ADA ALLOWS EMPLOYERS TO REFUSE TO HIRE DISABLED EMPLOYEE IF JOB THREATENS EMPLOYEE'S HEALTH

In another of a series of U.S. Supreme Court decisions favorable to employers (see May 2002 *VLCT News*, Legal Corner), the Court upheld the validity of an Americans With Disabilities Act (ADA) regulation that permits employers to screen out a disabled worker if the job adversely affects his or her own health or safety.

In *Chevron U.S.A. Inc., v. Echazabal*, 2002 WL 1270586 (2002), the Court was asked to consider whether the federal Equal Employment Opportunity Commission (EEOC) exceeded its rule-making authority under the ADA in enacting the subject regulation. The regulation allows employers to defend disability claims on the grounds that the employer's "qualification standards" are job-related and consistent with business necessity. At issue in *Chevron* was the specific language that includes as a qualification standard "a requirement that an individual shall not pose a direct threat to the health or safety of *that individual* [or others] in the workplace." (S*ee* 29 C.F.R. § 1630.15 (b)(2)(emphasis added).) The ADA itself allows employers to assert the direct threat defense when the disabled worker's condition poses a threat to others – but it is silent as to situations where the job poses a direct threat to the worker himself.

The *Chevron* case arose when Mario Echazabal was twice refused a job with Chevron because his physical examinations revealed that he had a liver condition that Chevron's doctors said would be aggravated by continued exposure to toxins at the refinery. Echazabal eventually filed suit, claiming that Chevron violated the ADA after refusing to hire him because of his disability (his liver condition). Chevron defended the case under the EEOC regulation permitting the defense that a worker's disability on the job would pose a direct threat to his health.

The Court upheld the ADA regulation on the grounds that the ADA statute itself gives the EEOC broad discretion in setting qualification standards. The ADA's language specifically references the term "may" in its reference to the types of qualification standards that fall within the limits of job relation and business necessity. For instance, the statute states that such qualification standards "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." The Court held that the use of the term "may" demonstrates that Congress did not intend for this particular qualification standard to apply exclusively to situations where only the health and safety of others is threatened.

As with any ADA issue, the VLCT Municipal Law Center urges municipalities to contact their counsel to ensure compliance with state and federal law in assessing health and safety risks of applicants or employees. Vermont's Fair Employment Practices Act will also apply to employment decisions affecting disabled workers, and the Vermont Supreme Court has not yet decided whether the direct threat defense would apply in these circumstances. Also, the ADA and Vermont's Fair Employment Practices Act contain very strict provisions concerning medical evaluations of applicants and employees, and therefore all municipal employers should have a complete understanding of these provisions before attempting to explore the medical backgrounds of their employees.

Further, even if a situation arises where a municipal employee poses a direct threat to herself or others, a further inquiry must be made to determine whether the threat can be eliminated or reduced through a reasonable accommodation. If so, then a

reasonable accommodation must be made and the worker must be allowed to remain on the job.

Finally, it cannot be emphasized enough that any direct threat analysis must be based on objective, supportable medical evidence. Making decisions based on rumor, fear and/or speculation about someone's medical condition is a sure way to invite a discrimination suit under state and federal law.

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