

12.11 ADA—Defenses—Business Necessity

Business necessity is a defense to a claim of discrimination under the ADA.

If you find that the defendant [*name*]’s application of a standard, criterion, or policy has [the effect of screening out or otherwise denying a job or benefit to individuals with plaintiff [*name*]’s disability] [a disparate impact on individuals with plaintiff [*name*]’s disability], the defendant [*name*] must prove, by a preponderance of the evidence, each of the following four elements regarding that standard, criterion, or policy:

First, it is uniformly applied;

Second, it is job-related;

Third, it is consistent with business necessity; and

Fourth, it cannot be met by a person with plaintiff [*name*]’s disability even with a reasonable accommodation.

If you find that each of the elements on which the plaintiff [*name*] has the burden of proof has been proved, your verdict should be for the plaintiff [*name*], unless you also find that the defendant [*name*] has proved each of the elements of this affirmative defense, in which event your verdict should be for the defendant [*name*].

Comment

See 42 U.S.C. § 12113(a) (describing defenses and terms); 29 C.F.R. § 1630.15(b) (1999) (describing the four elements a defendant must prove to satisfy its burden). For a discussion of the business necessity defense as it applies to an across-the-board employer qualification standard (hearing test for package car drivers), see *Bates v. UPS, Inc.*, 511 F.3d 974, 994-98 (9th Cir. 2007) (*en banc*). For an analysis of business necessity as it applies when an employer requires an employee to undergo a medical examination under 42 U.S.C. § 12112(d)(4)(A), see *Brownfield v. City of Yakima*, 612 F.3d 1140, 1146 (9th Cir. 2010) (holding that the standard may be met even before an employee’s work performance declines if the employer has significant evidence that could cause a reasonable person to inquire whether the employee is still capable of performing the job; finding police officer exhibiting erratic behavior could be referred for fitness for duty examination); see also *Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009) (defining medical examination).

The Supreme Court has recognized that the “direct threat” affirmative defense (*i.e.*, whether an employee poses a threat to others or to the employee himself or herself) is consistent with the “business necessity” principles encompassed in the ADA (§ 12113) and the EEOC regulations (29 C.F.R. § 1630.15(b)(2) (2001)). *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76-77 (2002).

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