

3 Circuit Court Rulings Offer ADA Compliance Lessons

By **Erin Foley and James Nasiri** (April 20, 2022)

Three federal circuit courts have issued recent Americans with Disabilities Act rulings — all of which resulted in employer victories — that collectively offer several important takeaways for employers and human resources personnel.

This article will briefly summarize these decisions out of the U.S. Courts of Appeals for the First, Seventh and Tenth Circuits, and then seek to provide some thoughts on how businesses can navigate difficult employment scenarios within the bounds of the ADA.



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Fincher v. Town of Brookline

The plaintiff in *Fincher v. Town of Brookline*^[1] was hired into the town's Sanitation Division, which required a commercial driver's license to hold an advanced position.

Since the plaintiff did not possess a CDL, he was designated as a packer.

Shortly after being hired, the plaintiff suffered a shoulder injury while throwing trash into a truck, eventually returning to work with restrictions on heavy lifting and working longer than six consecutive hours.



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The town initially accommodated the plaintiff by giving him less strenuous tasks, but when it could no longer accommodate his six-hour work days, the town placed him on short-term disability leave and subsequently scheduled a reasonable accommodation meeting.

At this meeting, the town determined that it could no longer accommodate the plaintiff due to his long-term work restrictions and failure to obtain a CDL, which resulted in the termination of his employment.

While the plaintiff only asserted a race discrimination claim under Title 42 of the U.S. Code, Section 1983, he alleged that the town refused to accommodate his disability because of his race, so the U.S. Court of Appeals for the First Circuit primarily focused on the town's efforts to reasonably accommodate the plaintiff's disability.

To that end, the plaintiff claimed that another laborer, referenced as "K.G.," could not perform the essential functions of his position due to a physical disability, yet the town granted K.G. a transfer.

The First Circuit reasoned, however, that the plaintiff and K.G. were not similarly situated because K.G. possessed a CDL and was transferred to a role requiring such a license.

When the plaintiff further contended that the town's reasons for termination were pretext for discrimination, the court emphasized the town's good faith efforts to accommodate the plaintiff's disability through light-duty assignments, modifications to his work schedule, and a reasonable accommodation meeting.

As a result, on Feb. 18, the First Circuit affirmed the ruling in the town's favor.

Pontinen v. U.S. Steel Corp.

The plaintiff in *Pontinen v. United States Steel Corp.*^[2] suffered from an uncontrolled seizure disorder, and his neurologist prescribed him medication to reduce the risk of seizures.

After taking the seizure medication for two years, the plaintiff made several requests to stop taking this medication, so his neurologist adjusted his treatment plan to gradually remove the seizure medication altogether.

A few months later, the plaintiff applied to a safety-sensitive position at U.S. Steel.

The company made him a job offer contingent upon passing a fitness-for-duty examination, but during the company's examination process, it was revealed that the plaintiff had experienced four seizures and stopped taking medication against his neurologist's advice.

Consequently, U.S. Steel determined that the plaintiff's work restrictions could not be accommodated, and revoked his job offer.

The plaintiff sued U.S. Steel under the ADA, and on appeal, the U.S. Court of Appeals for the Seventh Circuit began by assessing whether the company's decision to revoke the plaintiff's job offer was based on adequate medical evidence, and if it had undertaken an individualized assessment.

To that end, the court confirmed that U.S. Steel relied on several sets of objective medical evidence, including:

- The U.S. Department of Transportation's physical job requirements;
- The neurologist's medical referral form;
- The neurologist's treatment notes; and
- The plaintiff's own health forms and examination.

The plaintiff challenged U.S. Steel's reliance on DOT regulations as categorical discrimination, but the court emphasized that the company's decision was based on much more than solely the DOT regulations, which only bolstered the company's argument that an individualized assessment had occurred.

U.S. Steel also relied on the statutory "direct threat" defense, which provides that employers may refuse to hire an employee who poses a direct threat to the health and safety of others.^[3]

Here, the court reasoned that the workplace risk posed by the plaintiff was indefinite, likely to occur and severe in light of his uncontrolled seizure disorder and the company's potentially dangerous steel plant environment.

Accordingly, the Seventh Circuit affirmed the grant of U.S. Steel's motion for summary judgment on Feb. 11.

Litzsinger v. Adams County Coroner's Office

The plaintiff in *Litzsinger v. Adams County Coroner's Office*^[4] — who suffered from anxiety and depression — was a medicolegal death investigator for the coroner's office.

The plaintiff regularly examined bodies as they arrived, but on one occasion she refused, stating that she was burnt out. She then went on leave pursuant to the Family and Medical Leave Act.

Prior to her taking FMLA leave, the coroner's office had issued the plaintiff several performance warnings — most notably for excessive personal internet use — and upon her return from leave, it placed her on probation for these reasons.

Co-workers then reported that the plaintiff continued to visit websites unrelated to her work, leading the coroner's office to terminate her employment.

The plaintiff asserted claims under the ADA and FMLA, arguing that her former employer's stated reason for her termination — excessive personal internet use — was pretext for retaliation.

Specifically, she pointed out that the coroner's office exhibited frustration with her FMLA leave request, but the U.S. Court of Appeals for the Tenth Circuit found this evidence to be unavailing because the plaintiff failed to follow the office's FMLA leave policy.

The court also stressed that the coroner's office asked the plaintiff on multiple occasions whether she needed any help or accommodations related to her mental health issues, which she declined, stating that she thought an accommodation would "show weakness and possibly lead to disciplinary action."

On appeal, the Tenth Circuit rejected the plaintiff's additional arguments, including her attempt to show that a "regular employee" would not be fired for personal internet use.

Here, the court referenced the office's electronic media usage policy, which provided that personal internet use at work was a privilege revocable at the coroner's discretion.

The plaintiff further alleged that her former employer's reasons for termination changed over time, but the Tenth Circuit again disagreed, holding that the office's additional reasons simply bolstered its original justification.

Thus, the Tenth Circuit affirmed the ruling in favor of the coroner's office on Feb. 15.

ADA Compliance Takeaways for Employers

The ADA is a broad statute covering almost every employment scenario, and the flood of employee filings under the act is not going away anytime soon.

In fact, the ADA is one of the most frequently cited statutes in employment discrimination actions, both on the federal court level^[5] and at the Equal Employment Opportunity Commission.^[6]

The three cases discussed above provide an excellent foundation for our discussion regarding the ADA's contours both during an individual's hiring process and during his or her subsequent employment.

How to Approach the Hiring Process

Navigating the hiring process with respect to an applicant with disabilities can be a delicate affair that often leads to legal disputes. Fortunately, courts and administrative bodies offer various guidelines for employers on how to comply with the ADA during this process.

For example, consider the Pontinen case. During the Seventh Circuit's analysis of whether the applicant would pose a direct threat under the ADA, the court made an interesting statement when it noted that the plaintiff's claims would have been evaluated differently if the company made its hiring decision based solely on the DOT regulations.

This statement should raise a flag for employers — especially those operating within the Seventh Circuit's jurisdiction — that any hiring decisions must be an individualized and careful assessment of the individual's abilities as they relate to the job for which the person is applying.

In other words, any hiring decision made in reliance on general government or industry guidelines must also be supported by substantial evidence relevant to the specific employee at issue.

The EEOC has also issued guidelines that shed light on how employers can comply with the ADA at the preemployment stage.[7]

These guidelines provide a number of important points, including that:

- Employers cannot ask disability-related questions or require medical examinations before an offer has been made, but they can inquire about the applicant's ability to satisfy specific job functions;
- Once an offer has been made, the employer can then ask disability-related questions and require medical examinations, so long as the same process is followed for all employees in that job category;
- If a job offer is rescinded due to a disability, the employer must be able to show that its reasons supporting the decision are "job-related and consistent with business necessity"; and
- If a job offer is rescinded due to safety reasons, the employer must be able to show that the individual poses a direct threat.

In short, employers are cautioned against rejecting applicants simply because they present with a disability or request at the preemployment stage some type of accommodation.

All such inquiries should be further evaluated to determine if reasonable accommodation can

be made to the stated restrictions; whether further medical evaluation may be warranted post-offer to determine whether job modifications are available; or whether some other, more appropriate position — i.e., better suited to the individual's abilities — may be available.

ADA Compliance and the Accommodation Process

Outside of the hiring process, this recent trio of ADA decisions also provides several valuable takeaways when addressing accommodation requests from employees.

The Fincher decision, for instance, is an excellent case study on handling disability accommodation requests. Though the plaintiff in Fincher took multiple disability-related leaves of absence and returned with varying work restrictions, the employer consistently abided by its good faith duty to accommodate, or at least attempt to accommodate, reasonable requests.

Fincher also underscores an important principal of disability law: The determination of what constitutes a reasonable accommodation ultimately lies with the employer.

Employers that have participated in the interactive process in good faith and documented every step in the process are under no obligation to accommodate an employee when such an accommodation would infringe upon some legitimate business reason or be realistically unworkable when put into action.

Additionally, the Tenth Circuit's pretext analysis in Litzsinger reveals a key lesson for companies facing employment-related litigation.

Specifically, the court's reasoning heavily relied on the employer's relevant employment policies, which underscores the importance of implementing — and then following and enforcing — clear, uniform policies with regard to workplace conduct.

This practice is also highlighted in Fincher, where the employer maintained clear promotion requirements that were universally applied.

Implementing neutral policies in this manner can be a strong rebuttal to claims challenging the motivation behind certain employment decisions.

Last but certainly not least, every court mentioned above emphasized the importance of documentation.

For example, because the employer in Litzsinger regularly documented the plaintiff's performance issues, it was able to articulate more clearly a legitimate reason for the plaintiff's termination.

Employers must be diligent in this respect, as steady documentation of performance issues is one of the strongest possible defenses when facing an employment discrimination claim.

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[1] *Fincher v. Town of Brookline*, 26 F.4th 479 (1st Cir. 2022).

[2] *Pontinen v. United States Steel Corporation*, 26 F.4th 401 (7th Cir. 2022).

[3] 42 U.S.C.A. § 12113(b).

[4] *Litzsinger v. Adams County Coroner's Office*, 25 F.4th 1280 (10th Cir. 2022).

[5] Administrative Office of the U.S. Courts, *Just the Facts: Americans with Disabilities Act* (July 12, 2018) <https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act>.

[6] See U.S. Equal Employment Opportunity Commission, *Charges Statistics (Charges filed with EEOC) FY 1997 Through FY 2021*, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021>; see also Christopher J. DeGross, Matthew J. Gagnon, & Gerald L. Maatman, Jr., *2022 EEOC-Initiated Litigation Report*, Seyfarth Shaw LLP (2022), <https://www.content.seyfarth.com/publications/EEOC-Initiated-Litigation-2022/>.

[7] U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>.