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# Disability Discrimination in the Form of Ad Hoc Examinations

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# Disability Discrimination in the Form of *Ad Hoc* Examinations

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## ABSTRACT

*The 1990 Americans with Disabilities Act (ADA), alongside the Nebraska Fair Employment Practice Act (FEPA), prohibit discrimination against employees on the basis of disability. One of the lesser examined provisions of the twin acts presumes that employer-mandated medical examinations of individuals with disabilities amount to unlawful discrimination unless the employer can demonstrate a business necessity. The precise elements of a business necessity defense were articulated and explicated by the Nebraska Supreme Court in the recently decided case of Arens v. NEBCO, Inc.*

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## I. INTRODUCTION

In *Arens v. NEBCO, Inc.*, the Nebraska Supreme Court reversed a defense jury verdict on account of an erroneous evidentiary ruling.<sup>1</sup> Lenard Arens, a truck driver, sued his employer under Nebraska’s counterpart to the ADA, the Nebraska Fair Employment Practice Act, which prohibits discrimination because of disability.<sup>2</sup> In remanding Arens’ case for a new trial, the court adopted federal case law interpreting analogous provisions of the ADA dealing with medical examinations of employees. To avoid liability, an employer must now establish a three-

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<sup>1</sup> No. S-14-290, 2015 WL 5460677, \*18, 291 Neb. 834, 868, -- N.W.2d -- (Neb. Sept. 18, 2015).

<sup>2</sup> See NEB. REV. STAT. §§ 48-1101 to 48-1126 (2014).

part showing of business necessity when it requires an employee to submit to a medical examination. *Arens* displays principled statutory interpretation while giving effect to the legislative aim of achieving workplaces which are free from discrimination against individuals with disabilities.<sup>3</sup>

## II. STATUTORY BACKGROUND

Nebraska's unicameral legislature adopted the Nebraska Fair Employment Practice Act in 1965, just one year after Title VII on which it was modeled.<sup>4</sup> Discrimination on the basis of disability was added to the list of prohibited characteristics (e.g., race and religion) on which employment decisions can be made in 1973.<sup>5</sup> Nebraska's civil rights protections thus predated the congressional mandate of the ADA by seventeen years.<sup>6</sup>

What distinguishes disability discrimination from discrimination on the basis of characteristics race or religion is that it is not enough for an employer to ignore the existence of the characteristic. With racial discrimination, for example, a "color blind" approach typically relieves the employer of liability. With disability, however, ignoring the existence of a disability is insufficient—in some contexts, responding to the employee's disability is necessary in order to accommodate an employee's particular needs and impairments so that they can successfully meet the requirements of the job. Thus, disability discrimination can occur when a qualified disabled

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<sup>3</sup> 1965 Neb. Laws ch. 276, § 1; *see also* NEB. REV. STAT. § 48-1101 (2014) (proclaiming: "It is the public policy of this state that all people in Nebraska, both with and without disabilities, shall have the right and opportunity to enjoy the benefits of living, working, and recreating within this state.").

<sup>4</sup> 1965 Neb. Laws 782; *see also* *Airport Inn v. Neb. Equal Opportunity Comm'n*, 353 N.W.2d 727, 731 (Neb. 1984) (noting that FEPA "is patterned from that part of the Civil Rights Act of 1964").

<sup>5</sup> 1973 Neb. Laws, LB 266 § 1.

<sup>6</sup> *But see* Rehabilitation Act of 1973 at 29 U.S.C. § 791, *et seq.* (2014) (providing limited protections for individuals with disabilities).

worker is terminated on account of a disability, and it can also occur when a disabled worker is not given the accommodations that would permit her to do her job.<sup>7</sup>

As part of the comprehensive protections for individuals with disabilities, employer-mandated medical examinations are permitted only in narrowly-defined circumstances. Following the enactment of the ADA in 1990, the Nebraska legislature adopted amendments to FEPA which, mirroring the ADA, forbade employee medical examinations except where job-related and consistent with a business necessity.<sup>8</sup> Those provisions were squarely implicated in *Arens*.

### III. THE FACTS

Nebco hired Lenard Arens in 1976.<sup>9</sup> Soon, Arens was driving a concrete truck, but ten years into his career with Nebco, he shattered his kneecap in a work-related accident.<sup>10</sup> After his injury healed, Arens found it hard to drive a concrete truck in Lincoln, Nebraska's traffic on account of the strain on his "clutch leg." It was also hard for him to wash out the mixing drum, required several times a day since that required climbing a ladder with partial handholds. As an accommodation, Arens was assigned to tractor-trailers and delivered unmixed concrete materials to job sites. This was easier on his leg.<sup>11</sup>

In 1996, Arens was making a concrete delivery with a flatbed truck. Somehow, he fell and sustained a traumatic brain injury. He was unable to work for six months. His speech,

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<sup>7</sup> See NEB. REV. STAT. § 48-1107(1)(e) (2014) (defining discrimination as "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability"); 42 U.S.C. § 12112(b)(5)(A) (2015) (same); *see also* NEB. REV. STAT. § 48-1104(1) (2014) (making it unlawful "to discharge, or to harass any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's ... disability").

<sup>8</sup> *Arens v. NEBCO, Inc.*, No. S-14-290, 2015 WL 5460677, at \*15 (Neb. Sept. 18, 2015).

<sup>9</sup> *Id.* at \*5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

emotional stability, and memory were permanently affected. Rehabilitative therapy allowed him to return to work, but persistent dizziness made driving a concrete truck with ladders even less realistic.<sup>12</sup>

Nebco responded in ways that the drafters of the ADA and FEPA would praise. Arens' co-workers developed the habit of giving Arens written instructions to accommodate his short-term memory deficits. His supervisor, Ron Hansen, kept Arens from the concrete trucks and the one flatbed truck equipped with a forklift because of Arens' problems with dizziness. (A driver must climb onto the back of the trailer and then up and into the forklift.) Instead, Hansen assigned Arens to the flatbed trucks without a forklift and he never again assigned him to the concrete trucks.<sup>13</sup>

Hansen supervised Arens for 28 years but in the summer of 2006 Hansen retired. He was replaced by Gordon Wisbey. Arens began to feel that Wisbey was ignoring his impairments and singling him out.<sup>14</sup> Arens continued to see a mental health counselor and manage his emotional instabilities and cognitive impairments.

That fall, Arens was distracted by a guard directing traffic as he turned into a job site. An electrical switchbox was damaged. Arens dutifully completed a damage report the same day, but Wisbey reprimanded him. Nebco, Wisbey warned, would not tolerate that kind of behavior and further instances would result in more severe consequences, "up to and including termination." Two years later, when one of Nebco's junior drivers complained about driving the forklift truck, Wisbey told Arens that he was being re-assigned to drive the forklift truck. Arens later testified

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*5, 6.

<sup>14</sup> *Id.* at \*5.

that he told his supervisor the forklift truck was difficult for him on account of his impairments, but that he feared losing his job if he did not comply.<sup>15</sup>

On Monday, December 6, 2010, Arens had another minor accident as he turned into Nebco's driveway off of Cornhusker Highway.<sup>16</sup> Cars were approaching rapidly and Arens turned the corner sharply—at 10 miles per hour – to avoid an accident. A tarp box on the underside of the trailer hit the grass, scraping up some sod. The tarp box itself was undamaged. Other trucks had—Arens later claimed with photographic support—run over the grass in the same place. Arens told a dispatcher that a damage report was unnecessary because there had been no damage to the truck. The next day, when Wisbey asked Arens why he had not filed an report, Arens explained that there had been no truck damage. Wisbey later claimed the cost to repair the sod was about \$250. Arens fixed some of it himself.<sup>17</sup>

According to Arens, his coworkers then overloaded a forklift truck for a Wednesday delivery in the Lincoln city limits. Arens complained about the weight of the materials and the way they had been stacked, but he made the delivery. As he maneuvered a roundabout, however, the trailer frame hooked the tractor (because, Arens would explain, of the excessive weight). When he arrived on the job site, the customer objected, saying he had not ordered so much material.<sup>18</sup>

At the end of the Wednesday workday, Arens filed a “maintenance report,” but not a “damage report.” On Thursday, Wisbey, “had already talked to the general manager and had developed a plan for dealing with Arens.” Wisbey completed a damage report for Arens and told

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<sup>15</sup> *Id.* at \*6.

<sup>16</sup> Brief of Appellant at 14, *Arens v. NEBCO, Inc.*, No. S-14-290, 2015 WL 5460677 (Neb. Sept. 18, 2015).

<sup>17</sup> *Arens*, 2015 WL 5460677, at \*6, 7.

<sup>18</sup> *Id.* at \*7.

him if he had been at work on Monday, he would have fired him. Arens was dumbfounded. He was terrified.<sup>19</sup>

Early Friday morning, Arens' worst fears were confirmed. Wisby, in what Arens claimed was an angry and berating tone, explained to him that he was being reassigned from tractor-trailers back to concrete trucks. As it was winter, no one was ordering premixed concrete, so Arens was effectively laid off. Arens broke down and cried. He begged to be allowed to drive a flatbed without the forklift again. Arens was emotionally overwhelmed, avoided eye contact, and kept his head in his hands. The meeting lasted three hours.<sup>20</sup>

Later, Wisbey, under cross examination, would admit that he himself had had accidents driving a concrete truck. He conceded that other drivers had failed to file reports. He acknowledged that he had never before reassigned a driver for failing to file a report. And he admitted that other drivers had had accidents under his supervision—as many as twenty. None of those drivers had been reassigned.<sup>21</sup>

On Monday morning, Wisbey scheduled Arens for an occupational health screening. Later that day, he referred Arens to an employee counseling program. The Nebraska Supreme Court would characterize both appointments as medical examinations.<sup>22</sup>

The nurse who performed the occupational health screening was instructed by Nebco to screen for Arens' ability to drive a concrete truck. Arens had only recently completed a physical to maintain his commercial driver's license and a screening would not have been required if Arens could have simply returned to driving his former truck. The examination revealed that Arens could not climb an 18-inch step. Initially, the nurse reported that Arens could drive his

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<sup>19</sup> *Id.* at \*7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at \*16, n. 47.

former truck, if not a concrete truck. Later, she documented that Arens could not drive his former truck either. When Arens was told of the results of the screening, he became upset. Wisbey, concerned, told him that he needed to meet with a counselor and told him that if he did not, it would affect his laid-off employment status.<sup>23</sup>

According to Arens, Wisbey delivered this directive by throwing a counseling card and pamphlet at him; Wisbey did not write out any instructions or explain why Arens should attend counseling. Arens claimed that he told Wisbey that he saw a psychologist on a regular basis. Wisbey ignored him. Soon thereafter, Arens called the counselor's office and explained that he was already seeing a psychologist. The counselor told Arens that it was not mandatory that he receive counseling from that office if he was seeing a counselor elsewhere. Within a week, Nebco fired Arens, citing his failure to report to employer-mandated counseling.<sup>24</sup>

#### IV. DISCUSSION

At trial, Arens claimed, among other things, that the medical screening and mandatory counseling violated Nebraska Revised Statute Section 48-1107.02(j).<sup>25</sup> That statute prohibits mandatory medical examinations of current employees with disabilities except where the examination is "job-related and consistent with business necessity."<sup>26</sup> Nebco claimed that once it transferred Arens back to driving a concrete truck, it had the right to ensure that he could operate it safely; that a fitness-for-duty was both job-related and a business necessity, the necessity being

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<sup>23</sup> *Id.* at \*8.

<sup>24</sup> *Id.* at \*9.

<sup>25</sup> Lenard Arens also argued – and the court agreed – “that Nebco could not transfer him for his known physical and mental impairments [to driving a concrete truck] without first making reasonable accommodations or showing that it could not make accommodations.” *Arens*, 2015 WL 5460677, \*14.

<sup>26</sup> NEB. REV. STAT. § 48-1107.02(j) (2014). Another provision applies to medical examinations of job applicants. NEB. REV. STAT. § 48-1107.02(i) (2014). The Lancaster county district court confused the two provisions. *Arens*, 2015 WL 5460677, \*17.



safety. For similar reasons, Nebco justified mandatory counseling based on its concerns about Arens' emotional stability.

In adopting the federal standards for medical examinations of individuals with disabilities, the *Arens* Court recognized the importance of workplace safety concerns, but suggested that Nebco's business necessity defense would not be easy to establish.<sup>27</sup> "[O]nce an employee is doing a job," the Court noted, "actual performance is the best measure of his or her ability and [so] medical examinations should be rarely required of employees."<sup>28</sup> While acknowledging that whether Arens could physically drive a truck "was vital to Nebco's business", Nebco would have to show "significant evidence that a reasonable person would doubt that the employee could perform the essential functions of the job, with or without reasonable accommodations, because of a medical condition."<sup>29</sup>

A three-part evidentiary showing from the employer is required. First, the business necessity must be vital to the business (with the court acknowledging that a vital business interest was indeed present; a bona fide safety concern).<sup>30</sup> Second, the employer must have "a legitimate, nondiscriminatory reason to doubt the employee's ability to perform the essential

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<sup>27</sup> See *Arens*, 2015 WL 5460677, at \*16 (describing the business necessity defense to medical examinations of employees with disabilities as "a high standard.") citing 1 JONATHAN R. MOOK, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS & EMPLOYER OBLIGATIONS § 5.04[3][b] (2004); Deborah H. Buckman, Annotation, *Construction and application of § 102(d) of Americans with Disabilities Act (42 U.S.C.A. § 12112(d)) pertaining to medical examinations and inquiries*, 159 A.L.R. FED. 89 (2000); see also Chai R. Feldblum, *Medical Examinations and Inquiries under the Americans with Disabilities Act: A View from the Inside*, 64 TEMP. L. REV. 521, 535 (1991) (emphasizing that employers cannot "require broad, wide-ranging medical examinations--of either applicants or employees" without demonstrating "that the results of the examinations were necessary to insure the applicants' or employees' ability to perform the job."). The business necessity standard is an objective test. *Arens*, 2015 WL 5460677, at \*16.

<sup>28</sup> *Arens*, 2015 WL 5460677, at \*16.

<sup>29</sup> *Id.* at \*17.

<sup>30</sup> *Id.* at \*16.

functions of his or her duties.”<sup>31</sup> Annoying employee behavior or inefficient job performance standing alone cannot justify an exam; there must be “genuine reason” to doubt an employee’s abilities to execute their job functions.<sup>32</sup> Third, the examination itself must be narrowly tailored; “no broader than necessary.”<sup>33</sup>

Before the district court, Nebco argued that the occupational screening and counseling “were tailored to the job’s duties.”<sup>34</sup> Before the Supreme Court, Nebco emphasized that Arens had been required to pass an occupational screening test just like every other driver and pointed out that driving a concrete truck imposed different physical requirements than driving a flatbed. None of these assertions would be enough to achieve a business necessity defense, the Nebraska Supreme Court made clear.<sup>35</sup> Rather, the primary issue, on remand, would be “whether Nebco presented substantial evidence that it had a nondiscriminatory reason to doubt Arens’ physical ability to perform the essential functions of driving a concrete truck or tractor-trailer, with or without reasonable accommodations” and, as to the psychological counseling, whether Nebco had substantial evidence of nondiscriminatory reasons to doubt Arens’ mental abilities to perform his job’s essential functions – with or without any reasonable accommodations.<sup>36</sup>

## V. CONCLUSION

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, quoting *Sullivan v. River Valley School Dist.*, 197 F.3d 804, 811 (6th Cir. 1999).

<sup>33</sup> *Arens*, 2015 WL 5460677, at \*17.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* The court was unimpressed by Nebco having argued, on the one hand, that examining Arens for his fitness to drive the concrete truck to which he had been reassigned was necessary because a concrete truck involved different physical requirements than a flatbed, while “inconsistently argu[ing] that Wisbey did not anticipate any problems with transferring Arens because climbing the ladder on a concrete truck was very similar to the climbing that Arens had to do to get into the forklift on the back of his tractor-trailer.” *Id.*

<sup>36</sup> *Arens*, 2015 WL 5460677, at \*17.

*Arens* demonstrates the strength of anti-discrimination protections for individuals with disabilities in the context of employment. Employers do have the ability to impose necessary, narrowly-tailored medical examinations to ensure workplace safety. Yet employers may often require workplace examinations as a pretext for discrimination on account of an employee's disability. When an *ad hoc* examination is required without a preexisting policy that applies to a given situation, a strict application of the business necessity defense will be imposed.

The *Arens* Court's adoption of a three-part business necessity defense to examinations in employment is consistent with the FEPA's similarity to the ADA's employment provisions. In fact, the provisions governing medical examinations of current employees are identical.<sup>37</sup> The adoption of the federal courts' phraseology of the business necessity defense to employer mandated medical examinations also honors the express legislative intent of the Nebraska Unicameral.<sup>38</sup>

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<sup>37</sup> Compare NEB. REV. STAT. § 48-1107.02(j) (2014) with 42 U.S.C. § 12112(d)(4)(A) (2014).

<sup>38</sup> See *Arens*, 2015 WL 5460677, at \*15 (noting that the Nebraska legislature "intended that its 1993 amendments to [FEPA] would provide the same protections" as the ADA) (citing Introducer's Statement of Intent, L.B. 360, Business and Labor Committee, 93<sup>rd</sup> Leg., 1<sup>st</sup> Sess. (Jan. 29, 1993)).