



**Medical Examinations and Inquiries
Under the Americans with Disabilities Act
DBTAC: Great Lakes ADA Center***
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**Overview of the ADA's Provisions Governing
Disability-Related Inquiries and Medical Examinations**

When Congress enacted the Americans with Disabilities Act ("ADA"), it found that historically people with disabilities have been "subjected to a history of purposeful unequal treatment" in many areas including employment. (42 U.S.C. 12101) The ADA is unique among civil rights laws because it strictly prohibits certain inquiries and examinations. Specifically, Title I of the ADA bars employers from questioning about the existence, nature or severity of a disability and prohibits medical examinations until after a conditional offer of employment has been made. (42 U.S.C. 12112(d)(2)(A)) Even once a conditional offer is made, the ADA provides certain restrictions and safeguards. (42 U.S.C. 12112(d)(3) & (4))

At the pre-offer stage, the employer is only entitled to ask about an applicant's ability to perform the essential functions of the job. (42 U.S.C. 12112(d)(2)(B)) The ADA's restriction against pre-employment inquiries reflects the intent of Congress, to prevent discrimination against individuals with "hidden" disabilities, like HIV, heart disease, cancer, mental illness, diabetes and epilepsy, as well as to keep employers from inquiring and conducting examinations related to more visible disabilities like people who are deaf, blind or use wheelchairs. The ADA's prohibition against pre-employment questioning and examinations seeks to ensure that the applicant's disability is not considered prior to the assessment of the applicant's qualifications.

After a conditional offer is made, employers may require medical examinations and may make disability-related inquiries if they do so for all entering employees in that job category. (42 U.S.C. 12112 (d)(3)) If an examination or inquiry screens out an individual because of a disability, the exclusionary criterion must be job-related and consistent with business necessity. (42 U.S.C. 12112 (b)(6)) In addition, the employer must show that the criterion cannot be satisfied and the essential functions cannot be performed with a reasonable accommodation. (42 U.S.C. 12111 (8))

Once a person is employed, an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity. (42 U.S.C. 12112 (d)(4)(A)) An employer can ask about the ability of the employee to perform job-related functions and may also conduct voluntary medical examinations, which are part of an employee health program. (42 U.S.C. 12112 (d)(4)(B))

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All disability related information obtained from disability inquiries and examinations at any stage of employment must be maintained on separate forms in separate medical files and treated as a confidential medical record. (42 U.S.C. 12112(d)(3)(B))

Congress charged the Equal Employment Opportunity Commission (“EEOC”) with enforcing Title I of the ADA. Over the years, the EEOC has issued several documents that provide more in-depth analysis on disability related inquiries and medical examinations, including: *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act (1995)*; *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (2000)*; and *Fact Sheet: Job Applicants and the Americans with Disabilities Act (2003)*. All of these documents can be found on the EEOC’s website at www.eeoc.gov. Unlike other provisions of the ADA, the courts have generally been very deferential to the EEOC’s guidance on disability-related inquiries and medical examinations. (*See Grenier v. Cyanamid Plastics*, 70 F.3d 667 (1st Cir. 1995); and *Thompson v. Borg-Warner Protective Services Corp.*, 1996 WL 162990 (N.D. Cal. Mar. 11, 1996))

While the ADA’s provisions covering disability-related inquiries and medical examinations have not resulted in as much litigation as other provisions of the ADA, such as the definition of disability, several interesting issues have been examined by the courts. This Legal Brief will review the legal issues related to disability-related inquiries and medical examinations that have been the subject of litigation, and the court decisions interpreting those issues.

Prohibition Against Exams and Inquiries Prior to Conditional Offer of Employment

As noted above, Section 12112(d)(2) of the ADA prohibits employers from requiring applicants or employees to undergo medical examinations or answer disability-related inquiries prior to a conditional offer of employment. Several cases have examined this specific provision of the ADA:

In *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005), the court reversed the lower court’s granting of summary judgment for an employer. The case involved three HIV-positive applicants who alleged the employer conducted unlawful medical examinations during the application process by extending a job offer contingent on results of a medical examination. The court held that employers could only conduct medical examinations as the last step of the application process and only after making a real job offer.

In *Birch v. Jennico 2*, 2006 WL 1049477 (W.D. Wis. Apr. 19, 2006), the issue was whether a *real* conditional offer had been made prior to administering a medical exam. In this case, the court denied the defendant’s motion for summary judgment, explaining that if the plaintiff had been required to get a medical examination before he was hired,

then the ADA may have been violated. Relying on *Leonel*, the court noted that the ADA requires medical examinations to be conducted as a separate, second step of the selection process, after the individual has met all of the other job prerequisites.

Similarly, in *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002), the court stated that if a job offer is conditioned not only on the applicant successfully passing a medical examination, but also a myriad of non-medical screening tests, then the offer is not real. However, in this case, the plaintiff had already completed all non-medical screening tests, and signed statement of understanding entitled "conditional offer of employment." Consequently, the court granted the summary judgment for the employer and dismissed the plaintiff's ADA claims.

Who Can Bring Suit?

Courts have differed over the years about whether ADA's restrictions on disability-related inquiries and medical examinations protect only people with disabilities, or if it applies to all applicants and employees. In other words, can people who cannot prove that they have an ADA disability, still be protected by the ADA's prohibition against improper medical examinations and disability-related inquiries? The majority of courts have held that *any* applicant or employee who is subjected to an improper medical examination or disability-related inquiry can challenge illegal medical examinations. In *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221 (10th Cir. 1997), an employee filed an ADA suit against her employer for requiring employees to report their use of prescription drugs. The court held that the employer violated the ADA, and also ruled that the employee did not have to prove that she was an individual with a disability to bring her ADA case. Numerous other courts have reached similar conclusions. *See Conroy v. NY State Dept. of Correctional Services*, 333 F.3d 88 (2d Cir. 2003); *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003); *Fredenburg v. Contra Costa Co. Dept. of Health Services*, 172 F.3d 1176, 1182 (9th Cir. 1999); *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955 (10th Cir. 2002); *Jackson v. Lake County*, 2003 WL 22127743 (N.D. Ill. Sept. 15, 2003); and *Green v. Joy Cone Co.*, 278 F.Supp.2d 526 (W.D. Pa. 2003).

However, one court ruled that the applicant needed to provide evidence of an ADA disability to challenge a pre-employment medical exam. In *Bone v. City of Louisville*, 215 F.3d 325 (6th Cir. 2000), a police officer filed an ADA lawsuit after being required to submit to a psychological test prior to a conditional offer of employment. In an unpublished opinion, the court found that the applicant could not bring an ADA case because he did not have a disability.

Currently two circuits have expressly declined to address this question: the Third Circuit (*Tice v. Centre Area Transp. Auth.*, 247 F.3d 506 (3d Cir. 2001)); and the Fifth Circuit (*Fuzy v. S&B Engineers & Constructors, Ltd.*, 332 F.3d 301 (5th Cir. 2003)).

The reasoning supporting majority view that proving an ADA disability is not required is threefold. First, since Congress used the specific term "qualified individual with a

disability" throughout much of the ADA, using the general terms "job applicant" and "employee" in §12112(d) evidences an intent to broaden the class of individuals covered in the specific section addressing disability-related inquiries and examinations. Second, since the purpose of the ADA was to put an end to discrimination against people with disabilities, courts have held that the best way to effectuate this purpose is to allow all job applicants to bring a cause of action against offending employers, rather than to limit that right to a narrower subset of applicants who are in fact disabled. Third, courts have held that it would be circular to require an employee to demonstrate that he has a disability in order to prevent his employer from inquiring as to whether or not he has a disability.

Are Personality Tests Considered Medical Examinations?

As previously noted, the ADA prohibits medical examinations at the pre-employment stage. 42 U.S.C. 12112(d)(2) Courts have held that medical examinations include psychological tests. For example, in *Barnes v. Cochran*, 944 F. Supp. 897 (S.D. Fla. 1996), *affirmed*, 130 F.3d 443 (11th Cir. 1997), the court confirmed that the prohibition of medical examinations prior to a conditional offer of employment includes psychological examinations.

Many employers administer "personality" tests ostensibly to obtain information about job applicants, such as honesty and temperament, as a way to determine whether the person would be a good hire. These tests have become widespread and studies have found that approximately 44% of private employers administer some type of personality test as part of the application or promotion process. Mental health advocates oppose these tests because they can be used to identify psychiatric disabilities resulting in the screening out of people with certain diagnoses. Accordingly, plaintiffs will argue that certain employers are using personality tests to obtain unlawful disability-related information in a more indirect way. This then leads to the ultimate question: Is a personality test is considered a medical examination under the ADA?

To determine whether a particular test is a "medical" test for ADA purposes, the EEOC has identified the following seven factors:

- (1) whether the test is administered by a health care professional;
- (2) whether the test is interpreted by a health care professional;
- (3) whether the test is designed to reveal an impairment of physical or mental health;
- (4) whether the test is invasive;
- (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task;
- (6) whether the test normally is given in a medical setting; and
- (7) whether medical equipment is used.

ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" (1995)

The most prominent case addressing the issue of whether a personality test is a medical test under the ADA is *Karraker v. Rent-A-Center*, 411 F.3d 831 (7th Cir. 2005). In *Karraker*, a group of current and former employees filed a class action alleging that the

employer's policy requiring employees seeking management positions to take the Minnesota Multiphasic Personality Inventory (MMPI) violated the ADA. Management applicants that had a certain score on the MMPI were automatically excluded from consideration. The plaintiffs alleged that the MMPI could identify conditions such as depression, paranoia, schizoid tendencies and mania. The trial court found that the test did not violate the ADA because it was used for "vocational" purposes to predict future job performance and compatibility rather than for "clinical" purposes. The plaintiffs appealed and the Seventh Circuit reversed holding that the MMPI is a test designed to diagnose mental impairments, and has the effect of hurting the employment prospects of people with mental illness, it is an improper medical examination that violates the ADA. The court held it was not dispositive that the employer did not use a psychologist or other health care professional to interpret the test. Rather, who interprets the test results is only one of seven factors identified by the EEOC that a court should consider when determining if a test is a medical examination under the ADA. The court further stated that "the practical effect of the use of the MMPI is similar no matter how the test is used or scored--that is, whether or not RAC used the test to weed out applicants with certain disorders, its use of the MMPI likely had the effect of excluding employees with disorders from promotions."

In light of the court's decision in *Karraker*, employers should be very cautious when using personality tests, especially the MMPI. Employers should determine whether there are less risky or more effective methods available for evaluating potential employees.

Physical Ability Testing

In its ADA Enforcement Guidance, the EEOC states that a physical ability test in which an applicant demonstrates the ability to perform actual or simulated job tasks is not a medical examination under the ADA. Similarly, a physical fitness test is not a medical examination unless the employer measures an applicant's physiological or biological responses to performance, then the test is a medical examination. ***ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations"* (1995)** A few courts have issued decisions on this issue:

In *Fuzy v. S&B Eng'rs & Constructors, Ltd.*, 332 F.3d 301 (5th Cir. 2003), an applicant for a pipefitting position failed to meet a 100 pound weight lift test, and was not hired. The court dismissed the plaintiff's suit, holding that the weight lifting requirement was job related. However, in *Jeffrey v. Ashcroft*, 285 F. Supp. 2d 583 (M.D. Pa. 2003), the court reached a different result. In *Jeffrey*, the Bureau of Prisons terminated a chaplain with chronic pulmonary disease after he failed a physical abilities test. The court denied summary judgment for the employer, holding that there was not sufficient evidence to show that passing the physical test was related to an essential function of the job. Furthermore, chaplains hired before 1997 were not required to take the physical test, and the test requirement had been waived for other chaplains.

Employers should remember that while administering physical ability tests does not automatically violate the ADA, they should only use tests that demonstrate the applicant's ability to perform the job.

Reasonable Accommodations in Examinations and Testing

When requiring job applicants or current employees to undergo examinations or testing, employers are required to provide reasonable accommodations for the testing process. In its technical assistance document, *Fact Sheet: Job Applicants and the ADA (2003)*, the EEOC reiterates that a potential employer's obligation to provide reasonable accommodation in the application process. There have been relatively few court cases addressing this issue.

In *Van Buskirk v. City of Indianapolis*, 2004 WL 2137658 (S.D. Ind. May 12, 2004), a dispatcher with childhood polio was terminated after failing a typing test. This test requirement had been waived when the plaintiff was first hired, and there was no evidence of employee misconduct or poor performance. The employer argued that the plaintiff could not perform the essential functions of the job because he failed the test, and that there was no possible accommodation. In denying summary judgment for the employer, the court held that there was little evidence that typing was an essential function of the job, as this requirement had previously been waived when he initially applied for the job, and the plaintiff had successfully performed the job for seven years. Accordingly, because the employer had "accommodated" the plaintiff during the application process by waiving the typing test, there was a question of fact about whether typing was an essential function.

Confidentiality of Information Obtained from Medical Inquiries

As noted above, Section 12112(d)(3)(B) of the ADA requires that the information obtained regarding the medical condition or history of an applicant is to be collected and maintained on separate forms, kept in separate medical files, and treated as a confidential medical record. While there have been relatively few reported decisions on this provision of the ADA, the following cases provide some additional analysis:

In *Cripe v. Mineta*, 2006 WL 1805728 (D.D.C. June 29, 2006), the attorney of an employee with HIV sent a letter to the employer regarding work accommodations. The employer failed to keep the letter confidential (the letter was sitting on a desk without an envelope) and, as a result other employees learned of the plaintiff's HIV status. The court rejected the employer's argument that the information did not have to be protected since it was not marked as confidential. (*See also, Doe v. U.S.P.S.*, 317 F.3d 339 (D.C.Cir. 2003), where the supervisor's disclosure of HIV status in conjunction with request for leave under the FMLA may have violated the Rehabilitation Act, using the same standards as the ADA.)

In *Lentz v. City of Cleveland*, 410 F.Supp.2d 673 (N.D. Ohio 2006), responding to an officer's shooting incident, the city released his personnel files which contained a pre-

employment psychological evaluation. Newspaper reporters published this information. The officer filed an ADA suit, and the city defended its actions claiming that under Ohio law, pre-employment psychological evaluations are not medical records because they are not sought in the process of medical treatment. The court disagreed and stated that the federal ADA preempts the state law. The court held that these pre-employment evaluations are confidential medical records not subject to public disclosure, and thus, denied the defendant's motion for summary judgment.

However, confidential information may be shared with individuals involved in the hiring process who need to know the information. In *O'Neal v. City of New Albany*, **293 F.3d 998 (7th Cir. 2002)**, the employer disclosed results of a medical examination to members of the local pension board. This board claimed it needed to certify the plaintiff's examination, and thus, needed to know the information. As a result, the court found that the ADA had not been violated because the disclosure was proper.

The EEOC interprets the confidentiality provision to apply to medical information even if it is voluntarily disclosed. (See 1995 EEOC Guidance cited above.) However, some courts have taken a more restrictive view. In *Cash v. Smith*, **231 F.3d 1301 (11th Cir. 2000)**, an employee disclosed her diabetes to her supervisor, and subsequently the supervisor disclosed that information to the employee's co-workers. The plaintiff brought an ADA case for, among other things, the improper disclosure of her disability. Contrary to the EEOC's position on this issue, the court held that the provision prohibiting disclosure of disability-related information did not apply to voluntary disclosures.

Conclusion

Unlike many provisions of the ADA that are more subjective and have been the subject of significant litigation (e.g. definition of disability, reasonable accommodation, and direct threat), the ADA's provisions for disability-related inquiries and medical examinations are more precise and straightforward.

However, as the legal analysis above demonstrates, there are certain issues in this area where courts have differed. Employers should provide training to its employees on these issues, and carefully review current employment application documents, policies and procedures to ensure compliance with the ADA.