

## A Cautionary Tale for Employers: Mandatory EAP Attendance May Violate the Americans with Disabilities Act

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An Employee Assistance Program (“EAP”) is a program offered by an employer that may provide confidential psychological assessment, counseling, referrals and other services to employees who have personal and/or work based problems. A recent case, *EEOC v. Weis Supermarkets*, reinforces for employers that employees cannot be required to attend an EAP without the employer running afoul of the rules regarding medical testing under the Americans with Disabilities Act (“ADA”).

### **EEOC v. Weis Supermarkets**

In *EEOC v. Weis Supermarkets* (“Weis”), Elizabeth Book, a supermarket worker, alleged that she had been sexually harassed by her supervisor, who made vulgar, sexually related comments in the workplace, and touched her in a sexual manner without her consent. Book made a complaint against her supervisor, and he admitted to the inappropriate behavior. Weis issued the supervisor a warning and required him to attend sexual harassment training, but he was not disciplined in any other manner. Subsequent to her complaint, Book’s colleagues complained that she was creating a “hostile work environment” because they were afraid she was going to report them for engaging in unspecified workplace misconduct.

Weis required Ms. Book to complete an EAP referral as her condition of continued employment with the Company. Ms. Book was given 24 hours to initiate the EAP process and could not return to work until she had done so. Weis’ EAP program consisted of mental health counseling services by licensed therapists. In order to participate in the program, she had to complete an authorization form allowing the release of her medical records to the EAP. Ms. Book refused to comply with Weis’ order for her to attend the EAP program. She was then suspended and terminated.

### **EAP Attendance Cannot Be Mandatory**

The EEOC brought sexual harassment and disability discrimination claims against Weis. The EEOC and Weis eventually settled the case by a mutually agreed upon consent decree. The decree awarded \$75,000 to Ms. Book, and Weis agreed to remediate its sexually hostile work place. Further, Weis agreed not to require employees to participate in an EAP that would involve unlawful medical exams or disability-related inquiries. In a statement, the EEOC reiterated its position that medical examinations and disability-related inquiries must be job-related and consistent with business necessity. If they are not, as in the case of Ms. Book, they may violate the rights of workers under the ADA.

**TAKEAWAY:** EAPs are valuable resources but an employee’s attendance cannot be required unless the employer has a job-related reason for the requirement that is consistent with business necessity. If you have questions on your EAP program or any federal or New Jersey employment law, contact [Stephanie Gironda](#) or any member of the Wilentz [Employment Law](#) Team

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