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EMPLOYMENT PRACTICES HOTLINE

Workers With AIDS Have Legal Rights

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An owner of a restaurant chain in Michigan—let's call it the ABC Café—recently learned from one of his workers that the employee has AIDS.

The worker has been with the restaurant for two years and is an exemplary employee. He is a food server who also prepares salads, and he uses a knife as part of his job from time to time.

The employer is well aware of the employee's right to work without discrimination, but he is worried about health and safety issues relative to his other employees and patrons, and fears public relations issues might arise if word gets out to customers that he employs a food handler with AIDS.

In calling the EPL Hotline, the owner asked the following questions:

- Can or should the employer transfer the worker to a different position that does not require him to use a knife?
- Can he terminate the worker based on health and safety risks?
- Must or can he disclose the employee's condition to other employees and patrons?

Hotline Counseling: Employees with AIDS are accorded protection from disability discrimination, and dealing with such a workplace concern raises not only legal and business issues, but also public relations concerns as well.

The Americans With Disabilities Act prohibits any form of discrimination against "qualified individuals" with a "disability" (or a record of an impairment, or who is "regarded" as impaired) in the employment context.

A "disability" is any physical or mental impairment that presents a substantial limitation to an individual's ability to perform major life activities (such as talking, seeing, working, etc.).

A person is "qualified" if they have the requisite skill, experience and education, and are able to perform the essential functions of

the job, either with or without a reasonable accommodation.

Basically, a "reasonable accommodation" is any act on the part of the employer (such as changes to personnel policies, reallocating non-essential job functions, etc.) that enables an employee with a disability to perform the essential functions of the job.

If an employee is both "qualified" and "disabled" under the ADA, then the employer must provide that employee with a reasonable accommodation (unless doing so would create an undue financial burden, or present a direct threat to the safety and health of the employee or others).

The law of Michigan (the Elliot-Larsen Civil Rights Act and Persons With Disabilities Civil Rights Act) and most other states impose similar legal obligations on employers.

Many courts have held that having AIDS or testing positive for HIV-infection is a disability under the ADA. It also seems clear that ABC Café's employee is "qualified" under the ADA since the owner describes him as an "exemplary" employee who has no performance problems. (The employee's AIDS does not impair his ability to do his job.) In these circumstances, ABC Café is obviously dealing with a worker in a legally protected category.

The employer is in the position of trying to reconcile the employee's right to work without discrimination, with the health and safety concerns of the other employees and patrons, as well as the business risk of patrons refusing to frequent his establishment because of a perceived problem of a food-handling employee who has AIDS.

Moreover, the employer also must weigh the possible application of regulations under the Occupational Safety and Health Act regarding the handling of blood-borne diseases, and the risk of transmission with the manner in which he manages the food preparation and delivery process at ABC Café.

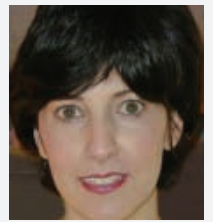
• Can or should the employer transfer the employee to another position that does not involve using a knife?

In answering this question, several factors are key.

First, the employee has not requested a reasonable accommodation. Second, his performance is such that the employer has no legitimate basis under the ADA to seek medical confirmation as to the worker's ability to perform his duties (or the need for a reasonable accommodation such as a transfer). Therefore the employer has no basis to require the employee to transfer to another position.

Acting on a stereotypical perception associated with the worker's impairment (having AIDS) is illegal disability discrimination. Unless there is a legitimate, overriding, business-related reason for a transfer (such as the need to cross-train employees to handle other functions, etc.), any transfer decision will be suspect.

At the same time, the employee's use of a knife involves the potential for cuts on the hand, and an issue might arise with respect to health and safety concerns. Courts considering similar issues in the healthcare sector (especially with employees involved in invasive



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surgery) have allowed employers to effectuate transfers since a risk of transmission to others (both co-workers and patients), while small, is not so low as to nullify the catastrophic consequences of an accidental transmission.

Section 12113(d) of the ADA also provides that employers may refuse to assign a worker to a job involving food handling if the person has an infectious or communicable disease that poses a risk that cannot be eliminated through reasonable accommodation.

Likewise, the ADA does not preempt any county or municipal regulations pertaining to health-risk concerns involved in food handling. The ADA requires the U.S. Department of Health and Human Services to publish a list of diseases that can be transmitted through food handling—AIDS and HIV-infection are not on that list.

Given all these legal issues, the health and safety concerns in this case probably do not present an imminent danger necessitating a transfer. The employer can easily address this risk by having the employee wear suitable gloves to protect against cuts and abrasions while using the knife, or modifying his job duties to reallocate any cutting functions to other food preparers.

Unless county or municipal regulations require otherwise (which the owner should check before making any personnel decision), the ADA would preclude any transfer decision based on the direct threat to safety defense.

- Can the owner terminate the employee based on the health and safety risk to others?

Unless the owner can show that the worker presents a substantial health and safety risk that cannot be eliminated by a reasonable accommodation, a firing is very risky. This is

especially so due to the employer's awareness of the application of the law—a knowing violation of the ADA subjects an employer to punitive damages.

This issue therefore raises the application of the ADA's "direct threat to safety" defense, and the issue recently argued to the U.S. Supreme Court in the case of *Chevron USA, Inc. v. Echazabal* on Feb. 27: whether or not an employer can refuse to hire (or can terminate) those with disabilities whose impairment makes it substantially more likely that they could be injured or injure others by the job they are seeking (or performing), or should persons with disabilities have the unilateral discretion to decide whether to risk their own personal safety and that of others.

The ADA allows employers to take personnel actions without liability against individuals who pose a direct threat to the health and safety of themselves or others in the workplace. In essence, an employer must balance its own legitimate interests with those of an employee with a disability.

However, the direct-threat defense creates a high hurdle; it must be based on current and verifiable medical evidence as well as the best available objective evidence. In ABC Cafe's situation, there does not appear to be any objective medical evidence of the employee's personal limitations.

Recent medical research seems to indicate there is no risk that a food server is at risk to transfer AIDS to others.

The fact that the worker also uses a knife from time to time to prepare salads does not

change the analysis either, as the owner can make some minor changes (reasonable accommodation) that eliminate the chances that the worker will cut himself (such as asking other food servers to cut salads or requiring the employee to wear suitable gloves while using a knife).

The owner also should give some thought to establishing protocols describing what will happen if employees cut themselves so as to ensure the employer's compliance with applicable OSHA regulations. In addition, a protocol requiring all employees to wear gloves might be a practical solution and assist in ensuring that no particular worker feels stigmatized by wearing the gloves.

- Can or must the owner disclose the worker's condition to the other employees and patrons?

If the employer discloses the employee's condition to others, he would run the risk of violating the employee's right of privacy as well as his right to work without discrimination under the ADA. If other employees discriminate against or harass the worker due to this disclosure, the employer might be liable for that activity, too.

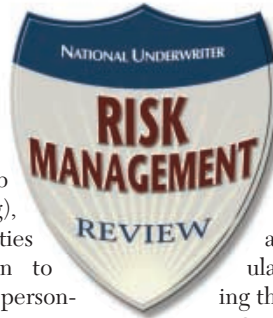
The ADA imposes strict confidentiality requirements with respect to an employee's medical information, and confidential medical information can be disclosed only to supervisory personnel who "need to know" of the employee's disability for purposes of providing a reasonable accommodation (or safety personnel who might be required to provide emergency medical services to an employee).

In these circumstances, it is apparent that the employer could disclose the employee's condition only to those supervisory personnel "who need to know" but not to other employees and/or patrons.

If a patron were to ask, the rules on disclosure are no different. An employee's private medical information is not a legitimate subject of discussion between an employer and patrons.

Rather, the employer should respond to the inquiries of any patrons (as well as any co-worker) by indicating that the restaurant complies fully with any and all applicable health, safety, and employment laws and regulations.

(The next "EPLI Hotline" column will appear on May 6.) 



Employers who fire or transfer a worker who handles food because they have AIDS or are infected with the HIV virus could find themselves sued for discrimination and fined by the government.

Lexington Insurance Company