



*Oklahoma Attorney General Scott Pruitt's  
Office of Civil Rights Enforcement Presents*

## **DISABILITY EMPLOYMENT LAW CONFERENCE**

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*25<sup>TH</sup> Anniversary of the Americans with Disabilities Act*

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*10.20.2015*

*A charitable event benefiting Oklahomans with disabilities and Oklahoma employers by offering practical strategies for successfully employing people with disabilities in compliance with disability employment laws.*

**[What are "Direct Threats" and "Undue Burdens"?)**

**Bill Wells/Wells Law Firm**

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**OKLAHOMA ATTORNEY GENERAL  
DISABILITY EMPLOYMENT LAW CONFERENCE**

***What are “Direct Threats” and “Undue Hardships”?***

*presented by*

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Bill Wells is the principal in Wells Law Firm, a labor and employment law firm located in downtown Oklahoma City. His practice emphasis is on labor and employment litigation.

Wells served four years as President of the Oklahoma Employment Lawyers Association, and is an active member of the Oklahoma Bar Association (Evidence Code Committee, Legal Ethics Advisory Panel, Labor and Employment Law Section). He serves as General Counsel for the Central Oklahoma Manufacturers Association, and previously served on the Board of Directors for the Oklahoma Lawyers Association and the Oklahoma Association for Rowing. He is also a proud shareholder in the Green Bay Packers.

Wells has presented programs on labor and employment law and trial techniques to legal, governmental and business groups throughout Oklahoma, including the U.S. Equal Employment Opportunity Commission, Oklahoma Judicial Conference, Oklahoma Bar Association, Oklahoma Trial Lawyers Association, State Chamber of Oklahoma, Oklahoma Manufacturing Alliance, Central Oklahoma Manufacturers Association, Oklahoma Transit Association and the Canadian Valley, Central, Francis Tuttle, Gordon Cooper, Great Plains, High Plains, Kiamichi, Mid-America, Moore Norman, Pioneer, Pontotoc, Red River and Southern Oklahoma Technology Centers. Seminar topics include: *"From the Boardroom to the Courtroom: Labor Litigation," "Crossfire: Navigating the Family and Medical Leave Act, the Americans with Disabilities Act and Oklahoma's Workers' Compensation Code,"* and *"Breaking News: Using News Media as Evidence at Trial."*

Wells is admitted to practice before the U.S. District Courts for the Western, Eastern and Northern Districts of Oklahoma, and the Tenth Circuit and Federal Circuit Courts of Appeal. He has handled litigation in the vast majority of Oklahoma's district courts, and has prosecuted and defended claims before the U.S. Equal Employment Opportunity Commission, U.S. Department of Labor, Oklahoma Attorney General Office of Civil Rights Enforcement, Oklahoma Department of Labor, Oklahoma Merit Protection Commission and the Oklahoma Employment Security Commission.

Wells is a graduate of the University of Oklahoma College of Law. Prior to moving to Oklahoma to accept a position with the Oklahoma City 89ers Baseball Club, he attended Indiana University. During law school, Wells was a member of the school's Association of Trial Lawyers of America trial competition team and was chosen for the Order of Barristers. Prior to law school, he was a staff writer for *The Oklahoman*.

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***WHAT ARE “DIRECT THREATS” AND “UNDUE HARDSHIPS”?***

*presented by*

**Bill Wells  
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Oklahoma City, Oklahoma**

**A. INTRODUCTION**

While gaining notoriety in establishing wheelchair-accessible curbs and disabled-patron parking spaces as common fixtures of everyday life, the Americans with Disabilities Act of 1990 ("ADA") has also had a dynamic impact in the American workplace. In furtherance of its objective to eliminate barriers to equal employment opportunities for individuals with disabilities, the ADA requires employers to hire, fire and make other employment-related decisions without regard to an applicant's or employee's "disability." 42 U.S.C. §§ 12101 et seq. More specifically, an employer cannot decline to hire or decide to fire a "qualified individual with a disability" because of the individual's disability. 42 U.S.C. § 12112.

The process of ascertaining whether an employment matter invokes the ADA begins with (and may end with) an analysis of the following two issues:

- (a) Is the subject employee an individual with a "disability"?
- (b) Is the subject employee a "qualified individual with a disability"?

A negative answer to either question will preclude an ADA claim.

**B. AN INDIVIDUAL WITH A “DISABILITY”**

Under the ADA, an individual with a “disability” is one who:

- (1) Has a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (2) Has a record of such an impairment; or,
- (3) Is being regarded as having such an impairment.

42 U.S.C. § 12102(2).

Under the first-prong definition, a physical or mental impairment must first be identified. Once identified, the impairment is then evaluated to discern whether it substantially limits one or more major life activities (e.g., walking, hearing, working a class of jobs).

**C. A “QUALIFIED INDIVIDUAL WITH A DISABILITY”**

Even in those situations where a “disability” is established, an employee must also prove he or she is “qualified” to invoke the protection of the ADA. 42 U.S.C. § 12111(8). The U.S. Court of Appeals for the 10<sup>th</sup> Circuit (the federal appellate court for Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) has crafted a two-part test for making such a determination:

First, we must determine whether the individual [in spite of his or her disability] could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

*Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10<sup>th</sup> Cir. 1996); *Cisneros v. Wilson*, 226 F.3d 1113, 1128-1129 (10<sup>th</sup> Cir. 2000); also see *Davidson v. AmericaOnline, Inc.*, 337 F.3d 1179, 1182 (10<sup>th</sup> Cir. 2003).

In this analysis, a negative answer to both of these questions will preclude an ADA claim. As such, at this stage of the analysis, the battle lines are usually drawn with regard to identifying (a) the essential functions of the employee's position, and/or (b) the existence of any reasonable accommodation that can be provided.

Deference is given to the employer in identifying the essential functions of a position. 29 C.F.R. § 1630.2(n)(3)(I). Often, a pre-existing job description will serve as critical evidence. 29 C.F.R. § 1630.2(n)(3)(ii).

**D. PROTECTION FOR A "QUALIFIED INDIVIDUAL WITH A DISABILITY"**

Once an employee has established that he or she is a "qualified individual with a disability," the employer is required to:

- (a) Provide the reasonable accommodation that will enable the employee to perform the essential functions of the position; and/or,
- (b) Not discriminate against the employee because of the employee's disability.

42 U.S.C. § 12112.

## E. “Direct Threats” and “Undue Hardships”

### What are “Direct Threats” and “Undue Hardships”?

- Within the context of litigation, “direct threats” and “undue hardships” are potential “defenses” to ADA claims.
- Under a “direct threat” defense, an employer is claiming that it undertook the employment action that is the subject of the discrimination claim (e.g., a refusal to hire, a decision to fire) because the applicant’s or employee’s disability poses a “direct threat” to the health or safety of the applicant/employee and/or others.
- Under an “undue hardship” defense, an employer is claiming that it did not provide a reasonable accommodation because doing so would pose an “undue hardship” on its operations.

### “Direct Threat” Example

Acme Corporation declines to hire John Doe because, it contends, Mr. Doe’s exposure to a chemical he would be required to utilize in the performance of the position he is applying for would exacerbate his disability (Hepatitis C).

### “Undue Hardship” Example

Beta Company denies Jane Doe’s request for an indefinite leave of absence to address her disability (diabetes) because, it contends, an open-ended leave of absence would pose an “undue hardship” on its operations.

### *Oklahoma Angle*

- ✓ The Oklahoma Anti-Discrimination Act provides that an employer may raise “any defense that is available under ... the Americans with Disabilities Act, ...”

Okla. Stat. Ann. tit. 25, § 1350(F).

### **“Direct Threat” Definition/Evaluation**

- An employer may impose a job requirement that “an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.”
- A “direct threat” means “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
- The direct threat determination shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job.
- The individualized assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.
- In determining whether an individual would pose a direct threat, the factors to be considered include the following:
  - ✓ The duration of the risk;
  - ✓ The nature and severity of the potential harm;
  - ✓ The likelihood that the potential harm will occur; and,
  - ✓ The imminence of the potential harm.

*Chevron USA v. Echazabal*, 536 U.S. 73, 78-79 (2002) (citing 29 C.F.R. §§ 1630.2(r), 1630.15(b)).

### **OSHA Sidebar**

- ✓ The Occupational Safety and Health Act of 1970 requires employers to provide employees with a “safe and healthful workplace.”

## **“Undue Hardship” Definition/Evaluation**

- An employer is not required to provide a reasonable accommodation if doing so would pose an “undue hardship” on the employer.
- A reasonable accommodation would pose an “undue hardship” if the accommodation would involve “significant difficulty or expense.”
- In determining whether a reasonable accommodation would pose an undue hardship, the factors to be considered include the following:
  - ✓ The nature and net cost of the accommodation, taking into consideration the availability of outside funding or tax credits;
  - ✓ The financial resources and employee population of the subject facility, and any effect on the expenses and resources of the facility;
  - ✓ The financial resources, employee populations and locations of any affiliated facilities;
  - ✓ The nature of the operation(s) of the subject facility and any affiliated facilities; and,
  - ✓ The impact of the accommodation upon the operation of the subject facility, including any impact on the ability of other employees to perform their duties and/or the facility’s ability to otherwise conduct business.

EEOC Enforcement Guidance No. 915.002: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (10/17/02).

### ***FMLA Sidebar***

The Family and Medical Leave Act of 1993 (FMLA) requires certain employers to provide certain employees with job-protected leave in certain circumstances. Any request for leave should be evaluated (and potentially administered) under the ADA and FMLA.

— Case Study —

***Osborne v. Baxter Healthcare Corp.***  
**U.S. Court of Appeals for the 10<sup>th</sup> Circuit (08/24/15)**

**Factual Background**

- Kelly Osborne, who is deaf and primarily communicates through lip reading, applied for a position as a Plasma Center Technician (“PCT”) with Baxter Healthcare at its “BioLife Plasma Services” business in Cheyenne, Wyoming.
- The PCT position involves three primary tasks: (1) taking donors’ medical history, (2) monitoring the area where donors give plasma to watch for adverse reactions, and (3) working in the sample preparation area where donated plasma is processed and stored.
- Following two interviews with BioLife’s local management, Osborne was conditionally offered the PCT position contingent upon a background check, drug test and medical screening.
- After learning that Osborne is deaf, Baxter Healthcare’s corporate office directed BioLife’s local management to rescind its offer of employment based on its belief Osborne could not perform the essential function of donor monitoring.
- After her offer of employment was rescinded, Osborne brought suit in federal district court claiming violations of the ADA.
- The federal district court dismissed Osborne’s claims based on its finding that Osborne could not perform the essential function of donor monitoring with or without a reasonable accommodation.

— Case Study —

***Osborne v. Baxter Healthcare Corp.***  
**U.S. Court of Appeals for the 10<sup>th</sup> Circuit (08/24/15)**

**Proposed Accommodation: Visual or Vibrating Alerts**

- BioLife’s plasma machines are equipped with an alarm that will sound in the event of certain donor adverse reactions.
- Osborne proposed that the plasma machines be equipped with visual or vibrating alerts to supplement the alarms.
- BioLife argued that such an accommodation would pose an “undue hardship” because it would be required to retain a specialized vendor.

***Undue Hardship Evaluation***

- ✓ The 10<sup>th</sup> Circuit held that such equipment modifications can be considered a reasonable accommodation, and that Baxter Healthcare failed to establish an “undue hardship” defense because it failed to demonstrate – through, for example, a cost analysis – how the accommodation would impose “significant difficulty or expense.”

**Proposed Accommodation: Donor Call Buttons**

- PCTs respond to donor verbal requests for assistance, including instances of adverse reactions.
- Osborne proposed that donors could be equipped with call buttons similar to those employed in hospitals.
- Baxter Healthcare argued that relying on call buttons would pose a “direct threat” to its donors.

***Direct Threat Evaluation***

- ✓ The 10th Circuit held that the infrequency (4-5 per year) and nature (e.g., headaches, nausea) of donor adverse reactions does not rise to the level of a “direct threat.”