

Balancing Safety and the Rights of Disabled Employees

by STEVEN FELLMAN

THE EQUAL EMPLOYMENT Opportunity Commission (EEOC) is the federal agency responsible for enforcing the provisions included in the Americans with Disabilities Act (ADA) that mandate equal employment for persons with disabilities. The Department of Transportation (DOT) is the federal agency responsible for setting safety requirements for commercial drivers operating in interstate commerce. The Occupational Health and Safety Administration (OSHA) is the arm of the Department of Labor responsible for setting health and safety requirements in the workplace. Ideally, these three Federal agencies should work together and coordinate their responsibilities, but sometimes they fail to do so. And the end result? The contractor/employer is placed in a lose-lose situation.

Take the example of the driver of a truck that moves materials to a job site and crosses state lines in the process. The truck in question is a sixteen-wheeler and the driver is required to have a commercial driver's license. One day, the driver comes to his supervisor and volunteers that he is an alcoholic who started drinking again and has now entered into a treatment program. He asks for a special work schedule so that he can take time off to attend the doctor-supervised program.

The contractor responds by saying the company will accommodate the driver and give him the flexible schedule that he wants, but he no longer qualifies as a driver and will instead be given a job on the loading dock. The employee then

sues, claiming that under the ADA his alcoholism is a disability and he is entitled to maintain his job as a driver as long as he has stopped drinking and is in the process of completing a valid recovery program. Although the DOT might find otherwise, the EEOC would contend that the employee is correct and his status as a driver should be maintained as long as he remains sober.


Let's take a second, similar set of facts, again involving trucking. A company's policy is that it will hire only qualified applicants. The company trains the applicants after they are hired, then has them apply for commercial driver's licenses. One of the applicants is qualified for the job, but has a medical history that indicates it is unlikely that he or she will ever get a commercial driver's license based on current DOT standards. According to the EEOC, that applicant must be hired by the company anyway, as they are a qualified person with a disability.

These situations don't make sense. What would happen if the employee with a disability had a couple of drinks and then got into an accident that involved bodily injury or death to a pedestrian while driving a company truck? What would a jury say if the plaintiff's attorney explained that the driver of the company truck that turned his client into a paraplegic had a history of alcoholism and the company was aware of that history?

Obviously, there is an urgent need for OSHA, EEOC and DOT to coordinate their positions. Unfortunately, there is no pressure

on the agencies to do so. Each agency operates within the confines of its own jurisdiction and no one looks at the big picture.

Who is supposed to provide oversight? That's the job of Congress, of course. But as we have all seen, Congress has not even been able to agree on a budget for the current fiscal year, let alone cooperate on a strategy to properly supervise the administrative agencies.

Under these circumstances, what can a contractor do to minimize liability? Contractors must make sure that job descriptions are tightly written so that job qualifications are spelled out in detail. Think long and hard about the essential skills needed for each position, and don't rely on old, outdated job descriptions. All the men and women sent from the hiring hall may not be qualified, and as an employer, you must have written criteria on file if you intend to reject unqualified applicants. A little preparation now can save you a lot of headaches – and legal and regulatory red tape – down the road. 



Steve Fellman is a shareholder with GKG Law in Washington, D.C. He is also general counsel to The Association of Union Constructors.