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Medical Examinations and Inquiries Under the ADA

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Topics To Be Discussed

- Overview
- Case Interpretations of Inquiries and Exams
- Who Can Bring Suit?
- Are Personality Tests Medical Examinations?
- Physical Ability Testing
- Reasonable Accommodations in Examinations and Testing
- Confidentiality of Information

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Disability Related Inquiries and Medical Examinations

Overview



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Disability-Related Information – 3 Stages of Employment Process

The EEOC divides the employment process into three stages for obtaining disability-related information.

- A. Pre-Employment
- B. After a Conditional Job Offer
- C. On-The-Job

Information on slides 5-8 is from the following EEOC Enforcement Guidance at eoc.gov: *Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*; *Reasonable Accommodation and Undue Hardship Under the ADA*; *Preemployment Disability-Related Questions and Medical Examinations Under the ADA*.

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Pre-Employment Inquiries

- Employers cannot ask about the existence, nature or severity of a disability
- The employer may only ask about an applicant's ability to perform the essential job functions.
 - ❖ Demonstrating performance may also be requested
 - ❖ It is best to have a uniform practice for all applicants
- Examples of Permissible/Impermissible Questions

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Disability Information – After a Conditional Job Offer

B. After a Conditional Job Offer is Made.

(An offer conditioned on the applicant successfully meeting the reasonable and legitimate physical and medical requirements of the job)

- Employers may ask disability-related questions and require a medical exam if done uniformly (all applicants).
- Employers cannot withdraw a job offer unless the disability prevents performing the essential job functions & a reasonable accommodation cannot be provided.
- The reasons for denying a job must be **job-related** and **consistent with business necessity**.

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Disability-Related Information – On The Job

C. Once An Employee is on the Job:

The employer may only seek disability-related information if there is a “**reasonable basis**” for the employer to think that the employee:

- Is **unqualified** to do the job;
- Needs a **reasonable accommodation**; or
- Poses a **direct threat** to the health or safety of the employee or others.

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Medical Inquiries in General

- The employer is **NOT** entitled to request information regarding:
 - ❖ General medical information
 - ❖ Medical conditions or impairments unrelated to the reasonable accommodation request

The information must be used in a way that is “**job-related and consistent with business necessity.**”

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42 U.S.C. §12112(d)(4)(A); 29 C.F.R. §1630.14(c).

Medical Examinations

- A medical exam cannot be required before making a conditional job offer.
- The EEOC defines “medical examination”
 - ❖ “a procedure or test that seeks information about an individual's physical or mental impairments or health.”
- If given after a conditional offer of employment, medical exams must be:
 - ❖ Given to all applicants for the position who were extended job offers
 - ❖ Job-related and consistent with business necessity

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EEOC Enforcement Guidance on *Disability-Related Inquiries and Medical Examinations of Employees Under the ADA.*

EEOC Medical Examination Criteria

“[O]ne factor may be enough...”

- (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;

(Continued)

EEOC Enforcement Guidance on *Disability-Related Inquiries and Medical Examinations of Employees Under the ADA.*

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EEOC Medical Examination Criteria (Continued)

- (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.

EEOC Enforcement Guidance on *Disability-Related Inquiries and Medical Examinations of Employees Under the ADA.*

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Deference to EEOC Guidance

Unlike other provisions of the ADA, 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); *Thompson v. Borg-Warner Protective Services Corp.*, 1996 WL 162990 (N.D. Cal. Mar. 11, 1996); and *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002)

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Disability Related Inquiries and Medical Examinations

Court Decisions



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Court Decisions

Leonel v. American Airlines, Inc., 400 F.3d 702 (9th Cir. 2005)

- **Facts:** Three HIV-positive applicants alleged the employer conducted unlawful pre-employment medical examinations. Employer extended job offer contingent on results of a medical examination.
- **Court:** Violation of ADA - employers can only conduct medical examinations as the last step of the application process and only after making a **real** job offer.

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Court Decisions (continued)

O'Neal v. City of New Albany, 293 F.3d 998 (7th Cir. 2002)

- **Facts:** Police officer applicant required to take medical tests to confirm he did not have "heart problems." Applicant declined and sued under ADA.
- **Court:** Plaintiff had already completed all non-medical screening tests, and signed statement of understanding entitled "conditional offer of employment."

❖ Consequently, the court dismissed his ADA claim.

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Waiver of ADA Liability Permissible?

One case has upheld an employer's use of a waiver of ADA liability to prevent applicant from challenging employer's gathering of disability-related information in the pre-employment stage.

Nilsson v. City of Mesa, 503 F.3d 947 (9th Cir. 2007).

Tip: Although waiver was upheld in *Nilsson*, employers should be cautious in obtaining disability information prior to a conditional offer of employment.

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Disability Related Inquiries and Medical Examinations

Who Can Bring Suit?



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Who Can Bring Suit?

- **Issue:** Do the ADA's restrictions on disability-related inquiries and medical examinations protect only people with disabilities, or all applicants and employees?
- 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.

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Who Can Bring Suit? Court Decisions

Roe v. Cheyenne Mountain Conference Resort, 124 F.3d 1221 (10th Cir. 1997)

- **Facts:** Employee filed an ADA suit against her employer for requiring employees to report their use of prescription drugs.
- **Court:** Employee did not have to prove that she was an individual with a disability to bring her ADA case.

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Who Can Bring Suit? Court Decisions (Continued)

Most courts have found proving disability not required.

- *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)

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Who Can Bring Suit? Rationale for Not Requiring ADA Disability

1. Congress used "job applicant" and "employee" instead of "qualified individual with a disability"
2. Broader interpretation supports ADA purpose to end to disability discrimination
3. Circular to require plaintiff to demonstrate a disability in order to prevent employer from inquiring about a disability

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Who Can Bring Suit? Court Decisions (continued)

However, one court ruled that the applicant needed to have 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.

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Disability Related Inquiries and Medical Examinations

Are Personality Tests Medical Examinations?



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Karraker and Personality Testing

Karraker v. Rent-A-Center,
411 F.3d 831 (7th Cir. 2005)

Facts:

- RAC used MMPI. (Enough acronyms?)

Issue:

- Is the MMPI a medical examination?
 - ❖ What if RAC used a vocational grader and grading system?

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Karraker and Personality Testing

Karraker v. Rent-A-Center,
411 F.3d 831 (7th Cir. 2005)

Holding:

- MMPI is a medical examination
 - ❖ **Designed** to diagnose mental illness.
 - ❖ Even if vocational, not a medical, scale is used (grading system & grader).
- Tends to screen out people with mental illness

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Karraker – Different Types of Psychological Tests

Some MMPI Yes/No Questions:

- I hear voices without knowing where they come from.
- I have fits of laughing and crying that I cannot control.
- I have a habit of counting things that are not important such as bulbs on electric signs, and so forth.

Karraker cited the EEOC Guidance that states:

“Psychological tests that are ‘designed to identify a mental disorder or impairment’ qualify as medical examinations, but psychological tests ‘that measure personality traits such as honesty, preferences, and habits’ do not.”

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The Karraker Court’s Chicago-Centric Sarcasm

The Court Said:

- “RAC argues that ... the test only measured ... ‘the extent to which the test subject is experiencing the kinds of feelings of ‘depression’ that everyone feels from time to time (e.g., when their favorite team loses the World Series).”
- “Although that particular example seems odd to us (can an Illinois chain really fill its management positions if it won't promote disgruntled Cubs fans?), the logic behind it doesn't seem to add up, either...”

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Karraker, 411 F.3d at 835

The *Karraker* Court – Personality Testing A “Poor Predictor”?

The Court continued:

- “Either the MMPI was a **very poor predictor** ..., (which might be one reason it is no longer used by RAC), or it actually was designed to measure more than just an applicant's mood on a given day...”
- “The MMPI is best categorized as a medical examination.”

29 *Karraker*, 411 F.3d at 835-37

Karraker Ramifications

Ramifications:

- MMPI may not be given pre-offer.
- Use of personality tests in general may not be job-related or consistent with business necessity.

Items of Note:

- Excellent use of sarcasm by the 7th Circuit.

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See EFE Personality Testing Fact Sheet and Article

Additional Issues Surrounding Personality Testing

- Are personality tests beneficial in evaluating applicants?
- Do the benefits outweigh the risks of litigation?
- Do personality tests violate the privacy and confidentiality rights of job applicants?
- Are there less risky or more effective methods available for evaluating potential employees?
- For Individuals: What to do when asked to take a Personality or Pre-Employment Test?

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Additional Issues Surrounding Personality & Pre-Employment Testing

- Might personality-type tests discriminate against individuals with other people such as those with:
 - ❖ Cognitive or learning impairments
 - ❖ Developmental disabilities
 - ❖ Communicative barriers. ASL ≠ English
 - ❖ Other disabilities
 - ❖ Poor English skills
 - ❖ Individuals from different cultures?

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Disability Related Inquiries and Medical Examinations

Physical Ability Testing



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EEOC & Physical Ability Testing

EEOC Enforcement Guidance on *Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*.

- 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.
- A physical fitness test **is** a medical examination if the employer measures an applicant's physiological or biological responses.
- **Tip:** Employers should remember that administering physical ability tests does not automatically violate the ADA, but they should only use tests that demonstrate the applicant's ability to perform the job.

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EEOC & Physical Ability Testing: Court Decisions

Fuzy v. S&B Eng'rs & Constructors, Ltd., 332 F.3d 301 (5th Cir. 2003)

- **Facts:** Applicant for a pipefitting position failed to meet a 100 pound weight lifting test and was not hired. He filed suit under the ADA.
- **Court:** Case dismissed because the weight lifting requirement was job related and therefore, was permissible.

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EEOC & Physical Ability Testing: Court Decisions (continued)

Jeffrey v. Ashcroft, 285 F. Supp. 2d 583 (M.D. Pa. 2003)

- **Facts:** The Bureau of Prisons terminated a chaplain with chronic pulmonary disease after he failed a physical abilities test. He filed suit under the ADA.
- **Court:** Insufficient evidence to show that passing the physical test was related to an essential job function.
 - ❖ Also, chaplains hired before 1997 were not required to take the physical test, and the test requirement had been waived for other chaplains.

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Disability Related Inquiries and Medical Examinations

Reasonable Accommodations in Examinations and Testing



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EEOC & Reasonable Accommodations in Examinations and Testing

EEOC Guidance:

When requiring job applicants or current employees to undergo examinations or testing, employers are required to provide reasonable accommodations for the testing process.

EEOC Fact Sheet: Job Applicants and the ADA (2003)

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Reasonable Accommodations in Exams and Testing: Court Decisions

Van Buskirk v. City of Indianapolis, 2004 WL 2137658 (S.D. Ind. May 12, 2004)

- **Facts:** Dispatcher with childhood polio was terminated after failing a typing test. He filed suit under the ADA.
- **Court:** Insufficient evidence that typing was an essential function of the job.
 - ❖ Requirement was waived when initially applied for job
 - ❖ Plaintiff successfully performed the job for 7 years.
 - ❖ Because the employer had “accommodated” plaintiff during the application process by waiving the typing test, court refused to dismiss the case.

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Disability Related Inquiries and Medical Examinations

Confidentiality of Information



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Confidentiality of Information Obtained from Medical Inquiries

ADA requirements for information obtained about an applicant or employee's medical condition or history:

- To be collected and maintained on separate forms,
- Kept in separate medical files, and
- Treated as a confidential medical record.
- Information can be available to supervisory staff but only on a "Need to Know Basis"
- What can be said to staff?

Americans with Disabilities Act: 42 U.S.C. § 12112(d)(3)(B); See also, EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA.

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Confidentiality of Medical Information: Court Decisions

Cripe v. Mineta, 2006 WL 1805728 (D.D.C. June 29, 2006)

- **Facts:** 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)
 - ❖ As a result other employees learned of the plaintiff's HIV status.
- **Court:** Rejected employer's argument that the information did not have to be protected since it was not marked as confidential.

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Confidentiality of Medical Information: Reference Checks

- Employers' responsibility to keep employee medical information confidential includes responses to reference checks on former employees.
- EEOC recently filed case against employer who disclosed medical information during an interview.

See *EEOC v. 7-Eleven of Hawaii*, No. CV 07-00478
(D. Hawaii complaint filed 9/17/07)

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Resources

- **DBTAC: Great Lakes ADA Center**
www.adagreatlakes.org; 800/949 – 4232(V/TTY)
- **Equip For Equality**
www.equipforequality.org; 800/610-2779 (V);
800/610-2779 (TTY)
- **Illinois ADA Project**
www.adagreatlakes.org; 877/ADA-3601 (V); 800/610-
2779 (TTY)

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More Resources



- **DOJ – Serving Customers with Disabilities**
www.ada.gov/reachingout/intro1.htm
- **Job Accommodation Network**
www.jan.wvu.edu
- **Equal Employment Opportunity Commission**
www.eeoc.gov
- **ADA Disability and Business Tech. Asst. Ctr.**
www.adata.org/dbtac.html

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Reasonable Accommodations for People with Psychiatric Disabilities

THE END



Presented by:
DBTAC: Great Lakes
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Equip for Equality



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Today's Session**



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