lines (*J Am Acad Psychiatry Law* 30(Suppl 2):S3–40, 2002). It could be argued that, compared with attorneys, forensic psychiatrists ask more open-ended questions, but this does not necessarily equate with informality. It is therefore perhaps somewhat hasty and unjust for the court to dismiss the exercise as informal and unstructured.

Post-traumatic Stress Disorder, Employment Discrimination, and Direct Threat Claims

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An Employee With Post-traumatic Stress Disorder May Be Terminated if Symptoms Pose a Direct Threat and Cannot Be Reasonably Accommodated

In *Jarvis v. Potter*, 500 F.3d 1113 (10th Cir. 2007), the U.S. Court of Appeals for the Tenth Circuit considered whether the trial court had erred when granting summary judgment in favor of the United States Postal Service (USPS) in a discrimination and retaliation suit by a postal worker with post-traumatic stress disorder. The appeals court affirmed the decision on the disability claim that the plaintiff was not a "qualified individual" because he posed a "direct threat" that could not be reasonably accommodated.

Facts of the Case

Lanny Bart Jarvis was a Vietnam veteran who had worked for the U.S. Postal Service as a mail handler and subsequently as a custodian. He had received a diagnosis of post-traumatic stress disorder in the late 1990s, and in 2002 he began to have difficulties at his workplace due to PTSD. After being startled twice by one co-worker, on two separate occasions he respectively "struck" and kicked her inadvertently; on another occasion he clenched his fist when startled by his supervisor. According to Mr. Jarvis, he also asked the supervisor to tell his co-workers that he had PTSD and that they should avoid "scaring" him; they should speak to him in a normal tone of voice and not approach him from behind. Neither his co-worker nor his supervisor reported these incidents.

A third incident led to the investigation that ultimately resulted in Mr. Jarvis' termination from the Postal Service. One witness said that Mr. Jarvis was obtaining a key to fix a mail truck when a co-worker "goosed or poked" (*Jarvis*, p 1118) him, whereupon he hit the co-worker's shoulder, and the co-worker reported the incident. During a deposition, Mr. Jarvis described his intentions more ominously and dramatically: "*I was ready to kill the guy*" (*Jarvis*, p 1117; emphasis in original). A witness described the incident as a "so-what deal" (*Jarvis*, p 1118).

The third incident led to an investigation resulting in Mr. Jarvis' being placed on leave with pay and almost immediately thereafter without pay. Mr. Jarvis appealed this decision, and the Postal Service held a "due process meeting" at which he reported that "if he hit someone in the right place, he could kill him," that his PTSD was worsening, that he "c[ould] no longer stop the first blow," and that he "could not safely return to the workplace" (*Jarvis*, p 1118). He also requested that his supervisor pursue disability retirement for him and offered to have his treating nurse practitioner, Sonia Hales, send a letter explaining the significance of his PTSD. As part of her letter, Ms. Hales stated that she had reviewed his prior treaters' records, which noted the severity of his symptoms, and that because of his PTSD, he "may pose some threat in the work place." She stated further that, given that he had identified his work as a "significant stressor in his life, . . . a medical retirement may be beneficial for him" (*Jarvis*, p 1119). He was then sent a letter of termination based on the incidents with the first and third co-workers, his assertions at his due process hearing, and his treater's letter. He then filed discrimination and retaliation complaints with the Equal Employment Opportunity (EEO) office. He also asked for accrued sick leave and vacation time, which he was denied. He was then sent a letter offering him the opportunity to resign should he do so by a certain date and without the condition that he receive disability retirement. (He ultimately received disability retirement.)

Mr. Jarvis sued the USPS in the district court for the District of Utah, alleging that it had violated the Vocational Rehabilitation Act (VRA), 29 U.S.C.S. § 701 et seq. (2006), and had retaliated against him for

his complaints to the EEO. The Postal Service moved for summary judgment, which was granted on both the discrimination and retaliation claims. On the discrimination claim, the district court agreed with the USPS that Mr. Jarvis posed a direct threat that could not be reasonably accommodated by the Postal Service and that he was therefore not a "qualified individual" under the VRA. It also granted summary judgment on the retaliation claim, finding that the USPS terminated him because he posed a direct threat, rather than because he had filed complaints and that he had failed to demonstrate that there was an alternate, or "pretextual," reason for the termination. Mr. Jarvis then appealed the granting of summary judgment.

Ruling

The Tenth Circuit found no error in the granting of summary judgment on the discrimination claim and affirmed part of the summary judgment on the retaliation claim, but it reversed on the part concerning financial compensation.

Reasoning

The court of appeals first explained that review of the trial court's ruling entailed evaluating whether the court used appropriate legal standards. The essential part of its decision-making was not a determination of whether Mr. Jarvis presented a direct threat, but whether the employer's determination that an employee poses a direct threat is "objectively reasonable."

Preliminarily, the court explained that an assessment of whether the VRA has been violated applies the same standards used to determine whether the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12111 et seq. (2006), has been violated. To make a claim of discrimination under the ADA, and hence the VRA, a person with a disability must demonstrate that he or she is a "qualified individual with a disability"—that is, "one who with or without a reasonable accommodation can perform the essential functions of the employment position (42 U.S.C. § 12111(8))" (*Jarvis*, p 1121). As a defense against this argument that an individual is qualified, EEOC regulation (29 C.F.R. § 1630.2 (r)) allows an employer to argue that an employee who poses a "direct threat," defined as "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," is not so qualified (*Jarvis*, p 1121). To make an objectively reasonable assessment, the employer must provide an assessment based on "the most current medical knowledge and/or the best available medical evidence" and must take into account four factors in determining whether a person poses a direct threat: "(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm" (*Jarvis*, p. 1122).

The Tenth Circuit reasoned that the evidence at the due process hearing, the interviews that the USPS conducted, and Ms. Hales' letter provided sufficient objective medical evidence and that, given the chronic nature of Mr. Jarvis' disease and the likelihood that he would be startled at any time, three of the four factors were satisfied: duration, likelihood, and imminence. It noted that determining the severity was less clear. More importantly, the court concluded that this threat could not be reasonably accommodated, given the evidence that co-workers could startle him inadvertently, as shown by the first co-worker's having done so, resulting in Mr. Jarvis' striking and kicking her.

Regarding the retaliation claims, although the court upheld summary judgment regarding two of the claims, namely that his termination and a failure to provide a written witness statement were retaliatory, it reversed the lower court's decision with respect to Mr. Jarvis' claims regarding the retaliatory nature of placing him on leave without pay, preventing him from obtaining accrued vacation and sick leave, and stipulating that he resign without assurance of medical disability retirement. It reasoned that, in line with ADA requirements, the USPS's explanation that Mr. Jarvis was a direct threat was not a sufficient explanation for these adverse actions. Therefore, it remanded these retaliation claims to the lower court.

Discussion

The court's decision regarding the discrimination claim in *Jarvis* appears to reflect the courts' and the public's growing concern regarding violence in institutions and by employees, postal workers being a notable example. Given that concern, it seems reasonable to expect the courts to rule on the side of public safety when a plausible concern regarding workplace safety arises. As a result, if a worker poses a direct threat, a strong showing that the employee can

be reasonably accommodated in this regard must be made to offset the direct-threat claim by an employer. In *Jarvis*, the only arguments made that Mr. Jarvis could be reasonably accommodated were his own suggestions that his co-workers be warned, speak in a normal tone, and not approach him from behind. Perhaps a more effective accommodation could have been suggested that would have satisfied the court had Mr. Jarvis undergone a forensic evaluation, which may have resulted in recommendations that would have reduced the risk. Moreover, the only professional evidence presented about his being a direct threat was his treater's letter, with a result contrary to the likely intent. A forensic evaluation might have contributed additional critical evidence concerning the implications of his psychiatric disability and whether it could have been accommodated in the workplace.

Character and Fitness to Take the Bar Exam

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Bar Applicant Failed to Meet His Burden of Proving by Clear and Convincing Evidence His Character and Fitness for Bar Admission

In *In re Application of Blackwell*, 880 N.E.2d 886 (Ohio 2007), the Supreme Court of Ohio reviewed the recommendation of the Ohio Board of Commissioners on Character and Fitness to disapprove Rahshann Blackwell's pending application to take the Ohio bar examination, because he was psychologically unfit to enter the practice of law.

Facts of the Case

Mr. Blackwell graduated from law school in May 2000, and had since failed the Ohio bar examination five times. During his last two attempts, in July 2003 and July 2005, he was charged with violating test protocol by continuing to write on portions of the examination after time was called. The current case is related to the July 2005 test protocol violation, but to understand the events leading to the current case, it is necessary to outline the prior related incidents.

In July 2003, Mr. Blackwell took the test but was subsequently charged with violating test protocol by continuing to write on portions of the examination after the allotted time had expired. That October, the Ohio Board of Bar Examiners disqualified five of his essay answers that were completed after time was called, leaving Mr. Blackwell unable to achieve a passing score. The matter was referred to the Ohio Character and Fitness Board, which appointed a panel to conduct a hearing to investigate further. At the hearing, Mr. Blackwell provided clear and convincing evidence as to his good character and fitness and assured the panel that he would not violate test protocol in future examinations. Thus, the panel recommended to the Ohio Character and Fitness Board the approval of Mr. Blackwell as having the character and fitness to apply to take the bar examination again. In November 2004, he applied to take the examination, but his application was rejected as incomplete by the Office of Bar Admissions.

By March 22, 2005, Mr. Blackwell had acquired four traffic violations, for which he was arrested, charged, and detained in jail. In addition, he was sued by the University of Denver for approximately $6,200 in past-due tuition. While still detained in jail, Mr. Blackwell applied to take the July 2005 bar examination by updating the re-examination character portion of the rejected November 2004 application and asking his secretary to submit it with a now-invalid notarized signature page. Although the character portion of the re-examination questionnaire clearly requires applicants to disclose "any civil or administrative action or legal proceeding" and "any criminal or quasi-criminal action of legal proceeding" (*Blackwell*, p 534), Mr. Blackwell failed to disclose this information in the application. Eventually, he disclosed his legal proceedings to the Bar Admission Office after dismissal of all but one of the traffic violations.

In July 2005, he took the bar examination and was again charged with violating test protocol by continuing to write on portions of the examination after the expiration of the allotted time. The Board of Bar Examiners disqualified his entire bar examination after receiving four witness reports of the alleged test-