Employment Law Briefing

Insights on Legal Issues in the Workplace

MARCH/APRIL 2006

INSIDE ...

Think twice before using screening tests

The Americans with Disabilities Act (ADA) bars employers from using pre-employment medical tests as a condition of employment. But does it bar the use of personality tests to screen employees considered for promotions? That was the question before the Seventh Circuit in *Karraker v. Rent-A-Center*.

Promotion denied

Two brothers worked for a chain of stores that offer appliances and furniture on a rent-to-own basis. Most new employees start as entry-level account managers. To progress to upper-level management positions, employees had to answer 502 questions from the Minnesota Multiphasic Personality Inventory (MMPI) — a test the company said it used to measure personality traits.

When the company refused to promote the brothers based on test results, they sued, alleging that the ADA barred the test. The trial court ruled that the use of MMPI didn't violate the ADA.

Physical includes mental

The Seventh Circuit first found that the ADA's disability definition wasn't limited to physical impairments but also included mental impairments. Three specific provisions limit employers' ability to use medical exams and inquiries as a condition of employment:

1. An absolute prohibition against pre-offer of employment medical tests,
2. A prohibition against the use of medical tests that lack job-relatedness and business necessity, and
3. A prohibition against the use of tests that screen out or tend to screen out people with disabilities.

The parties stipulated that, even though the applicants who took the tests were already employed, the tests were administered "pre-employment" for ADA purposes because they were required for those seeking new positions within the company. Thus, the only issue that needed to be resolved was whether the test constituted an ADA-defined medical exam.

The Seventh Circuit noted that the EEOC defined "medical examination" as "a procedure or test that seeks information about a person's physical or mental impairments or health." In determining whether a particular test is a "medical examination," the EEOC says to consider whether:

1. A health care professional administers the test,
2. A health care professional interprets the test,
3. The test is designed to reveal an impairment of physical or mental health,
4. The test is invasive,

Not just a personality test

Here are actual test questions that shed light on why the Seventh Circuit concluded that the Minnesota Multiphasic Personality Inventory wasn't just a personality test.

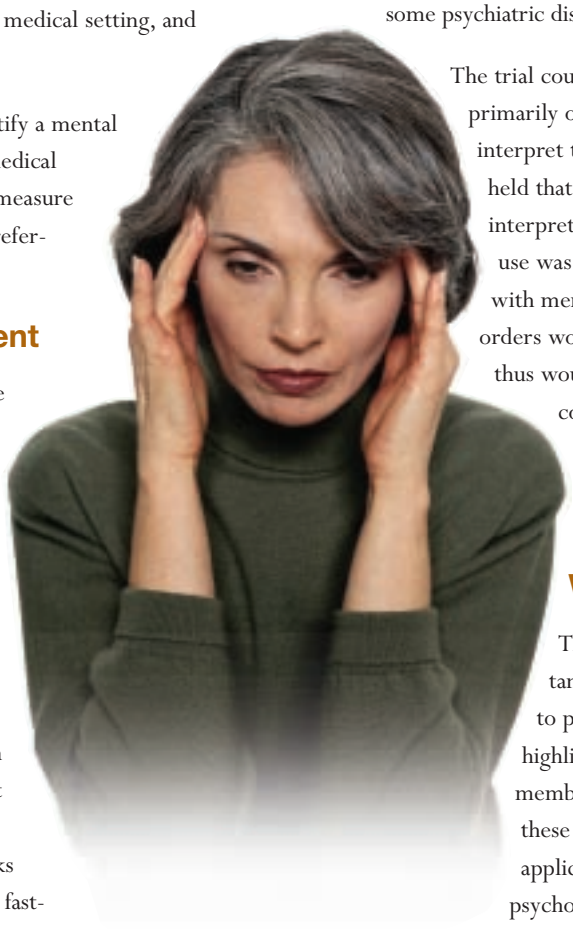
Applicants were asked whether these statements were true or false:

- **"I see things or animals or people around me that others do not see."**
- **"I commonly hear voices without knowing where they are coming from."**
- **"At times, I have fits of laughing and crying that I cannot control."**
- **"My soul sometimes leaves my body."**
- **"At one or more times in my life I felt that someone was making me do things by hypnotizing me."**
- **"I have a habit of counting things that are not important such as bulbs on electric signs, and so forth."**

Clearly, these questions seem designed to learn more about applicants' possible mental disorders than just their personalities.

5. The test measures an employee's performance of a task or measures his or her physiological responses in performing the task,
6. The test is normally given in a medical setting, and
7. Medical equipment is used.

Psychological tests designed to identify a mental disorder or impairment qualify as medical exams. But psychological tests that measure personality traits such as honesty, preferences and habits do not.



The company's argument

The company argued that it used the test only to measure personality traits. For example, it argued that the test didn't measure clinical depression, but rather the extent to which an applicant may feel the kinds of feelings of depression that everyone may feel from time to time.

Rejecting this argument, the Seventh Circuit found that the MMPI doesn't merely measure potentially relevant traits such as whether someone works well in groups or is comfortable in a fast-paced office. Rather, the MMPI measures where a person falls on scales measuring traits such as depression, hypochondria, hysteria, paranoia and mania. In fact, elevated scores on some MMPI scales can be used to diagnose some psychiatric disorders.

The trial court in dismissing the case relied primarily on the fact that a psychologist didn't interpret the test. But the Seventh Circuit held that, even though a psychologist didn't interpret test results, the impact of the test's use was to deny promotions to employees with mental disorders. Applicants with disorders would score poorly on the MMPI and thus would fail to be promoted. So the court concluded that the test was a medical exam barred by the ADA's prohibition against pre-employment medical exams.

What we can learn

This case demonstrates the importance of employers' being sensitive to pre-employment inquiries that can highlight the fact that an applicant is a member of a protected group. Scrutinize these inquiries — including interviews, application forms, medical exams and psychological tests — to ensure that they won't lead to discrimination claims.

Giving proper notice for FMLA leave

The Sixth Circuit had to decide whether an employer violated the Family and Medical Leave Act (FMLA) by firing a worker who failed to give sufficient notice that he needed to take medical leave. The court's decision in *Walton v. Ford Motor Co.* hinged on what constitutes proper FMLA notice.

The worker is injured

An hourly factory worker injured his knee while working in his yard. He reported the injury the next morning to his supervisor and visited the company nurse, who treated him for a sprain or strain. He didn't ask to take leave or obtain leave-of-absence forms from the nurse, but worked at his job for the rest of the morning.

In the afternoon, the employee went to his doctor with his supervisor's permission and was diagnosed with a torn ligament. The doctor gave him a note instructing him to stay off work until an orthopedic surgeon could see him. He didn't return to work or inform anyone at the company of his status.

The worker reports his injury

The next day, the worker informed the security department — which was manned by independent contractors, not company employees — that his doctor had instructed him not to work until he could see the specialist four days later. The security department recorded his call on the hourly personnel absence call-in log sheet. The entry stated that the reason for his absences was that he was "sick" and that he expected to return in four days. But he didn't try to contact his supervisor, the labor-relations department or the medical department to inform them of the reason for his absence, and he didn't give anyone any medical documentation supporting his absence.

The specialist diagnosed a torn ligament and advised the employee to stay off work for the next four weeks. He reported this the next day to the security department. Again, the log sheet entry stated that the reason for his absence was that he was "sick" and would be out for four weeks. But he notified no one else of the reason for his absence and produced no medical documentation to support it.

The worker is fired

Two days later, the company notified the worker by registered mail that, if he didn't contact the labor-relations department within five business days, the company would fire him. Although he admitted getting a notice from the post office advising him of the arrival of the registered letter, he claimed that he didn't receive the letter until 11 days later, four days after the company terminated his employment.

The worker alleged unlawful interference with his FMLA rights. He claimed that calling the security office to report absences was standard procedure. But he admitted that security couldn't grant a medical leave of absence. The trial court threw out his suit without a trial.

The worker appeals

On appeal, the Sixth Circuit first found that FMLA rules regarding unforeseeable leaves require employees to "give notice to the employer of the need for FMLA leave as soon as practicable." The rules further state that employees are "expected" to give notice "within no more than one or two

working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible."

The Sixth Circuit noted that it had previously held that an employer couldn't fire a worker for failing to adhere to internal company policies for requesting and receiving FMLA leave when notice otherwise complied with FMLA rules. In that previous case, the court held that employers cannot deny FMLA leave on grounds that an employee failed to comply with internal procedures — as long as the employee gives timely verbal or other notice.

The Sixth Circuit found that the company had many times notified workers in writing that they were not to contact security if they needed FMLA leave.

So the issue for the Sixth Circuit was whether the worker — by twice calling the security office — had given sufficient notice that he was invoking FMLA protection. The court concluded that he had not.

The worker failed to give proper notice

The court found that the company had many times notified workers in writing that they were not to contact security if they needed FMLA leave. Rather, they were to notify the labor-relations department within two business days of an initial absence and then complete and return the requisite FMLA forms to the medical department. The notices specifically stated, "Do not request FMLA through security." The employee was aware of these procedures and had followed them for several previous medical leaves.

For these reasons, the Sixth Circuit held that the employee had failed to carry his burden of establishing that he had sufficiently notified the company of his need to take leave for an FMLA-qualifying injury.

Employer's warnings unheeded

The key factor in the Sixth Circuit's decision was that the employer had warned employees not to request FMLA leave through the security office. The court noted that the FMLA doesn't require employers to foresee that employees would not have read the notices it had sent regarding requesting FMLA leave.

Nothing in the worker's communications with his supervisor or the medical department indicated that he needed FMLA leave. Nothing in the security office's log sheets would establish a right to FMLA leave; they stated only that he was sick, as opposed to anything that would show that he had a serious health condition. Also, the security guards were not company employees but rather independent contractors. Thus, notice to the guards was not the same as notice to the employer.

This case demonstrates that adherence to details is an important aspect of FMLA cases for both employers and employees. It is necessary to scrutinize FMLA rules and adhere to them faithfully to avoid running afoul of them.

Use caution when dealing with perceived disabilities

Does the Americans with Disabilities Act (ADA) require employers to reasonably accommodate an employee merely regarded or perceived as disabled? That was the question before the Tenth Circuit in *Kelly v. Metallics West Inc.*

The worker needed oxygen

After three years, a receptionist was promoted to customer-service supervisor. About a year later, she was hospitalized with a blood clot or pulmonary embolism in her lung. She returned home on supplemental oxygen, and three weeks later her physician cleared her to return to work.

On her first day back on the job without supplemental oxygen, the supervisor felt short of breath and light-headed and had a headache. The next day, she saw her doctor and he gave her a note stating, "Patient needs to use oxygen at work." The company refused to permit her to use oxygen at work. She worked without oxygen for about a week with the same symptoms as before. When she again asked to use supplemental oxygen, the company terminated her employment, stating that her using an oxygen bottle at work was "unacceptable."

Discrimination and retaliation

The supervisor alleged discrimination and retaliation under the ADA. The jury found that the employer had violated the ADA by refusing to permit her to return to work with supplemental oxygen and by terminating her employment in retaliation for requesting the accommodation of working with supplemental oxygen. The employer moved for judgment as a matter of law, arguing that the ADA didn't require it to reasonably accommodate the employee, who was "regarded as disabled" but wasn't actually disabled, as defined by the ADA, because the condition wasn't permanent. The court denied the motion and the employer appealed.

The Tenth Circuit noted that the circuit courts were split as to whether reasonable accommodation is available to an employee merely regarded or perceived as disabled. But it chose to follow those circuits holding that the ADA required reasonable accommodation under these circumstances.

The court noted that the ADA bars discrimination against "a qualified individual with a disability" and that the act defines "qualified individual" as a person with a disability who — with or without reasonable accommodation — can perform the essential functions of the employment position that the person "holds or desires." The ADA defines a "disability" to include being "regarded" as having "an impairment" that "substantially limits" one or more of a person's "major life activities."

The ADA's plain language protects persons regarded as disabled but who, with reasonable accommodation, can perform the essential functions of their jobs.

The Tenth Circuit decides

The court thus held that the ADA's plain language protects persons regarded as disabled but who, with reasonable accommodation, can perform the essential functions of their jobs. The court held that this was the proper result because "an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions."

In this sense, the court concluded, "the ADA encourages employers to become more enlightened about their employees' capabilities, while protecting employees from employers whose attitudes remain mired in prejudice."

Decide on performance, not assumptions

This case demonstrates the importance of employers not assessing employees' health status. If no basis existed for concluding that the employer regarded the employee as disabled, the ADA wouldn't have applied and no legal justification would have existed for requiring reasonable accommodation. Employers should decide personnel matters based on performance — using objective criteria — rather than on assumptions about an employee's health.

CEO's words come back to bite company

The issue before the Ninth Circuit was whether a company and its chief executive officer had engaged in unlawful racial discrimination owing to the CEO's persistent refusal to use an employee's Arabic name. This case, *El-Hakem v. BJY Inc.*, shows how costly racial discrimination can be.

Manny or Hank?

The employee, Mamdouh El-Hakem, strenuously objected when the CEO repeatedly insisted on calling him by the non-Arabic name Manny. The employee suggested that he be called Hakem if the CEO found Mamdouh difficult to pronounce. Instead, the CEO suggested calling him Hank, a name the employee also found objectionable. Despite continued objections, the CEO persisted in calling him "Manny" for almost a year. The CEO believed that a Western name would increase the employee's chance for success in his job and would be more acceptable to the company's clientele.

The employee sued the CEO and the company, alleging unlawful racial discrimination under Title VII and 42 U.S.C. Section 1981. After a five-day trial, the jury found in favor of the employee and awarded him $15,000 in compensatory damages, $15,000 in punitive damages and attorneys' fees (which probably vastly exceeded the damages awards).

A racial epithet?

On appeal to the Ninth Circuit, the defendants first argued that they couldn't be held liable under Sec. 1981 for intentionally discriminating on the basis of race, because the name Manny isn't a racial epithet. Unpersuaded, the court found that actionable race discrimination needn't be based on physical or "genetically determined characteristics such as skin color." Rather, a group's ethnic characteristics encompass more than its members' physical traits and skin color, and names are often a proxy for race and ethnicity.

In support of its finding, the court cited an earlier ruling that the ridicule of a Chinese woman for mispronouncing "Lima" was an example of racial discrimination even though the ridicule was not directed at a genetically determined physical trait. So the Ninth Circuit held that the record here clearly showed the CEO's intention to discriminate against the employee's Arabic name in favor of a non-Arabic name and that this evidence sufficiently supported the jury's verdict.

Frequent or pervasive?

Next, the defendants argued that the CEO's conduct was not frequent or pervasive enough to create a hostile work environment under Title VII. But the Ninth Circuit rejected this argument as well. It noted that the required level of severity or seriousness varies inversely with the conduct's pervasiveness or frequency. Because the CEO's conduct occurred frequently and consistently for nearly a year, a reasonable juror could conclude that the employee's work environment was hostile.

Finally, because the CEO was acting within the scope of his employment at all times, the Ninth Circuit held that the company was vicariously liable for the hostile environment created by the CEO.

What can we learn?

The company and the CEO might have fared better — and saved considerable money — if they had offered to settle the suit and had used a procedure available under the Federal Rules of Civil Procedure called an *offer of judgment*.

Here's how it could have worked here: The defendants could have offered money (as a judgment) to settle the suit. If the plaintiff had refused the judgment and later won his suit but failed to win the amount that had been offered, his claim for attorneys' fees would have been cut off and he would have been entitled to attorneys' fees only for time expended before the defendants offered the judgment.

This can be an effective tool for settling cases.

This publication is distributed with the understanding that the author, publisher and distributor are not rendering legal, accounting or other professional advice or opinions on specific facts or matters, and, accordingly, assume no liability whatsoever in connection with its use. ELBma06