

# Legal Briefings

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## **“Can They Ask Me That?” Advising People with Disabilities About the Disability Inquiry and Medical Examination Provisions of the Americans with Disabilities Act**

### **Overview**

When Congress enacted the Americans with Disabilities Act (“ADA”), it found that people with disabilities had been “subjected to a history of purposeful unequal treatment” in many areas, including employment.<sup>1</sup> Congress included a variety of provisions in Title I of the ADA to address the employment discrimination people with disabilities have experienced, including restricting employers’ usage of disability-related inquiries and medical examinations. Attorneys advising and representing people with disabilities need to understand the legal issues, administrative interpretations and relevant court decisions in this area.

At the pre-offer stage, 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.<sup>2</sup>

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.<sup>3</sup> 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.”<sup>4</sup>

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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.<sup>5</sup> An employer can ask about the ability of the employee to perform job-related functions and can also conduct voluntary medical examinations “which are part of an employee health program.”<sup>6</sup>

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.”<sup>7</sup>

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.<sup>8</sup> Unlike their treatment of EEOC guidance regarding other provisions of the ADA, the courts have generally been very deferential to the EEOC’s guidance on disability-related inquiries and medical examinations.<sup>9</sup>

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, several interesting issues have been examined by the courts that attorneys representing people with disabilities should understand. This Article will review several of the legal issues related to disability-related inquiries and medical examinations that have been the subject of litigation, and the administrative guidance and court decisions interpreting

those issues.

## ***Prohibition Against Exams and Inquiries Prior to a Conditional Offer of Employment***

As noted above, Section 12112(d)(2) of the ADA prohibits employers from requiring applicants to answer disability-related inquiries or undergo medical examinations prior to a conditional offer of employment. The ADA’s restriction against pre-employment inquiries and medical examinations reflects the intent of Congress to protect the privacy of individuals with “hidden” disabilities, like HIV, heart disease, cancer, mental illness, diabetes and epilepsy, as well as to limit employers from inquiring and conducting examinations related to more visible disabilities like deafness, blindness or use of wheelchairs.

This two-step application process enables attorneys representing applicants with disabilities to more easily identify and prove that discrimination occurred in the hiring process. By isolating the medical portion of the screening process and delaying it until all non-disability inquiries have been made, employers are required first to determine whether a person is qualified for the job. If the applicant is deemed qualified and given an offer, but then rejected after being subjected to disability-related inquiries or medical examinations, an attorney would have a strong argument that the client was rejected, and thereby discriminated against, based on disability rather than a lack of qualifications.<sup>10</sup>

In *Leonel v. American Airlines, Inc.*, the Ninth Circuit upheld the ADA provision “that employers can only conduct medical examinations as the last step of the application process after making a real job offer.”<sup>11</sup> 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.<sup>12</sup> The court reversed the lower court’s summary judgment for the employer.<sup>13</sup>

*Birch v. Jennico 2* examined whether a *real* conditional offer had been made prior to administering a medical exam.<sup>14</sup> 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.”<sup>15</sup> The court noted that the ADA requires medical examinations to “be conducted as a separate, second step of the selection process, after an individual has met all other job prerequisites.”<sup>16</sup>

While generally disability disclosure is not required during the hiring process, there may be times when an applicant elects to disclose a disability, such as when a reasonable accommodation is needed. Moreover, in some situations disclosing a disability may actually be beneficial because a particular employer is actively seeking to hire people with disabilities as part of an employee diversity policy. Attorneys advising people with disabilities should emphasize that disability disclosure is their decision. Because of the continuing prevalence of prejudices

and stereotypes connected with disabilities, many people may choose not to disclose their disabilities unless necessary to the hiring process.

### Who Can Bring Suit?

Another issue courts have examined is whether the ADA’s restriction on disability-related inquiries and medical examinations protects 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 an unlawful medical examination. For example, in *Roe v. Cheyenne Mountain Conference Resort, Inc.*, an employee filed an ADA suit against her employer for requiring employees to report their use of prescription drugs.<sup>17</sup> 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.<sup>18</sup> Most courts have reached similar conclusions.<sup>19</sup> Additionally, the EEOC has taken this position.<sup>20</sup>

The reasoning supporting the 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

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ADA, using the general terms "job applicant" and "employee" in Section 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 in fact have an ADA disability. Third, courts have held that it would be circular to require employees to demonstrate that they have a disability in order to prevent their employers from inquiring as to whether or not they have a disability.

## Are Personality Tests Considered Medical Examinations?

The majority view regarding pre-employment inquiries allows people with certain physical and mental impairments to enforce these provisions of the ADA despite the fact that they may not be able to prove they have an ADA disability. This is important because many courts have taken a narrow view of disability in ADA cases. While attorneys often must reject employment cases in which the person will have difficulty proving an ADA disability, cases involving disability-related inquiries and medical examinations do not necessarily impose that barrier to representation.

As previously noted, the ADA prohibits *medical* examinations at the pre-employment stage.<sup>21</sup> Some courts have held that medical examinations include psychological tests.<sup>22</sup> The EEOC's position is that psychological examinations are medical examinations "if they provide evidence that would lead to identifying a medical disorder or impairment."<sup>23</sup>

Many employers routinely administer "personality" tests as part of the application process ostensibly to obtain information about job applicants as a way to determine whether the person would be a good employee. 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, attorneys representing people with disabilities who have been denied employment after undergoing a personality test will want to consider arguing that the employers are using personality tests to unlawfully obtain disability-related information in a more indirect way.

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

- (1) whether the test is "administered by a health care professional";
- (2) whether the results are "interpreted by a health care professional";
- (3) whether the test is "designed to reveal an impairment of physical or mental health";
- (4) whether the employer is "trying to determine the applicant's physical or mental health or impairments";

- (5) whether the test is invasive;
- (6) whether the test measures an employee's performance of a task or measures his/her "physiological responses to performing the task";
- (7) whether the test is "normally given in a medical setting"; and
- (8) whether medical equipment is used.<sup>24</sup>

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, Inc.*<sup>25</sup> 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.<sup>26</sup> Management applicants that had a certain score on the MMPI were automatically excluded from consideration.<sup>27</sup> The plaintiffs alleged that the MMPI could identify conditions such as depression, paranoia, schizoid tendencies and mania.<sup>28</sup> The district 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.<sup>29</sup> On appeal, the Seventh Circuit reversed, holding that the MMPI is designed to diagnose mental impairments, it has the effect of hurting the employment prospects of people with mental illness, and it is an improper medical examination that violates the ADA.<sup>30</sup> The court held it was not dispositive that the employer did not use a psychologist or other health care professional to interpret the test.<sup>31</sup> Rather, who interprets the test results is only one of several 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."<sup>32</sup>

## Confidentiality of Information Obtained from Medical Inquiries

In light of the court's decision in *Karraker*, attorneys representing people with disabilities who have been denied employment or promotions should explore whether the employer utilized the MMPI or other personality test as part of the decision making process.

As noted above, Section 12112(d)(3)(B) of the ADA requires that information obtained about 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.

One court required that documents containing an employee's medical information be strictly safeguarded. In *Cripe v. Mineta*, the attorney of an employee with HIV sent a letter to the employer regarding work accommodations.<sup>33</sup> The employer failed to



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keep the letter confidential by leaving the letter on a desk without an envelope, misplacing the letter, and failing to segregate the employee's medical documents from other documents.<sup>34</sup> As a result, other employees allegedly learned of the plaintiff's HIV status.<sup>35</sup> When denying summary judgment, the court rejected the employer's argument that the information did not have to be protected since it was not marked as "confidential."<sup>36</sup>

Another court required that pre-employment evaluations be kept confidential, regardless of contravening state law. In *Lentz v. City of Cleveland*, responding to an officer's shooting incident, the city released his personnel files which contained the results of his pre-employment psychological evaluation.<sup>37</sup> Newspaper reporters published this information.<sup>38</sup> 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.<sup>39</sup> The court held that the ADA preempts the state law, and thus, these pre-employment evaluations are confidential medical records not subject to public disclosure.<sup>40</sup>

However, confidential disability-related 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*, the employer disclosed results of a medical examination to members of the local pension board.<sup>41</sup> This board took the position that in order to certify the plaintiff's examination, it

needed to know the information. As a result, the court held that the ADA had not been violated because the disclosure was proper.<sup>42</sup>

The EEOC interprets the confidentiality provision to apply to medical information even it is voluntarily disclosed. However, the EEOC's position was not followed in *Cash v. Smith*, where the court held that an employee's voluntary disclosure of her diabetes could be re-disclosed by the employer without violating the ADA.<sup>43</sup>

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.

## Conclusion

However, as the legal analysis above demonstrates, there are certain issues in this area where courts have differed. Attorneys should carefully review interpretations of these provisions by the EEOC and the courts when advising and representing people with disabilities. Also, to the extent possible, attorneys should proactively educate employers about the benefits of providing training to their managers on these issues before a dispute arises, and recommend that employers carefully review current employment application documents, policies and procedures to ensure compliance with the ADA.

## Notes:

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1. 42 U.S.C.A. § 12101(a)(7) (West 2007).
2. *Id.* § 12112(d)(2)(A)—(B).
3. *Id.* § 12112(d)(3).
4. *Id.* § 12112(b)(6).
5. *Id.* § 12112(d)(4)(A).
6. *Id.* § 12112(d)(4)(B).
7. *Id.* § 12112(d)(3)(B).
8. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, NOTICE No. 915.002, EEOC ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000), *available at* <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> [hereinafter EEOC, EMPLOYMENT INQUIRIES]; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, NOTICE No. 915.002, ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (1995), *available at* <http://www.eeoc.gov/policy/docs/preemp.html> [hereinafter EEOC, PREEMPLOYMENT QUESTIONS]; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, JOB APPLICANTS AND THE AMERICANS WITH DISABILITIES ACT (2003), <http://www.eeoc.gov/facts/jobapplicant.html> [hereinafter EEOC, JOB APPLICANTS].
9. See *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 672 (1st Cir. 1995); *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990, at \*4 (N.D. Cal. Mar. 11, 1996).
10. See EEOC, PREEMPLOYMENT QUESTIONS, *supra* note 11.
11. 400 F.3d 702, 708—09 (9th Cir. 2005).
12. *Id.* at 704—05.
13. *Id.* at 714.
14. No. 05-C-670-S, 2006 WL 1049477 (W.D. Wis. Apr. 19, 2006).
15. *Id.* at \*2—3.
16. *Id.* at \*2. *But see, O’Neal v. City of New Albany*, 293 F.3d 998, 1010 (7<sup>th</sup> Cir. 2002) (Medical examination did not violate the ADA where plaintiff had already completed all non-medical screening tests and signed a statement entitled “Conditional Offer of Employment Statement of Understanding.”)
17. 124 F.3d 1221, 1226 (10th Cir. 1997).
18. *Id.* at 1229—30.

## Notes (continued):

19. See *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 722 (8th Cir. 2003); *Conroy v. N.Y. State Dept. of Corr. Servs.*, 333 F.3d 88, 94—95 (2d Cir. 2003); *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 960 n.4 (10th Cir. 2002); *Fredenburg v. Contra Costa Co. Dept. of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999); *Jackson v. Lake County*, No. 01 C 6523, 2003 WL 22127743, at \*8 (N.D. Ill. Sept. 15, 2003); *Green v. Joy Cone Co.*, 278 F.Supp.2d 526, 537—38 (W.D. Pa. 2003), *aff'd*, 107 F.App'x 278 (3d Cir. 2004). *But see*, *Bone v. Louisville*, 215 F.3d 1325 (6<sup>th</sup> Cir. 2002).
20. EEOC, EMPLOYMENT INQUIRIES, *supra* note 11.
21. 42 U.S.C.A. § 12112(d)(2) (West 2007).
22. *Barnes v. Cochran*, 944 F. Supp. 897, 904 (S.D. Fla. 1996), *aff'd sub nom.*, *Barnes v. Broward County Sheriff's*, 130 F.3d 443 (11th Cir. 1997). *But see* *Thompson v. Borg-Warner Protective Servs. Corp.*, No. C-94-4015 MHP, 1996 WL 162990 (N.D. Cal. Mar. 11, 1996) (holding that a psychological test was not a medical examination prohibited by the ADA).
23. EEOC, PREEMPLOYMENT QUESTIONS, *supra* note 11.
24. *Id.*
25. 411 F.3d 831 (7th Cir. 2005).
26. *Id.* at 833—34.
27. *Id.* at 834.
28. *Id.* at 833.
29. *Id.* at 836.
30. *Id.* at 837.
31. *Id.* at 836.
32. *Id.* at 836—37.
33. No. Civ.A.03-2206 (RWR), 2006 WL 1805728, at \*3 (D.D.C. June 29, 2006).
34. *Id.* at \*6.
35. *Id.*
36. *Id.* See also *Doe v. United States Postal Service*, 317 F.3d 339 (D.C. Cir. 2003), where a supervisor's disclosure of an employee's HIV status in conjunction with a request for leave under the FMLA may have violated the Rehabilitation Act, which uses the same privacy standards as the ADA. *Id.* at 343—45.
37. 410 F. Supp. 2d 673, 682—83 (N.D. Ohio 2006).
38. *Id.* at 683.
39. *Id.* at 700.
40. *Id.* at 700-701.
41. 293 F.3d 998, 1009 (7th Cir. 2002).
42. *Id.*
43. 231 F.3d 1301, 1307 (11th Cir. 2000).