. Recently, the federal appeals court covering Ohio, Kentucky, Tennessee and Michigan issued a decision that puts employers at risk of violating the Americans with Disabilities Act (ADA) in this scenario. *Kroll v. White Lake Ambulance Authority*, 6th Cir. No. 10-2348.

In this decision, the court ruled an employer can violate the ADA by requiring a distressed employee to seek counseling. Counseling can be a "medical exam" under the ADA. So, any requirement that an employee seek counseling must be "job-related and consistent with business necessity." This is true even where the employee gets to decide the nature and provider of the counseling, and where the employer never obtains a diagnosis.

Emily Kroll worked as an Emergency Medical Technician for White Lake. After she became involved in a tumultuous romantic relationship with a married co-worker, White Lake began receiving reports of concerns about Kroll's well-being and complaints of erratic behavior. One co-worker expressed concern that Kroll might be contemplating suicide. Other complaints reflected that Kroll's angry outbursts while on duty were compromising patient care and creating safety issues while she was operating ambulances in emergency situations.

Kroll's supervisors were concerned about Kroll's ability to perform her job safely, and they told her she would not be permitted to continue working for the company unless she obtained counseling. They suggested that she could use their EAP provider or some other mental health provider of her choice. They did not ask her to seek or obtain any diagnosis or to have her counselor report back to White Lake about any condition she may have suffered. Kroll refused to get counseling, resigned, and sued.

Kroll argued that her employer violated her rights under the ADA. The ADA allows an employer to require a medical examination only

where the employer can prove that the exam is both “job-related and consistent with business necessity.” Kroll argued in her suit that White Lake’s requirement that she obtain counseling amounted to an unlawful medical exam that was not job-related or necessary to the operation of her employer’s business.

The central issue in the decision was whether the employer’s “counseling” requirement amounted to a medical exam under the ADA. The court ruled that counseling can be a medical exam under the ADA, even if the employer does not tell the employee what type of counseling to seek or ask for a report of the counselor’s findings. White Lake will now have to prove that sending Kroll to undergo counseling was both related to her job and consistent with White Lake’s business needs.

This court decision teaches employers several important lessons:

- Employers should weigh the legal risks before sending an employee to counseling. Generally, an employer who focuses on the employee’s conduct is on safer legal grounds than an employer who tries to speculate on the cause of such conduct.
- Requiring an employee to obtain counseling imposes a legal burden that employers can avoid by merely making all employees aware that EAP or other counseling resources are available should an employee determine that he or she needs counseling.
- An employer’s best intentions will carry little to no weight in determining whether sending an employee for counseling amounts to a medical exam under the ADA. Even if the employer has no interest in obtaining a diagnosis of a mental health condition, courts are now likely to view any type of psychological or emotional counseling as a medical exam for purposes of the ADA.
- Employers must have their “ducks in a row” to make sure any required counseling is job-related and consistent with business necessity. Generally, employers should have sound and documented justification that explains why a medical

exam is needed for an employee to perform his or her job. Thus, any decision to send out an employee for counseling now must be carefully scrutinized.

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