



Disability Related Questions and Medical Exams

Presented by Equip for Equality

Barry C. Taylor, VP for Civil Rights and Systemic Litigation
Rachel M. Weisberg, Staff Attorney, Manager, Employment Rights Helpline

Special thanks to PILLI Fellows Ross Kloeber, Lauren Rushing and Michelle Smit

September 12, 2018



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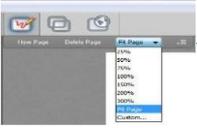
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Outline of Today's Webinar

- The "Rules"
- Defining Disability-Related Inquiry and Medical Exam
- Stage 1: Pre-Offer
- Stage 2: Post-Offer
- Stage 3: Employment
- Drugs and Alcohol Testing
- Confidentiality
- Questions



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The “Rules”

42 U.S.C. §12112(d)

- **Stage 1: Pre-Offer**
 - ◊ No disability inquiries and no medical exams – with exceptions
 - ◊ **Goal:** Ensure applicants are assessed on qualifications
- **Stage 2: Post-Offer**
 - ◊ After receiving conditional job offer, before starting work
 - ◊ Any questions about disability and any medical exams – with three caveats
 - ◊ **Goal:** Isolate decision-making process so individuals know if their disability is the reason for exclusion
- **Stage 3: Employment**
 - ◊ Questions and exams must be job-related and consistent with business necessity
- **All stages:** Confidentiality requirements for information collected

What is a “Medical Examination”

- **No definition in statute or regulations**
- **Guidance from EEOC**
- **Definition:** A procedure or test that seeks information about an individual’s physical or mental impairments
- **Examples:**
 - ◊ Vision tests conducted or analyzed by an ophthalmologist or optometrist; blood, urine, and alcohol tests checking for alcohol use; tests for genetic markers, blood pressure screening, range-of-motion tests that measure muscle strength; and diagnostic procedures, such as x-rays
- **Tests for current use of illegal drugs are not medical exams**
www.eeoc.gov/policy/docs/qanda-inquiries.html (Employee guidance)
www.eeoc.gov/policy/docs/preemp.html (Pre-Employment guidance)

Are Psychological Tests and Personality Tests Medical Exams?

- YES ... if “designed to identify a mental disorder or impairment”
 - NO ... if “measure personality traits such as honesty, preferences, and habits”
- Seven factors**
- (1) Administered by a health care professional
 - (2) Interpreted by a health care professional
 - (3) Designed to reveal an impairment of physical or mental health
 - (4) Invasive
 - (5) Measures employee’s performance of a task or measures his/her physiological responses to performing the task
 - (6) Normally given in a medical setting
 - (7) Requires medical equipment

One Psychological Test (MMPI) = Medical Exam

Karraker v. Rent-A-Center

411 F.3d 831 (7th Cir. 2005)

- Employer required all employees seeking management positions to take the Minnesota Multiphasic Personality Inventory (MMPI)
 - ◊ Questions: "I see things or animals or people around me that others do not see" and "My soul sometimes leaves my body"
- Challenged by a class of current/former employees
- **Issue:** Is the MMPI a medical exam?
- **7th Cir:** Yes, MMPI is a medical exam. Examined EEOC factors:
 - ◊ Designed (at least in part) to diagnose mental impairments
 - ◊ Has effect of hurting employment prospects
 - ◊ Not dispositive that the employer did not use a psychologist or other health care professional to interpret the test

What is a "Disability Inquiry"?

- **No definition in statute or regulations**
- **Guidance from EEOC**
- **Definition:** A question that is likely to elicit information about an individual's disability, even if it is not explicitly about disability.
- **Examples:**
 - ◊ Have you ever been hospitalized?
 - ◊ How many days were you absent from work due to illness?
 - ◊ Are you taking any medications?
- **Questions about an employee's well-being ("how are you") are generally not disability inquiries**
 - ◊ **See EEOC v. Thrivent Financial for Lutherans, 700 F.3d 1044 (7th Cir. 2012)** (asking employee who did not show up for work what was going on was not a disability-related inquiry)

Conflict in the Courts

Conroy v. N.Y. State Department of Correctional Services

333 F.3d 88 (2d Cir. 2003)

- **Employer policy:** Employees returning from sick leave required to provide a doctor's note with a "brief general diagnosis" sufficient to allow employer to determine leave entitlement and evaluate need for pre-reinstatement medical exam
- **2nd Circuit:** Disability-related inquiry. May tend to reveal a disability

Lee v. City of Columbus

636 F.3d 245 (6th Cir. 2011)

- **6th Circuit:** Found similar policy was not a disability-related inquiry
 - ◊ **Conroy** decision "has unnecessarily swept within the statute's prohibition numerous legitimate and innocuous inquiries that are not aimed at identifying a disability"

Stage 1: Pre-Offer

- **General rule:** No medical exams. No disability inquiries.
 - ◊ 42 U.S.C. § 12112(d)(2)(A)

EEOC v. Grisham Farm Products, Inc. 191 F.Supp.3d 994 (W.D. Mo. 2016)

- Employer required all job applicants to complete a pre-offer health history form which inquired about 27 different health conditions
- Questions about “everything from allergies to epilepsy to breast disorder to heart murmur to sexually transmitted diseases to depression to varicose veins and beyond.”
- **Court:** Found for EEOC (granted judgment on pleadings)
 - ◊ Grisham violated the ADA

Recent Federal Agency Enforcement

EEOC: Two recent settlement agreements

- Ex: ***EEOC v. Strataforce***, 17-4104 (S.D. Ind. Con. Dec. 11/13/2017)
 - ◊ Required applicants to complete an application package that included a detailed medical questionnaire before the company offered the applicant a position or placement
 - ◊ Now required to provide notice to applicants of their rights
 - ◊ www.eeoc.gov/eeoc/newsroom/release/11-14-17.cfm

DOJ: Nine recent settlement agreements

- Ex: ***United States and City of Fallon, NV***
- Application asked: “[a]re you now receiving or have you ever received any benefits or payments to you or your doctor for any job related injury? If yes, when and where did this occur.”
- www.ada.gov/fallon_nv_sa.html (2/3/2015)

Exception #1: Reasonable Accommodations for Application Process

- May ask applicants whether they need a reasonable accommodation for the application process
- **But** may not ask applicants if they will need a reasonable accommodation for the job

DOJ Settlement with City of DeKalb www.ada.gov/dekalb_il_sa.htm

- Application question: Do you have any physical or mental conditions, which may impair your ability to perform the duties of the position(s) for which you are applying?
 - ◊ Yes ___ No ___
 - ◊ If yes, please state the condition and the nature of your work limitations: _____
- DOJ found question violated ADA

Exception #2: How Employee Would Perform Job

- Employers may ask applicants about their ability to perform job-related functions or describe/demonstrate how they would do job

Adeyemi v. D.C
525 F.3d 1222 (D.C. Cir. 2008)

- During interview, employer asked Deaf applicant how he communicated in offices where no one knew sign language
- Court:** No ADA violation
 - “Entirely appropriate”
 - Could lawfully require how he would perform specific job-related tasks

Exception #3: Voluntary Questions for Affirmative Action

- Employers may ask applicants to voluntarily self-identify for purposes of affirmative action programs
 - Important issue now with Section 503 of the Rehabilitation Act

Associated Builders & Contractors, Inc. v. Shiu
30 F. Supp. 3d 25 (D.D.C.), *aff'd*, 773 F.3d 257 (D.C. Cir. 2014)

- Plaintiffs sued federal agency that promulgated regulations under and enforces Section 503 (OFCCP)
- Argued Section 503's data-collection requirements violated agency's authority because it violated the ADA
- Court:** Found for agency
 - Section 503 contractors only “invite” applicants to disclose – applicants are free to decline and “suffer no loss if they do so”
- Note:** Also defense to ADA if conduct required by other federal law

Exception #3: Voluntary Questions for Affirmative Action

- EEOC says these questions are okay even if they are not required by Section 503 or state law, if they are voluntary and intended to benefit people with disabilities
- Employers should add additional language:
 - Information is for affirmative action program
 - Disclosure is voluntary and information will be kept confidential
 - Information will be used in accordance with the ADA

EEOC Letter to DOL/OFCCP about inviting applicants to disclose disability without violating the ADA
www.dol.gov/ofccp/regs/compliance/sec503/Self_ID_Forms/OLC_letter_to_OFCCP_8-8-2013_508c.pdf

Best Practices for Responding to Improper Medical Questions

- No perfect answer
- Ideas for written applications
 - ✦ Leave question blank
- Ideas for interview
 - ✦ Answer the question
 - ✦ Redirect the interviewer by saying: "I'd like to focus on my qualifications for the job"
 - ✦ Try to address the underlying concern by saying: "I am able to perform this job or I am able to perform this job without accommodations"

Stage 2: Post-Offer

- **Post-Offer:** Time period after employer makes an offer of employment but before an individual starts working
 - ✦ After employer has evaluated all relevant non-medical info
- **General rule:** Employers may ask any questions or require any medical exams subject to three requirements.
 - ✦ 42 U.S.C. § 12112(d)(3)(B)
 - ✦ (1) Done for *all* incoming employees in that job category
 - ✦ (2) Must treat all information as confidential
 - ✦ (3) Must be used in accordance with ADA
 - Cannot withdraw offer unless (A) job-related and consistent with business necessity and essential job functions cannot be accomplished with reasonable accommodation or (B) employee poses a "direct threat"

Withdrawing Conditional Job Offer

EEOC v. American Tool & Mold

21 F. Supp. 3d 1268 (M.D. Fla. 2014)

- During post-offer, pre-employment period, employee disclosed that he had a back injury and had surgery in 2003
- Third-party evaluator requested old records from surgery and information about restrictions
- Employee provided a release for his records and employer received information, but third-party evaluator said it was insufficient
- Employee provided statement that he had no restrictions since the 2003 surgery and additional confirmation from a doctor
- Evaluator again found evidence insufficient
- Found employee not fit for duty – he was then fired
- **Court:** Found for EEOC/plaintiff (granted MSJ on liability)

Withdrawing Conditional Job Offer

- **Recap rule:** Employer cannot screen out employees with disabilities unless exclusionary criteria is job-related and consistent with business necessity and performance of an essential job function cannot be accomplished with reasonable accommodation
- **Here, not job-related and consistent with business necessity**
 - ◊ No consideration of employee's job
 - ◊ Decision made without any awareness of employee's job or its essential functions
 - ◊ Nor was failure to provide 2003 document independent grounds
 - Only possible reason for request is to "dispel a fear of additional worker's compensation claims or potential future injuries"
 - Not permissible under the ADA
- **No direct threat for same reason (no individualized inquiry)**

Who Pays for Follow-up Test?

EEOC v. BNSF Railway Co. 2018 WL 4100185 (9th Cir. Aug. 29, 2018)

- Employee disclosed back injury from 4 years ago – no current pain
- Employer required *current* MRI – employee's MRI was two years old
- Employee's insurance wouldn't pay cost of MRI because he was asymptomatic; he could not afford to pay cost; offer revoked
- **9th Circuit:** Found for employee (affirmed judgment on liability)
 - ◊ ADA authorizes testing that may disproportionately affect persons with disabilities; does not authorize employer to further burden a prospective employee with the cost of the testing
 - ◊ Cannot impose additional cost only on people with disabilities
 - ◊ "[E]ffectively preclude many applicants, which is at odds with the ADA's aim to increase opportunities for persons with disabilities"

Withdrawing Offer Based on Direct Threat

- **Statute/Regulations:** A significant risk of **substantial harm** to the health or safety of **the individual** or others that cannot be eliminated or **reduced** by reasonable accommodation
 - ◊ 42 U.S.C. § 12111(3); 29 C.F.R. §1630.2(r)(**additional words**)
- **Analyzing direct threat**
 - ◊ Requires "individualized assessment of the individual's present ability to safely perform the essential functions of the job"
 - ◊ Four factors: "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." The determination should be based on "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."

Common Direct Threat Fact Pattern: Concerns about Workers' Comp Claims

EEOC v. Amsted Rail. Co., Inc. 280 F. Supp. 3d 1141 (S.D. Ill. 2017)

- Individual applied to be a “chipper,” which requires using a hammer and grinder to remove metal protrusions from steel casings
- Applicant passed medical examination
- Provided information indicating he had corrective surgery to relieve carpal tunnel syndrome several years ago – then disqualified due to fear that he would develop carpal tunnel syndrome again.
- **Court:** Found for EEOC (granted partial MSJ)
 - ◊ Employer’s conduct “smacks of exactly the kind of speculation and stereotyping that the [ADA] was designed to combat”
 - ◊ Employer failed to conduct a true direct threat analysis
 - ◊ Based decision on generalized assumptions

Stage 3: Employment

- **General rule:** Employers may only make disability-related inquiries or require medical examinations that are job-related and consistent with business necessity (employer’s burden)
 - ◊ 42 U.S.C. § 12112(d)(4)(A)
- **Examples of situations that meet requirement**
 - ◊ Employee requests a reasonable accommodation
 - ◊ Employer has a reasonable belief, based on objective evidence, that an employee is unable to perform the essential functions of her job or will pose a direct threat due to medical condition
 - ◊ Periodic examinations, under certain circumstances

Business Necessity is Not “Mere Expediency”

Lewis v. Government of D.C. 282 F. Supp. 3d 169 (D.D.C. 2017)

- Plaintiff worked as an HR advisor
- Various offices combined in consolidated lab—included a number of safety sensitive jobs and positions
- As a condition of continued employment, all relocating employees would be subject to random drug and alcohol testing
- Arguably also required disclosure of prescription medications
- Plaintiff refused to comply with this requirement – fired and sued
- **Court:** Found for employee (denied MSJ)
 - ◊ Case rises and falls with business necessity inquiry
 - ◊ The business necessity standard is “quite high” and “not to be confused with mere expediency”

Reasonable Accommodation

- **Rule:** OK when disability/need for accommodation is not obvious

Sloan v. Repacorp, Inc. 310 F.Supp.3d 891 (S.D. Ohio 2018)

- Employee operated heavy and dangerous machinery
- Took prescription morphine to treat severe neck and back pain
- This violated company policy
- Employer asked for medical documentation that it was ok for the employee to be operating heavy machinery and whether a non-opiate medication could reasonably accommodate his disability
- Employee refused – was fired
- **Court: Found for employer; request was proper (granted MSJ)**
 - Construed case as failure to accommodate (modify policy)
 - Employer not required to take an employee's "word for it"

Scope of Medical Inquiry

- **Rule:** Requests must be narrowly tailored to the accommodation and disability at issue

Bingman v. Baltimore County 714 F. App'x 244 (4th Cir. 2017)

- Employee attempted to return to work following medical leave for a back injury – County asked for medical records
- Issue: Sought records about back injury AND prior cancer treatment
- Employee was initially cleared; then found unfit and fired
- **Jury (July 2016):** Verdict for plaintiff - \$400,000
- **4th Cir:** Affirmed jury verdict
 - "undisputed" that the County had made "unlawful inquiries" when asking about the employee's cancer instead of limiting its requests to his back injury

Can Employee Perform Essential Job Functions?

- **Rule:** OK if *objective* evidence from a *reliable* source gives reason to question employee's ability to perform essential job functions

Barnum v. Ohio State University Medical Center 642 Fed. Appx. 525 (6th Cir. 2016)

- Employee worked as a certified registered nurse anesthetist
- She was required to undergo fitness-for-duty examination
- Numerous sources that the employee was showing an inability to concentrate on caring for patients; inability to perform at least one routine task; made comments suggesting suicidal thoughts
- Employee underwent exam – was reinstated and sued
- **Court:** Found for University (affirmed summary judgment)
 - Reasonable person would have questioned if employee was still capable of performing her job duties

Repeated conduct v. conduct in isolation

Brownfield v. City of Yakima

612 F.3d 1140 (9th Cir. 2010)

- Police officer ordered to undergo a psychiatric fitness for duty
 - ◊ Based on: Swearing at and disobeying a superior officer; loud argument with a co-worker; his wife had called police to report a domestic altercation episode; his co-workers reported several concerning comments
- **Court:** Found for employer (affirmed summary judgment)
 - ◊ Rejected argument that business necessity cannot be met before performance declines
 - ◊ Distinguishing a "isolated instances of lost temper" (which would likely fall short of establishing business necessity) with "repeated volatile responses"
 - ◊ Notes decision is "heavily colored" by nature of plaintiff's job

Considering Surrounding Facts

Wright v. Illinois Dep't of Children & Family Svcs.

798 F.3d 513 (7th Cir. 2015)

- Following employee's encounter with child who lived at a center, the center's doctor barred employee from further contact with the child
- Supervisor/administrator also expressed concern given employee's long-standing behavior including failure to follow orders
- Doctor issued a medical report questioning her ability to work with children – "her mental health needs to be assessed"
- DCFS ordered caseworker to undergo fitness for duty (FFD) exam
- Caseworker refused on numerous occasions
- **Jury:** FFD was not job-related & consistent with business necessity
- **District Ct:** Denied DCFS's motion for judgment as a matter of law

Considering Surrounding Facts

- **7th Cir:** Upheld decision for employee
 - ◊ Employer bears the burden of establishing business necessity
 - ◊ Burden is "quite high"
- When a fitness for duty was pending, common practice was to place employee on desk duty – here, employee continued to oversee her normal case load (22 cases) for almost 2 months
- Assigned employee to a new case while FFD was pending
 - ◊ Inconsistent application of its own policy
 - ◊ Suggests no real concern about safety
- Administrator testified that she should have removed the employee from her cases

“Threats” (Not Direct Threat) in the Workplace

Owusu-Ansah v. Coca-Cola Company

715 F.3d 1306 (11th Cir. 2013)

- During a meeting with management, employee banged his hand on the table and said that someone was “going to pay for this.”
- Referred to a psychiatric FFD, where he was given the MMPI
- **Court:** Found for employer (affirmed summary judgment)
 - ◊ FFD was job-related and consistent with business necessity
 - ◊ Ability to handle stress and work reasonably well are essential
 - ◊ Expressly says no need to show direct threat

See also ***Painter v. Ill. Dep’t of Trans.***, 715 Fed. App’x 538 (7th Cir. 2017) (finding medical evaluation justified when employee sent threatening email to a union rep, growled/snapped/screamed at coworkers, gave blank stares and intimidating looks, ranted, constantly mumbled, etc.)

Does Employee Pose Direct Threat?

Stragapede v. City of Evanston

865 F.3d 861 (7th Cir. 2017)

- Employee who worked in city’s water services department acquired a traumatic brain injury – took leave
- Had a fitness for duty and city’s neurologist noted he had “mild residual cognitive deficits” but cleared his return
- City asserts employee had performance issues—problems changing water meter, logging into his computer, reporting to wrong locations, and driving through intersection looking down
- City reported concerns to neurologist who concluded that these events were likely caused by his brain injury
- Drafted letter saying he was a direct threat and could not safely perform the essential functions of his job – then fired

No Direct Threat

- Employee filed ADA lawsuit
- **Jury** found for employee – awarded him over \$575,000
- City appealed and argued that it honestly believed that employee posed a direct threat so it should not be liable
- **7th Cir:** Found for employee (affirmed decision)
 - ◊ Direct threat defense requires “medical or other objective evidence” – city’s subjective belief about the employee’s risk was insufficient
 - ◊ Jury could have found the doctor’s opinion to be unreasonable because it had one-sided information only and months before he had cleared his return
 - ◊ Employee was able to explain some issues and other issues weren’t safety issues

Periodic Medical Examinations

Port Auth. Police Benevolent Ass. v. Port Auth. of NY 2017 WL 4838320 (S.D.N.Y. Oct. 24, 2017)

- Suit brought by union of police officers
- Challenged 3 different medical exams – annual exam, 2 fitness for duty exams
- **Court:** Must be job-related, consistent with business necessity
 - ◊ Standard for policies: 1) Purpose is vital to business 2) Group subject to policy is consistent with purpose 3) Narrowly tailored
- **Annual exam: Found for union (granted summary judgment)**
 - ◊ Purpose is vital – ensure officers can do safety-sensitive job
 - ◊ But group is too broad – includes all officers, regardless of title and job assignment, not consistent with public safety rationale
 - ◊ Exam is too broad – can identify conditions having no impact on an officer's ability to do the job

Periodic Medical Examinations

- **FFD for workplace injuries: Found for ER (granted MSJ)**
 - ◊ Purpose is vital – determining workers' compensation eligibility and authorizing medical treatment
 - ◊ Group is narrow – only applies to officers injured on job
 - ◊ Exam is narrow – tailored to employee's "chief complaint" and limited to formulating a working diagnosis
- **FFD for non-workplace injuries - sick leave of 5+ days: Found for union (granted MSJ)**
 - ◊ Purpose #1: curb excess absences – not necessarily vital
 - ◊ Purpose #2: determine if officer can safely return – vital
 - ◊ Group is too broad
 - Applies to all officers regardless of job tasks
 - No evidence that officers out 5+ days would be safety risk

Periodic Medical Examinations

Parker v. Crete Carrier Corporation 839 F.3d 717 (8th Cir. 2016)

- All commercial truck drivers with BMI of 35+ were required to undergo a sleep study to test for obstructive sleep apnea
- Plaintiff argued that his individual circumstances should exempt him
- **6th Cir:** Found for employer (affirmed summary judgment)
 - ◊ Employers may require a class of employees to submit to a medical exam if it has "reasons consistent with business necessity for defining the class in the way that it has."
 - ◊ Here, justified due to the nature of commercial truck driver, and the danger that an incapacitated driver can pose
 - ◊ Reliable evidence = Individuals with BMI of 35+ were more likely to have sleep-apnea and could fall asleep while driving
 - ◊ Recommendations by federal agencies

Wellness Plans

Background on Issue

- Employer wellness plans often require medical exams / inquiries
- Some employers provide "incentives" for participation

Question: Do these run afoul with the ADA's restrictions?

- Two exceptions: Safe harbor & "voluntary" disclosure

2016: EEOC released final rules about wellness programs

- Wellness plans do not fall within safe harbor exception
- "Voluntary" permits employers to impose penalties of up to 30% of the cost of self-only coverage to encourage employees to disclose otherwise confidential medical information
- **Regs:** www.gpo.gov/fdsys/pkg/FR-2016-05-17/pdf/2016-11558.pdf
- **Q&A:** www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm

Wellness Plans What is "Voluntary"

EEOC v. Orion Energy Systems, Inc. 208 F.Supp.3d 989 (E.D. Wis. 2016)

- Employees who opted out of wellness plan had to pay entire monthly health insurance premium (\$413.43 - \$1,130.83 / month)
- Employer argued: Safe Harbor & Voluntary
- **Court:** Agreed partially with employer and partially with EEOC
 - ◊ Safe Harbor did not apply – this is a very limited exception
 - New EEOC regulation says that safe harbor is not applicable to wellness programs (and is retroactive)
 - Even without relying on new regulation, plans generally unrelated to basic underwriting, risk classification
 - ◊ However, participation in wellness plan was "voluntary"
 - Not mandatory – just a "strong incentive"
 - No claim that regulation re: 30% cap was retroactive

Wellness Plans Status of EEOC Regulations

AARP v. EEOC

292 F.Supp. 3d 238 (D.D.C. 2017)

- AARP said regs conflict with the ADA/GINA - 30% is not voluntary
- **Court (8/17): Found for AARP**
 - ◊ EEOC's regulations were arbitrary - no explanation to justify proposed incentive levels
 - ◊ Remanded to EEOC for further revision - did not vacate due to concerns about it would cause business disruptions
- **Court (12/17): Found (again) for AARP**
 - ◊ EEOC's projected timeline for completing its revisions were unacceptably slow -- est. 2021
 - ◊ Agreed to vacate EEOC regulations effective 1/19
 - ◊ This gave enough time that it would not disrupt business
- **Status:** Unknown if EEOC will complete its new rule prior to 1/19

Drugs and Alcohol

- **Remember:** Tests for *current use* of illegal drugs are not medical exams
- But what about... *prior use* of illegal drugs?
 - ✦ Rule: OK if it does not elicit information about a disability
 - ✦ Past illegal drug *addiction* = can be a disability
 - ✦ Past casual drug *use* = not a disability
- **EEOC:** Cannot ask questions that get at addiction
- **Examples:**
 - ✦ Have you ever been treated for drug abuse?
 - ✦ How often did you use illegal drugs in the past?

Drugs and Alcohol

- Similar rules for alcohol inquiries
- **EEOC:** Cannot ask questions that get to addiction
 - ✦ Have you participated in an alcohol rehabilitation program?
- **Even if tests are generally OK, remember, employers cannot:**
 - ✦ (1) use drug test to seek information about more than illegal drugs
 - ✦ (2) use drug tests as "qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability . . . unless the . . . criteria, . . . is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6)

Drug Test to Gather Medical Information

EEOC v. Grane Healthcare Co. 2 F. Supp. 3d 667 (W.D. Pa. 2014)

- All applicants were required to undergo a test for illegal drugs
 - ✦ Applicants submitted urine samples and completed forms with information about their medications
 - ✦ If a drug test was positive, employer cross-checked the test result with the list of medications
- Many issues in case, but focus on test for illegal drugs
- 4 applicants tested positive due to *legal* medications
- **Court:** These drug tests and forms were medical exams/inquiries
 - ✦ Samples tested for elements like "glucose" and "blood"
 - ✦ While some drug tests may have the incidental effect of detecting legal drug use, here, tests structured to elicit evidence

Additional Questions Following Drug Test

Harrison v. Benchmark Elecs. Huntsville, Inc., 593 F.3d 1206 (11th Cir. 2010)

- Plaintiff takes barbiturates for epilepsy – failed pre-offer drug test
- Plaintiff explained that he had a prescription
- Employer asked a series of questions including how long he had been disabled, what medication he took, and how long he had taken it. The plaintiff did not receive the job.
- **Court:** Found for employee (reversed/remanded MSJ)
 - ◊ Questions posed unlawful pre-employment inquiry
 - ◊ While the employer “was permitted to ask follow-up questions to ensure that [plaintiff’s] positive drug test was due to a lawful prescription, a jury may find that these questions exceeded the scope of the likely-to- elicit standard.”

Confidentiality

- **General rule:** All disability/medical information obtained through medical exams and inquiries must be kept confidential
 - ◊ Kept on separate forms and in separate medical files
 - ◊ Treated information as confidential medical records
 - **Exceptions:**
 - ◊ Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations
 - ◊ First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment
 - ◊ Government officials investigating compliance with this provision of the ADA shall be provided relevant information upon request
- 42 U.S.C. § 12112(d)(3)(B); §12112(d)(4)(C)

Scope of Confidentiality Requirements

Examples where courts found ADA’s confidentiality provisions applied because information was obtained through medical examination or disability inquiry

- Employer who requested employee provide prescription medication information and submit to a fitness for duty exam
 - ◊ **Hambright v. Bartow County, Georgia**, 2017 WL 6460246 (N.D. Ga. July 11, 2017)
- Employer asked an employee why she was in the hospital
 - ◊ **Fleming v. State Univ. of New York**, 502 F.Supp.2d 324 (E.D.N.Y. 2007)
- Employer who required an employee to submit a certificate from a doctor to support FMLA leave
 - ◊ **Doe v. U.S. Postal Service**, 317 F.3d 339 (D.C. Cir. 2003)

Scope of Confidentiality Requirements

EEOC v. Thrivent Financial for Lutherans

700 F.3d 1044 (7th Cir. 2012)

- Employee doesn't show up for work and supervisor emails: "Give us a call. We need to know what's going on." Employee responds by email that he's been in bed all day with a migraine headache
- Supervisor allegedly discloses to prospective employers that employee has migraines
- **Court:** No ADA violation – disclosure was voluntary
 - ◊ Rejected EEOC's argument that confidentiality protection extended to all employer-initiated, job-related inquiries; confidentiality provision applies only to medical inquiries
 - ◊ Distinguished other situations where employer had reason to know of a medical condition – no such evidence here

Impermissible Disclosure

Examples where courts found employer violated ADA

- Shared results of employee's medical exam with a colleague who had no supervisory authority
 - ◊ **Henderson v. Borough of Baldwin**, 2016 WL 5106945 (W.D. Pa. Sept. 20, 2016)
- Merged employees' medical records with personnel files
 - ◊ **EEOC v. ValleyLife**, 2017 WL 227878 (D. Ariz. Jan. 19, 2017)
- Left doctor's letter concerning plaintiff's reasonable accommodation request uncovered on a desk where other employees could see it
 - ◊ **Cripe v. Mineta**, 2006 WL 1805728 (D.D.C. June 29, 2006)
- Allowed an employee's drug screen to be leaked to the press
 - ◊ **Giaccio v. City of New York**, 502 F.Supp.2d 380 (S.D.N.Y. 2007)

Does Exception Apply?

- Supervisor has a need to know why an employee was on sick leave.
 - ◊ **Lee v. City of Columbus**, 636 F.3d 245 (6th Cir. 2011)
- Permissible for doctor to disclose exam results to a local pension board as it had to certify plaintiff's examination for the hiring process
 - ◊ **O'Neal v. City of New Albany**, 293 F.3d 998 (7th Cir. 2002)
- Permissible to disclose information about plaintiff's alcoholism and alcoholic pancreatitis to supervisor due to concerns that he would arrive to work impaired during his FMLA leave in a job involving heavy machinery
 - ◊ **Foos v. Taghleef Industries, Inc.**, 132 F.Supp.3d 1034 (S.D. Ind. 2015)

Who Can Enforce Rights?

- Every circuit to consider the issue has held that *all* individuals are protected by rules on disability inquiries and medical exams
 - **Owusu-Ansah v. Coca-Cola Co.**, 715 F.3d 1306, 1310 (11th Cir. 2013) (listing other cases with similar holdings)
 - **Kroll v. White Lake Ambulance Authority**, 691 F.3d 809, 816 (6th Cir. 2012) (“The importance of § 12112(d)(4)(A) in preventing discrimination is underscored by the fact that, in contrast to many other provisions of the ADA, all individuals—disabled or not—may bring suit in aid of its enforcement.”)
 - **Roe v. Cheyenne Mountain Conference Resort, Inc.**, 124 F.3d 1221, 1229 (10th Cir. 1997) (“It makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether he has a disability.”)

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Questions?





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