

# LAW WATCH

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A Legal Newsletter from Foley & Lardner

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In *EEOC v. Exxon Corporation*, the U.S. Court of Appeal for the Fifth Circuit (which covers Texas, Louisiana and Mississippi) recently held that employers using safety-related, broad-based qualification standards need not prove that each disqualified disabled employee posed a direct threat to the health or safety of self or others. Rather, the employer need only demonstrate that the qualification standards are job-related and consistent with business necessity.

## Facts of the Case

Exxon Corporation established a policy terminating the employment of employees working in specific safety-sensitive, minimally-supervised positions, who had undergone treatment for substance abuse. Exxon established this policy in response to the Exxon Valdez oil spill, which arguably could have resulted, in large part, because of the chief officer's alcoholism. Although the policy affected approximately 10% of Exxon's work force, Exxon claimed that, because the policy minimized the risk of accidents should an employee relapse into substance abuse, it promoted job safety, furthered environmental protection, and reduced Exxon's future tort liability.

The Equal Employment Opportunity Commission ("EEOC") filed suit against Exxon on behalf of several employees, claiming that, by screening out a broad class of individuals with disabilities, Exxon's policy violated the Americans with Disabilities Act ("ADA"). Based upon its own Interpretive Guidance, the EEOC claimed that, in order to institute a safety-related, broad-based qualification standard based upon a disability, an em-

## FIFTH CIRCUIT RULES THAT SAFETY-RELATED QUALIFICATION STANDARDS NEED ONLY BE SUPPORTED BY BUSINESS NECESSITY TO SATISFY THE AMERICANS WITH DISABILITIES ACT

### Executive Summary

**Action:** *The U.S. Court of Appeal for the Fifth Circuit recently held that an employer's generally applicable safety-related qualification standards can be valid without the need for the employer to prove that each affected employee posed a "direct threat" of harm to himself/ herself or others. Rather, the employer may defend a challenged qualification standard as a business necessity.*

**Impact:** *Employers will have more leeway to design and implement safety policies and procedures without risk of violating the ADA even if the qualification standard screens out a broad class of disabled individuals, as long as the employer can prove that the standard is job-related and consistent with business necessity.*

**Effective Date:** *Immediately.*

ployer must always demonstrate that the individual employees affected by the policy posed a direct threat to the health or safety of themselves or oth-

ers to prove that the qualification standard is job-related and consistent with business necessity. Reversing the ruling of the U.S. District Court for the Northern District of Texas granting partial summary judgment in favor of the EEOC, the Fifth Circuit held that, if an employer institutes a policy affecting a broad class of disabled employees, the policy must be consistent with business necessity, but the employer need not demonstrate a direct threat in every case.

## Analysis

The ADA prohibits discrimination against a qualified individual with a disability if that individual can perform the essential job functions with or without reasonable accommodation. More specifically, the ADA prohibits an employer from using general qualification standards to screen out a broad class of disabled individuals. Nevertheless, if physical or mental qualification standards adversely impact individuals with disabilities, employers may raise two affirmative defenses to challenges to the standards under provisions of the ADA. First, Section 12113(a) of the ADA permits an employer to screen out an individual if the qualification standard is job-related and consistent with business necessity:

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards . . . that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity . . . .

Second, Section 12113(b) allows an employer to raise the defense that the employee's disability poses a significant threat of harm to the himself/herself or others:

The term "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.

This "direct threat" defense is much more difficult to establish because it requires that an employer be able to prove — in each individual case — that a particular employee poses a significant threat in the workplace because of his or her inability to satisfy the qualification standard. Speculation that a threat may be posed will not sustain the direct threat defense. In contrast, the "business necessity" defense requires only that the employer be able to establish that — in general — the qualification standard is narrowly constructed to avoid undue discrimination and truly related to legitimate safety concerns of the employer.

According to the EEOC, employers could not use the more broad-based business necessity defense. Instead, the EEOC claimed that whenever an employer used a safety-related, disability-based, qualification standard, it had to demonstrate **in every case** that the standard was required because of the "direct threat" posed by each individually affected employee.

In *Exxon*, the Fifth Circuit rejected the EEOC's position, noting that the language of Section 12113(a) implies that it covers general standards that apply to **all employees**, whereas Section 12113(b) relates to requirements that **individuals** not pose a threat to health or safety. In addition, although no other court of appeal had addressed this specific issue, the Fifth Circuit noted a "general trend" among the appellate circuits to rule that **employees who are unable to meet general safety requirements are unqualified for their jobs** regardless of whether the employer can prove the direct threat defense.

The *Exxon* decision provides that employers will have more latitude in establishing policies to address safety concerns without risk that they will be required to prove that the policy was necessary in each individual, case-by-case, situation. Still, employers must ensure that such policies are job-related and consistent with business necessity. In other words, employers must (1) narrowly tailor their policies to address the specific business concern; (2) base their policies on empirical evidence, including scientific and medical research; and (3) avoid policies based on prejudices and stereotypes. To evaluate whether the risks addressed by a safety-related policy is in keeping with business necessity, the courts will weigh the magnitude of the possible harm, as well as the probability of occurrence. As such, generally applied safety policies related to disabilities must be carefully drafted.

To illustrate, although Exxon prevailed on appeal in the present case, the Fifth Circuit remanded the case to the trial court to determine whether chances that former drug and alcohol abusers would relapse was high enough to justify Exxon's policy. Accordingly, employers are still well-advised to consult with counsel before implementing safety-related policies and qualification standards that may implicate the ADA.

If you would like a copy of the decision, or if you have questions about safety qualification standards specifically or the ADA generally, we encourage you to contact **Bob Wenbourne** in our Sacramento office, **Bud Bobber** in our Chicago office, **Guy Farmer** in our Jacksonville office, **Rick Albert** or **Michael Graham** in our Los Angeles office, **Michael Auen** in our Madison office, **Tom Pence** or **Ann Mennell** in our Milwaukee office, **Dick DuRose** in our Orlando office, **Darrell Pugh** in our San Diego office, **John Douglas** in our San Francisco office, or the member of the firm who normally handles your legal matters.

*Law Watch* is a review of recent legal developments prepared by the law offices of Foley & Lardner.

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