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Briefly

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EMPLOYER MAY REASSIGN MORE QUALIFIED EMPLOYEE

EVEN IF DISABLED EMPLOYEE WANTS VACANT JOB

Joe Lynch

"The plaintiff contended that Wal-Mart should automatically reassign her to a vacant position, rather than requiring her to compete with other applicants for that position. "

In a recent ruling, the court was faced with the question of whether an employer who has an established policy to fill vacant job positions with the most qualified applicant is required to reassign a qualified disabled employee to a vacant position, although the disabled employee is not the most qualified applicant for the position. Huber v. Wal-Mart Stores, Inc., 19 AD Cases 484 (C.A. 8, 2007). The plaintiff contended that Wal-Mart should automatically reassign her to a vacant position, rather than requiring her to compete with other applicants for that position. Wal-Mart disagreed, citing its non-discriminatory policy to hire the most qualified applicant. The court concluded that ". . . the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position for such a reassignment would violate a legitimate non-discriminatory policy of the employer to hire the most qualified candidate. This conclusion is bolstered by the Supreme Court's decision in U.S. Airways v. Barnett [cite omitted], that an employer ordinarily is not required to give a disabled employee a higher seniority status to enable the disabled employee to attain his or her job when another qualified employee invokes an entitlement to that position conferred by the employer's seniority system."

Editor's Note *- It should be noted that another federal appeals court, the Tenth Circuit, has ruled contrary to the Wal-Mart ruling, that reassignment under the ADA results in automatically awarding a position to a qualified disabled employee regardless of whether other better qualified applicants are available, and despite an employer's policy to hire the best applicant. Now with the Wal-Mart ruling, however, there are two circuits, the Eighth Circuit and the Seventh Circuit, that allow the employer to fill a vacant position with the most qualified applicant, regardless of the fact that a qualified disabled employee wants the job. Because of this split in federal rulings, advice of counsel is necessary in an individual situation.*

KNOW YOUR ATTORNEY

Mary Dee Allen

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EEOC ISSUES OPINION ON USE OF FITNESS TESTS FOR JOB PROMOTIONS

Under the Disabilities Act, there are strict rules on the use of medical examinations and tests in the hiring process. The EEOC wrote an informal advisory letter dated March 28, 2007, which addresses these issues in the context of fitness tests for a job promotion.

Preston D. Pierce .....
"According to the EEOC, physical fitness tests to measure a person's performance of physical tasks in a new position do not violate the restrictions of the ADA on medical examinations as long as they do not include tests or procedures that could be considered medical."

According to the EEOC, physical fitness tests to measure a person's performance of physical tasks in a new position do not violate the restrictions of the ADA on medical examinations as long as they do not include tests or procedures that could be considered medical. Only disability-related inquiries and medical examinations are subject to ADA restrictions. A number of factors are relevant in determining whether a test or procedure is a medical examination. They include whether the test or procedure was administered or interpreted by a healthcare professional; whether it was designed to reveal an impairment; whether it measured the performance of a task or the physiological responses to performing a task; and/or whether medical equipment was used. For example, if the tests you wish to conduct simply measures a person's strength or endurance and does not measure physiological responses such as heart rate or blood pressure before or after performing the tests, they are permissible at any time.

The advisory letter then addresses the circumstances based on whether a person being considered for a promotion was applying for a new job or was non-competitively entitled to the position. If the person was applying for a new job, he or she must be treated as a job applicant. This means that you cannot ask him or her any disability-related questions or require a medical examination before making a conditional offer of the new position. After you extend an offer, you may ask the individual disability-related questions or require a medical examination as long as you treat all entering employees in this job category the same. An employer treating the person as an applicant and using medical information learned about a disability to withdraw the job offer, has to show that the person was not able to perform the job's essential functions or would pose a direct threat, with or without reasonable accommodation. A direct threat indicates a significant risk of substantial harm to the individual or others.

If the individual being considered was not an applicant but instead was non-competitively entitled to the position, he or she as an employee may only be asked disability-related questions or required to take medical examinations that are job-related and consistent with business necessity. To ask such questions, you must have a reasonable belief, based on objective evidence, that: (1) the employee's ability to perform essential job functions will be impaired by a medical condition; or (2) the employee posed a direct threat because of a medical condition.

Editor's Note *- While there is nothing really new in the law in this EEOC advisory letter, it furnishes a useful summary of the use of medical tests and examinations in the promotional process, and their particular application to fitness tests.*

COURT FINDS SEX DISCRIMINATION OVER EMPLOYER'S USE OF PRE-EMPLOYMENT STRENGTH TEST

During the winter, the federal Eighth Circuit Court of Appeals found sex discrimination in an employer's use of a pre-employment strength test at a canned meat plant in Iowa. EEOC v. Dial Corp., 99 FEP Cases 321 (C.A. 8, 2006). In the sausage packing area, workers daily lift and carry up to 18,000 pounds of sausage, walking the equivalent of four miles in the process. They are required to carry approximately 35 pounds of sausage at a time and must lift and load the sausage to heights between 30 and 60 inches above the floor. Employees who work in the sausage packing area experienced a disproportionate number of injuries as compared to the rest of the workers in the plant.

Suzanne K. Roten .....
"The employer implemented several measures to reduce the injury rate, including an ergonomic job rotation, institution of a team approach, lowering the height of machines to decrease lifting pressure for the employees, and conducting periodic safety audits. "

The employer implemented several measures to reduce the injury rate, including an ergonomic job rotation, institution of a team approach, lowering the height of machines to decrease lifting pressure for the employees, and conducting periodic safety audits. In 2000 Dial also instituted a strength test used to evaluate potential employees, called the Work Tolerance Screen (WTS). In this test job applicants were asked to carry a 35 pound bar between two frames, approximately 30 and 60 inches off the floor, and to lift and load the bar onto these frames. An occupational therapist watched the process, documented how many lifts each applicant completed, and recorded her own comments about each candidate's performance. Starting in 2001, the plant nurse also watched and documented the process.

For many years women and men had worked together in the sausage packing area doing the same job. Forty-six percent of the new hires were women in the three years before the WTS was introduced, but the number of women hires dropped to 15% after the test was implemented. The overall percentage of women who passed the test was 38% while the men's passage rate was 97%. While overall injuries and in strength-related injuries among sausage workers declined consistently after 2000 when the test was implemented, the downward trend in injuries had begun in 1998 after the company had instituted measures to reduce injuries.

The Equal Employment Opportunity Commission (EEOC) sued in 2002, and at trial the EEOC presented an expert who testified that the WTS was significantly more difficult than the actual job workers performed at the plant. He explained that although workers did 1.25 lifts per minute on average and rested between lifts, applicants who took the WTS performed six lifts per minute on average, usually without any breaks. He also testified that in two of three years before Dial had implemented the WTS, the women's injury rate had been lower than that of the male workers. In contrast, the employer presented an expert in work physiology, who testified that in his opinion the WTS effectively tested skills which were representative of the actual job, and an industrial and organizational psychologist, who testified that the WTS measured the requirements of the job and that the decrease in injuries could be attributed to the test. Dial also called its plant nurse who testified that although she and other Dial managers knew the WTS was screening out more women than men, the decrease in injuries warranted its continued use.

The lower court, affirmed by the appeals court, found that the WTS had a discriminatory effect, and that the employer had not demonstrated that the WTS was a business necessity or shown either content or criterion validity of the test, in that the employer had not effectively controlled for other variables which may have caused the decline in injuries, including other safety measures that it had implemented. The court apparently was persuaded by the EEOC's expert in industrial organization, and his testimony "that a crucial aspect of the WTS is more difficult than the sausage making jobs themselves" and that the average applicant had to perform four times as many lifts as current employees and had no rest breaks. Concerning the employer's argument for the criterion validity of the test, the court noted that the employer claimed that the decrease in injuries showed that the WTS enabled it to predict which applicants could safely handle the strenuous nature of the work. However, the court found the sausage plant's injuries started decreasing before the WTS was implemented, and that the injury rate for women employees was lower than that for men in two of the three years before the employer implemented the WTS. In short, the evidence did not require a lower court to find that the decrease in injuries resulted from the implementation of the WTS instead of the other safety mechanisms the employer started to put in place in 1996.

Editor's note *— Many employers have physical jobs that create significant injury rates, and some of them have experimented with strength tests as part of the hiring process. While conceptually such an approach may seem entirely logical, if the effect of the test disqualifies a substantially higher proportion of females and/or some particular protected class, legal claims can result. Even if such disparate impact occurs, the tests are deemed to be valid and therefore legal if they accurately predict the successful performance of the job and/or appropriately test the requirements for the job. In this case, the test had an adverse impact on females, and the employer was not able to prove that the test accurately predicted the successful performance of the job, and could not prove that the reduction in injuries resulted from use of the test.*

Although employment tests are not litigated today as much as they were in the 60's and 70's, there is a potential for an employment test to result in litigation. Therefore, employers purchasing tests from commercial providers and/or developing tests of their own, should ensure that such test are job-related and consistent with business necessity, or otherwise "valid." Advice of counsel is recommended, and commercial test providers should be required to offer proof of validity of their tests. A few providers have even been willing to guarantee the validity of their tests.

PERSPECTIVE

IMPROVING THE HIRING PROCESS

Howard B. Jackson ...
"A good first step is establishing objective hiring standards for the position, which includes identifying specific minimum knowledge, skill and experience qualifications."

Hiring and recruitment are critical issues for many employers. Improving the speed and legality of the hiring process can help meet staffing needs more efficiently. This article provides some suggestions

A good first step is establishing objective hiring standards for the position, which includes identifying specific minimum knowledge, skill and experience qualifications. This assists with legality, such as Americans With Disabilities Act and other concerns, and with speed by allowing the hiring manager to quickly screen out unqualified applicants.

Some employers go further to prevent any inference of discrimination by using a "blind applicant" review system. Under such a system, the applicant's name and address is removed before circulation to determine who will be interviewed.

Also consider screening out applicants who do not fill out the application completely. Often, applicants leave out certain information because they are trying to hide something. If the employer uniformly requires all applicants to fill out the application completely (and provides assistance with doing so if needed, to avoid ADA or other discrimination concerns), this may eliminate some problematic candidates.

Once the applications have been screened, conduct a limited number of interviews and do so promptly. Generally, limit interviews to three or four candidates per open position. Then, make the offers promptly as well. Strong candidates are often interviewing with multiple employers, and unnecessary delay can result in losing them to another hiring employer.

Particularly for management level positions, consider conducting panel interviews with a diverse group of persons on the panel. This can increase efficiency, as opposed to multiple interviews with individuals, and can help show the candidate that the employer is using an inclusive, non-discriminatory process.

Consider providing structured interview guidelines. This helps provide appropriate questions for interviewers, and lessens the likelihood of their asking inappropriate questions or using inappropriate criteria.

Application of these principles can help reduce the time, expense, and legal exposure in the hiring process.

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