

## **Are Mandatory EAP Referrals Illegal under the ADA: Simon Says, apply the “Some Harm” standard**

Dealing with employee issues under the ADA continues to be one of the single most challenging aspects of managing employees, especially when performance or misconduct issues are also in play. A recent decision out of the 10th Circuit Court of Appeals (covering Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) highlights that challenge.

In *Scheer v. Sisters of Charity*, 144 F.4th 1212, 1215 (10th Cir. 2025), Bethany Scheer sued her former employer after it terminated her following her refusal to participate in its Employee Assistance Program (EAP) for mental health counseling as part of a Performance Improvement Plan (PIP).

To set the stage, Scheer worked for Sisters of Charity from 2014 to 2019. During this time, Scheer had inconsistent job performance, receiving seven corrective actions for failure to meet her productivity targets. Scheer also received counseling because of professional and behavioral issues. Ultimately, Sisters of Charity put Scheer on a PIP to increase her consistency. The day before the PIP was drafted, Scheer told coworkers, including a supervisor and manager, that she was struggling with personal issues, causing concern for her mental well-being and safety. The PIP was revised to include an action plan consisting of a mandatory referral to EAP for counseling as a condition of continued employment.

When presented with the PIP, Scheer disputed the need for it as she has met the minimum standards for productivity. However, she indicated she was not opposed to seeing a counselor. Scheer was later presented with the EAP Formal Referral Form, which she refused to sign. Sister City terminated Scheer’s employment, and Scheer sued, alleging that Sisters of Charity perceived her as suffering from a mental illness. Originally, the lower district court granted summary judgment to the employer, concluding that a mandatory EAP referral was not an adverse employment action because it did not cause a “significant change” to Scheer’s employment status. Because the mandatory referral was not an adverse employment action, the district court originally concluded that Scheer’s employment was properly terminated because she refused to fulfill a condition of the PIP.

Soon after, the U.S. Supreme Court’s *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), decision issued, changing the legal standard (used in certain circuits), from needing to show ‘significant,’ ‘material,’ or ‘serious injury to requiring only “some harm.” In other words, the employer’s action “must have left [the plaintiff] worse off, but need not have left her significantly so.” The 10th Circuit reversed and remanded its original summary judgment findings, concluding that Scheer’s allegations warrant reconsideration by the district to determine whether Scheer suffered “some harm” when her employment was conditioned on executing the Form.

So, what does this decision mean in application? Does it mean that mandatory referrals to EAP are illegal? Not necessarily. However, employers should exercise caution and consult with labor and employment counsel before requiring an employee to attend mental health counseling, even when well intentioned. Employers may experience an uptick in ADA litigation because now only ‘some harm’ is required to be deemed an adverse action instead of a heightened ‘significant’ employment change. Put another way, because the lowered threshold may increase the likelihood that plaintiffs will survive dismissals, litigation under the ADA may be more protracted. Now is the time for employers to review their EAP and mental health referral policy to ensure they are compliant with the ADA. Meanwhile, stay tuned to find out what the District Court decides when re-evaluating Scheer’s claim under the lower standard of harm.

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