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Briefly

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PERSONALITY TESTS FOR PROMOTION May Violate ADA

Fred Baker

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Many employers are beginning to use personality tests to assess promotability of employees, including but not limited to, promotions to supervisory and managerial positions. Even a football draft prospect to the NFL is required to take up to fifteen personality and knowledge tests, in addition to assessing their ability to run, catch, and throw. In a recent case, a federal circuit court has ruled that an employer's inclusion of the Minnesota Multiphasic Personality Inventory in a battery of tests required for promotion violates the Americans with Disabilities Act (ADA). Karraker v. Rent-A-Center, Inc., 16 AD Cases 1441 (C.A. 7, 6/14/05).

The plaintiffs did not score sufficiently high on the tests to be considered for a promotion, and brought a class action lawsuit on behalf of the employees at 106 employer stores, claiming that the employer that used the testing violated the ADA. They also claimed that the employer failed to protect the confidentiality of the test results.

The court noted that Congress enacted three provisions in the ADA which explicitly limit the ability of employers to use "medical examinations and inquiries" as a condition of employment: a prohibition against using pre-employment medical tests; a prohibition against the use of medical tests that lack job-relatedness and business necessity; and a prohibition against the use of tests to screen out (or tend to screen out) people with disabilities. The court noted that the employer did not defend the case by arguing that the test is "job-related and consistent with business necessity," but instead defended the case on the basis that the test was not a medical examination and thus not regulated at all by the ADA. The court stated that the case largely turned on whether the test was designed to reveal a mental impairment. The employer argued that it used the test only to measure personality traits, not to disclose mental illness. The lower court accepted the employer's argument, because the test was not interpreted by a psychologist, suggesting it was not a medical examination.

The circuit court rejected the lower court's analysis, finding that the practical effect of the use of the test was similar no matter how the test was used or scored - that is, whether or not the employer used the test to weed out applicants with certain disorders, its use of the test likely had the effect of excluding employees with disorders from promotions. The court found the fact that a psychologist did not interpret the test was not dispositive of the issue, and that use of the test without proof of validity violated the ADA.

Editor's Note *- Since many employers use personality testing, this case is a "wake-up call" to employers to seek competent legal opinion as to whether the use of such tests must meet the requirements of the ADA. This issue may turn on such factors as whether the personality test is a "medical examination," and if so, whether it is "job-related and consistent with business necessity."*

KNOW YOUR ATTORNEY

Judith DePrisco

Judith is an Associate in the Knoxville, Tennessee office of the firm, which she joined in 2002. Her law practice includes an emphasis in workers' compensation, employment discrimination and wrongful discharge litigation, ADA and FMLA compliance, as well as general liability claims and contract disputes. She received her Bachelor of Arts degree in English and History and M.A. in Medieval and Renaissance Studies from the University of North Carolina, and her law degree from the University of Tennessee. Judith is a member of the Knoxville and Tennessee Bar Associations. Judith is a member of the Mid-South Workers' Compensation Association, West Knox Human Resources Association, and the East Tennessee Lawyers' Association for Women.

HIRING OF ILLEGAL WORKERS
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times) the actual damages sustained, plus attorneys fees. In other words, it is an extremely powerful law that was originally passed to use against gangsters, but has been interpreted to apply to a variety of laws, including actions indictable under the Immigration and Nationality Act. The case was brought as a class action alleging that Mohawk and third-party temporary staffing agencies and recruiters conspired to violate federal immigration laws, destroy documentation, and to harbor illegal workers in an attempt to suppress wages. In response to the employer's Rule 12(b)(6) motion to dismiss the plaintiffs' complaint for failure to state a claim, the Eleventh Circuit said that the workers provided enough evidence of a pattern of racketeering activity to avoid dismissal and that the RICO claims under federal and state law could move forward.

DISCUSSING DISABILITY ISSUES
With Current Employees

In general, employers are not supposed to discuss disability issues with current employees. In addition, unless an applicant's disability is known or obvious, employers are not supposed to raise or discuss disability issues with an applicant prior to making a condition offer of employment. Such a situation could occur, for example, where the medical condition is obvious or disclosed to the job interviewer. Although you cannot generally ask an applicant any medical questions, you can ask all applicants whether they can perform the essential functions of the job with or without reasonable accommodations. You can also ask applicants to describe or demonstrate how they would do so.

Judith DePrisco
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Once the person is hired, there are four situations where an employer can discuss disability issues or require medical examinations:

(1) if an employee is having difficulty performing job tasks and the employer has a reasonable basis to believe it is related to a medical condition;

(2) if an employee has requested a reasonable accommodation for a disability;

(3) if the employee is performing fine in the position, but the employer has a reasonable basis for concern that the employee may pose a "direct threat" to the employee or others; and

(4) if the employee is returning to work after a medical leave of absence or if the question/examination is job related and consistent with business necessity.

Any medical inquiries or examinations of employees must be job related and consistent with business necessity. This means that your questions or examinations should be limited to that which you need to know to determine if the employee can continue to perform the job, poses a direct threat and/or requires a reasonable accommodation and, if so, what the reasonable accommodations should be.

When such medical issues are raised, the employer must gather facts about the employee's performance and get medical input from people who have knowledge about the employee's condition. This may involve an interactive process with the employee, and a discussion of reasonable accommodations that do not work as undue hardship on the employer.

EMPLOYER MAY PREFER BILINGUAL PERSON
Without Discriminating

In light of today's multi-national workforces, many employers prefer to have certain persons, particularly managers or supervisors, with bilingual capabilities. In a recent case, the plaintiff sued his employer alleging discrimination on the basis of race, color, national origin, and age, because he was not hired into a position and instead the position was given to a bilingual person. Richardson v. Center Care, Inc., 94 FEP Cases 1009 (S.D. N.Y. 2004). The federal district court in New York rejected the plaintiff's claims, finding that giving preference to a person because he speaks a second language does not give rise to claim of statutory discrimination.

Anita Patel
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DEALING WITH SUBPOENAS
For Protected Health Information

Joe Lynch

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Under the Health Insurance Portability and Accountability Act (HIPAA), healthcare providers and group plans generally are not allowed to disclose Protected Health Information (PHI) except for treatment, payment or healthcare operations. This creates a problem for employer group health plans that receive subpoenas for such information. For a group health plan to be required to disclose PHI in compliance with the subpoena, it must receive a written statement and accompanying documentation from the party that wants the information certifying that it has made reasonable efforts to notify the patient in writing of its request. The notice to the patient must contain enough detail to permit him to raise an objection about the disclosure to the court or administrative tribunal. Only if the time for raising an objection is passed and no objections were raised, or all objections have been resolved and the request for disclosure is consistent with the resolution, may the PHI be disclosed. There is another exception if the group health plan is involved in a lawsuit in its capacity as a covered entity, such as where it is being sued for having denied medical benefits. Under these circumstances, it can use and disclose PHI without a subpoena since the activities fall within the definition of "healthcare operations." Of course, HIPAA itself allows disclosure of PHI through other means, including circumstances where a patient signs a fully compliant HIPAA authorization form allowing the disclosure, or where the disclosure is authorized by the order of a court or administrative tribunal.

HIRING OF ILLEGAL WORKERS STATES CLAIM For RICO Conspiracy To Lower Wages

Suzanne Roten

The significance of the RICO law is that it allows a plaintiff to recover treble (3 times) the actual damages sustained, plus attorneys fees.

The United States Court of Appeals for the Eleventh Circuit, has joined three other circuits in ruling that a plaintiff worker may bring a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) against his employer for knowingly employing and harboring illegal workers allowing the employer to reduce labor costs by depressing wages for its legal employees. Williams. v. Mohawk Industries, 177 LRRM 2550 (6/9/05). The significance of the RICO law is that it allows a plaintiff to recover treble (3

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OSHA REJECTS CHALLENGES To Its Ergonomics Guidelines

Preston Pierce

The coalition had argued that the guidelines were not objective, . . .

In a July 28 letter, OSHA stated that its ergonomic guidelines meet the standards established by the Information Quality Act. OSHA denied a request by the National Coalition on Ergonomics to withdraw and revised ergonomics guidelines for the nursing home industry, retail grocery stores, and poultry processing. The coalition had argued that the guidelines were not objective, presented only one side of the ergonomics "debate," and did so with almost no reference to scientific research. The coalition stated that the guidelines "suggest that '[musculoskeletal disorders]' is an accepted and readily definable medical term," but "it is not." Additionally, the coalition said, the guidelines often state that there is a causative link between "risk factors" and "injuries." OSHA's reliance on "equipment" and "work practices" to reduce the "risk of injury" is unsupported by science, the group added, noting that the National Academy of Science has "rejected the notion that employers can effectively address MSDs through simple physical modifications of the workplace." Therefore, the coalition argued that OSHA withdraw and reconsider the poultry, grocery, and nursing home ergonomics guidelines.

OSHA responded that the information provided in the guidelines is supported by analyses conducted by the National Academy of Science and the National Institute for Occupational Safety and Health, as well as other sources. The coalition has 45 days to appeal the agency's decision to deny its request, which was issued on July 28, 2005.

SAVE THE DATE

Labor & Employment Law Conference
October 13 & 14, 2005
Marriot - Knoxville, TN

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AFL-CIO SPLIT IS BIGGEST LABOR DEVELOPMENT In Fifty Years

Howard Jackson

In the long run, no one really knows whether the split is good or bad for the labor movement.

As expected on July 25, the opening day of the AFL-CIO Convention and 50th Anniversary, leaders of two of the largest AFL-CIO unions, the Teamsters and the Service Employees, announced they were the leaving the federation in the labor movement's biggest schism since the 1930's. A few other large AFL-CIO Unions seem poised to leave the federation soon, including the United Food and Commercial Workers Union and Unite Here (textile, hotel and restaurant workers). In addition, three other AFL-CIO Unions have joined the new "rebel" labor federation, the "Change To Win" Coalition.

This agreement among the unions has been mounting for some time, with the rebel federation group arguing that the AFL-CIO's emphasis on lobbying and backing political candidates was coming at the expense of organizing efforts. Others within the AFL-CIO claim that the split is not a disagreement over a philosophy, but "a transparent attempt at a power grab" by certain labor leaders.

In the long run, no one really knows whether the split is good or bad for the labor movement. The last major labor split occurred 70 years ago, when the CIO split from the AFL. The two organizations merged in the mid-1950's. Some believe that the split could be good for unions in the long run by forcing them to compete with each other for membership, thus proving that they can out-organize the other.

In the short run, however, there is no question that organized labor will be weakened politically and economically. Many state and local labor councils vitally effect organized labor's success, and those labor councils are left in a state of disarray following the split. It is even possible that the unions in the two rival federations will start fighting and raiding each others' shops without the AFL-CIO to mediate disputes. Congressional Democrats are worried, particularly since the AFL-CIO has been friendly to the Democratic Party, and leaders of the new coalition say the labor movement should reach out by being more bi-partisan, rather than being so closely aligned with Democrats.

There is some speculation that as a result of this threat, there may be more "corporate campaigns" on the part of labor unions, involving economic pressure on employers to recognize "card check" or neutrality agreements instead of using the Labor Board's secret ballot election procedures. Employers are also reminded that when the AFL-CIO originally split back in 1935, the labor force grew over the next 20 years from about 13 percent of the non-agricultural work force to about 35 percent.