Human Resources

Treading Lightly Through the Hiring Thicket

By Teresa Anderson

In their desire to hire productive employees, companies must ensure that their preemployment screening programs are lawful.

Preemployment screening can help management avoid hiring problem employees--a laudable goal. However, employers must tread carefully through the screening process, or they may find themselves in violation of the discrimination laws set by the Americans with Disabilities Act (ADA).

Security Management, with the assistance of legal experts, has reviewed the docket of 131 recent ADA cases at the Equal Employment Opportunity Commission (EEOC) to see whether any instructive trends are evident. The docket consists of ADA cases currently under litigation or recently decided. Most of the cases reviewed concerned preemployment issues, rather than disagreements that arose during employment. Our analysis focused on three of these preemployment dispute categories: medical tests, medical questions, and genetic tests.

Background.
The ADA divides employment into three time periods: before the job offer, after the job offer, and employment. During the first stage, an employer is not allowed to ask questions that are likely to cause the applicant to divulge a disability. At this stage, the employer cannot require medical tests and can only ask whether an applicant can perform essential job-related functions, with or without reasonable accommodation.

After an offer has been made but before the applicant has started

working, employers have the freedom to ask any type of medical question or require any medical test, but employers are limited in what they can do with this information. At this stage, the job offer is considered conditional; however, a conditional offer can be withdrawn only under two conditions: if the test reveals that the applicant cannot perform the essential functions of the job (with or without reasonable accommodation) or if placing the candidate in the job--given the applicant's medical condition--would pose a direct threat to the health or safety of the applicant or other employees. As an example of the latter situation, an employee who suffers intermittent, unpredictable blackouts could not drive a forklift without posing a direct safety threat in the workplace.

For current employees, employers can only require medical tests or ask medical questions when they are job-related and necessary for business reasons. The only exception is drug testing. The ADA does not protect current users of illegal drugs, nor does it consider drug testing a medical exam. Thus, employers have the right to test their employees or applicants for unlawful drugs at any time. Some state laws do, however, place restrictions on the circumstances under which an employer can test for drugs. For example, some states preclude random drug testing and limit testing to situations involving an accident or reasonable suspicion.

Claims.
All ADA claims must first be filed through the EEOC. Claimants can also pursue a case on their own by filing a lawsuit rather that waiting for the EEOC to act.

Not every claim filed with the EEOC is deemed by the commission to have merit. The EEOC received 108,939 claims in 1998, but approximately one-third of these cases were either withdrawn, pursued independently, or settled without the commission's help, according to EEOC spokesperson Reginald Welch. When the remaining two-thirds were investigated, only 4,000 were deemed to have merit.

Medical tests.
Medical tests were a factor in at least 52 of the 131 cases reviewed by the magazine. The frequency of medical test claims among the cases reviewed is not surprising, given that a 1998 study by the American Management Association found that nearly one out of every two employers requires all applicants to take a preemployment medical exam. Though such medical tests can help

determine whether a potential employee can perform specific job duties, an employer must be cautious about the scope and methodology of the tests.

According to a 1997 policy guide published by the EEOC, medical tests must be job-related or consistent with business necessity and as nondiscriminatory as possible. Testing that is broad enough to disqualify large groups of people should be reevaluated by the company.

For example, in 1997 the EEOC filed a lawsuit against Comet Rice Ingredients Company for a violation of the ADA. Comet Rice required that each applicant for a manual labor position submit to a back x-ray. Based on the results of the x-rays, the company disqualified every applicant whose x-ray indicated certain back anomalies.

The company denied these applicants employment without conducting further physical exams or considering their prior medical or work history. The company did not conduct any individualized assessment of the applicants to determine whether they could perform specific job functions. According to the EEOC complaint, the company rejected qualified applicants because it perceived them as disabled when they were not.

The company denied any wrongdoing but settled the case, paying $38,000 in damages. As part of the settlement, the company agreed to alter its hiring program, offer the disqualified applicants full-time employment, and issue semiannual reports on its hiring practices to the EEOC.

In a similar case, DSI Transports, Inc., required a physical examination for all applicants for driver's positions. Based on the exam, the company disqualified applicants found to have any of several ailments including back anomalies, certain types of diabetes, high blood pressure, and mild respiratory dysfunction. The EEOC sued the company, claiming that its hiring practices discriminated against individuals with perceived disabilities. Settling out of court, the company agreed to pay the applicants $200,000 in damages.

Companies that rely on doctors to make medical judgments about whether an applicant is physically able to perform certain tasks are not absolved of liability. Even if the mistake is made by the

physician hired to conduct the medical tests, the company can be held responsible for any discrimination that occurs.

This principle is illustrated in *EEOC v. Texas Bus Lines* (U.S. District Court for the Southern District of Texas, 1996). In that case, Arazella Manuel applied for a driver's position at Texas Bus Lines that would have required her to drive an eleven-passenger van and transport passengers between Houston hotels and the airport. Manuel was interviewed, her references were checked, and she successfully passed a driver's test. Manuel then submitted to a physical exam as required by federal law. (Department of Transportation regulations require that all drivers of public transportation vehicles pass a physical examination and obtain a certificate of fitness.)

Following her physical exam, Manuel was disqualified. The doctor conducting the exam concluded that, because Manuel was overweight, she would not be able to move swiftly in the event of an accident. The doctor based this decision on his observation of Manuel getting out of her seat and walking to the observation room before the physical. The doctor disqualified Manuel even though obesity is not a disqualifying factor under Transportation Department regulations and Manuel had no other medical problems.

The EEOC sued Texas Bus Lines under the ADA, claiming that Manuel's obesity, rather than actually being a disability, was only perceived as a disability and resulted in her disqualification. The court found in favor of the plaintiff, ruling that the doctor's evaluation was not a medical opinion and was not based on any objective medical tests. Further, ruled the court, the company is responsible for the doctor's decision. In the written opinion of the case, the judge wrote: "If an employer's relationship with a physician who conducts a medical examination results in the discriminatory rejection of applicants protected by the ADA, the employer is liable for a violation of the statute."

This case also highlights another point: The ADA not only protects people who are actually disabled, but also those who are perceived as disabled. If an employer wrongly believes that an applicant is disabled--an employer mistakenly believes an applicant has AIDS because of the applicant's appearance, for example--and refuses to hire the applicant because of that perception, then the employer has violated the ADA. If the applicant sues, the employer can be held

liable for monetary damages and may be ordered to give the applicant the job.

Medical questions.
Inappropriate disability-related questions accounted for 50 of the 131 EEOC cases reviewed. Asking questions about medical conditions, without testing of any kind, can be a violation of the law if the question is designed to uncover a disability. According to ADA requirements, an employer "shall not...make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." Again, these rules apply only to the questions asked before an offer of employment is extended.

For example, in *EEOC v. Community Coffee* (U.S. District Court for the Southern District of Texas, 1995), Timothy Burke applied for a job as a sales clerk and was interviewed by the store's manager. During the interview, the manager asked Burke about his facial abnormality. Burke was asked to describe how the abnormality occurred and whether past employees or customers had encountered problems dealing with him because of the abnormality. Burke's application for employment was subsequently rejected. The EEOC sued Community Coffee for discrimination, claiming that the company made unlawful preemployment inquiries about a perceived disability. The jury found for the plaintiff and awarded Burke $15,000 in compensation.

As with medical tests, a prospective employee need not be disabled to successfully sue for discrimination due to an improper medical question. This point was recently established in *Griffin v. Steeltek* (U.S. Court of Appeals for the Tenth Circuit, 1998). In the case, Randy Griffin applied for a job with Steeltek and was asked to complete an employment application. On the application, Griffin was asked whether he had ever received workers' compensation or disability income. Griffin wrote that he had received disability income due to third-degree burns to his hands and feet and surgery on his elbow. Neither on the application nor during the interview process did Griffin claim to be disabled.

After the interview, Griffin was told that he was the most qualified applicant and would probably be hired. However, Griffin was not hired, and was told that his application was rejected because he did not have two years' experience in the specific job he was applying for. Griffin had not been informed of that requirement.

Griffin sued Steeltek for discrimination under the ADA, claiming that the company had asked improper questions. The district court ruled in favor of the defendant, stating that even if the question was improper, Griffin had no right to claim discrimination because he was not disabled. Considering the question for the first time, the appeals court disagreed. According to the written opinion of the case, the ADA prohibition against making disability-related inquiries of prospective employees "is not limited to qualified individuals with disabilities."

Asking improper medical questions can also affect an employer's right to fire its employees if they lie during the application process. In *Downs v. Massachusetts Bay Transportation Authority* (U.S. District Court for the District of Massachusetts, 1998), the court ruled that an employer cannot terminate an employee for lying about a medical condition if the question asked by the employer is illegal under the ADA.

Anthony Downs was hired as a bus driver for the Massachusetts Bay Transportation Authority after undergoing several preemployment tests, including a personality test, a driving test, a medical exam, and a drug test. Prior to undergoing the company's required medical exam, Downs filled out a medical form. On the form, Downs was asked whether he had ever experienced joint pain or had ever received workers' compensation benefits. Despite the fact that he had received workers' compensation benefits on numerous occasions and that two of these complaints were due to problems with his elbow, Downs answered no to both questions.

Two years after his hire, Downs filed an injury report claiming that he had developed a problem with his elbow. He underwent surgery for the problem and then filed a request for workers' compensation benefits. While researching the claim, the transportation authority discovered that Downs had falsely answered the questions on the medical questionnaire. He was subsequently fired.

Downs sued his employer, claiming that the questions he answered falsely should never have been asked. The transportation authority claimed that regardless of the nature of the question, lying during the application process should be punished by dismissal. The court found in favor of the plaintiff, ruling that an employer that violates the rights of its employees by asking illegal questions cannot base employment decisions on the answers to those questions.

Genetic tests.
Preemployment genetic testing is not widespread. It is, however, already controversial. Though governed by the same rules applied to medical tests, genetic testing is considered more intrusive than standard medical tests because it seeks to predict future illness rather than measure an applicant's current job qualifications.

In one of the first cases involving genetic testing, *Norman-Bloodsaw v. Lawrence Berkeley Laboratory* (U.S. Court of Appeals for the Ninth Circuit, 1997), the court ruled that preemployment testing for genetic illness (such as sickle cell anemia) violates the ADA unless the employer can prove it had a clear business-related reason for conducting the tests. The testing, conducted by Lawrence Berkeley Laboratory on behalf of the U.S. Department of Energy, was part of an overall preemployment screening program that also tested all employees for syphilis and tested female employees for pregnancy. The court found no clear job-related reason for the agency to require this information about prospective employees.

The message is clear. Though it may be tempting to screen out employees with potential medical problems, employers must beware of violating legal guidelines that limit such screening to a narrow range driven by the job-relatedness of the condition. Companies that fail to tread carefully through this prickly preemployment screening patch may find their reputations tarred and their management stuck with a costly lawsuit.

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Accurate Applications

By Timothy S. Bland and Sue S. Stalcup

Employment applications are a basic starting point for preemployment screening, but companies must ensure that these documents do not violate federal or state antidiscrimination laws. The following overview highlights the primary legal considerations

with regard to an application's instructions, questions, and disclaimers.

Instructions.
Companies should consider including several legally significant instructions on the application. First, employers may want to include a statement that any application containing unrequested information will be automatically rejected. Such an instruction will prevent applicants from creating a basis for a lawsuit by including extraneous information about themselves and then claiming that they were rejected for unlawful reasons. For example, one common technique is for applicants to state on an application that they are union organizers, even though the application does not request such information. If they are not hired, they might sue the employer, claiming they were unlawfully rejected because the employer knew that they were union organizers. Including a statement that applications with extraneous information will automatically be rejected gives employers a legitimate, nondiscriminatory basis for rejecting such applicants.

Second, the company may want to state in writing on the application how disabled applicants can request any accommodation needed to enable them to complete the application. The Americans with Disabilities Act (ADA) not only requires reasonable accommodation of the disabled during employment but also at each stage of the selection process. Including such an instruction on the application lets disabled applicants know that they have the right to, and burden of, requesting any necessary accommodation.

Finally, although not legally required to do so, employers may want to include an equal opportunity statement in the instructional section or elsewhere on the application. Doing so puts the applicant on notice that the employer adheres to the principles of equal employment opportunity and that the applicant's signature on the application indicates the applicant's acknowledgment of the policy.

Questions.
The body of the job application consists of questions addressed to the applicant that are designed to elicit information that will help the employer decide whether the applicant meets the minimum qualifications for the position being filled. In drafting this section, employers must be careful to include only lawful questions.

According to the EEOC, employment applications are tests in the same sense that any tool used to determine whether an applicant will go forward in the selection process is a test. Employment applications must, therefore, either have no adverse impact on applicants who are protected by federal employment discrimination laws or must be job-related. Of course, the easiest way to validate a question on an application is to show that the information requested is related to the applicant's ability to perform the job.

The primary issues employers should avoid include race, religion, gender, age, national origin, or union affiliation. Questions related to other issues, such as citizenship, arrest records, financial status, military records, and disability may pass legal muster if they are job-related; many questions on these topics would be deemed improper, however, and employers must be certain they are on sound legal ground before including them.

National origin. Title VII prohibits discrimination on the basis of national origin. Not only are employers prohibited from asking applicants where they were born, but they are also prohibited from asking where an applicant's parents were born or what an applicant's native language is. Instead, employers should ask applicants if they are eligible to work in the United States. If it is essential for persons holding a particular job to speak or write in English, applicants may be further asked if they can do so. Certain high-security positions may legally require U.S. citizenship.

Sex. Under Title VII, employers are prohibited from discriminating against persons because of their gender. Certain questions about pregnancy and children have been deemed by the EEOC and the courts to constitute unlawful inquiries. Questioning whether an applicant plans to have children or is married is also illegal.

Financial status. Questions regarding applicants' financial status are considered unlawful unless they are job-related, since some minorities may disproportionately have greater financial problems. Thus, it may be unlawful to ask applicants questions that may indicate their financial status. Related questions, such as whether they own a car, are also illegal unless car ownership is necessary to perform the job--as in a position for a pizza delivery person, for example.

In addition, employers should not ask applicants if they have ever filed for bankruptcy, since the federal bankruptcy code prohibits

discrimination in employment because a person has been bankrupt or has been associated with a bankruptcy.

Arrest records. According to the EEOC, inquiries about whether applicants have ever been arrested violate Title VII because such inquiries tend to adversely affect minority job applicants.

Employers may ask about job-related criminal convictions, however. For example, someone who has applied for a position as a security officer to guard valuable goods could be asked if he or she had ever been convicted of theft. Likewise, a person applying for a position as a bank teller or other position handling money could be asked about the same types of convictions.

Similarly, applicants being considered for a position involving interaction with children could be asked about crimes such as rape, assault, and battery, which might indicate that they would pose a risk to the youngsters. (There may be applicable state or federal laws requiring criminal background checks for some positions.)

According to the EEOC, employers must consider certain factors before declining to employ an applicant because of a conviction. These include the nature and gravity of the offense; time elapsed since the conviction or completion of a jail sentence, and how the conviction is related to the job. The more serious the conduct on which the conviction was based, the more recently it occurred, and the more job-related the conviction is, the more likely it is that an applicant can be lawfully rejected based on the conviction.

Age. The Age Discrimination in Employment Act prohibits discrimination against persons who are forty years old or older. Questions that specifically ask an applicant's age should be removed from applications, as should other questions that might indirectly indicate the applicant's age, such as a question asking the year the applicant graduated from high school.

Height and weight. As some experts warn, inquiries into the height and weight of applicants may indirectly give the employer some indication of the sex or national origin of the applicant. Furthermore, since courts have held that morbid obesity is a disability under the ADA, such inquiries, which would reveal whether an applicant is morbidly obese, would violate the ADA. Therefore, questions about height and weight should only be asked when there is a job-related reason for doing so.

Smoking. Bans on smoking in the workplace are becoming popular. Therefore, employers may be tempted to ask applicants whether they smoke. However, the laws of many states expressly prohibit employers from discriminating against applicants who smoke. Employers wishing to inquire about whether applicants smoke should thus consult the laws of each state in which the application will be used to determine whether such an inquiry is lawful. A possible alternative would be to indicate on the application that the employer provides a smoke-free work environment for its employees. Such a statement may prevent some potential applicants who smoke from applying for the job.

Disclaimers.
A final section of most employment applications consists of certifications, disclaimers, and other notices to applicants. In this section, the applicant is often required to certify the accuracy of the information provided. This certification should be expanded to further warn applicants that misstatements or omissions on the application could result in a refusal to hire or in a discharge if untruths are discovered after hire.

Where appropriate, employers should also consider including an employment-at-will disclaimer in this section that places the applicant on notice that neither the application, nor any subsequent employment resulting from it, is intended to create, or will create, a contract of employment for any specific period of time.

The application is an indispensable hiring tool, but one that must be wielded with skill. Through careful drafting and attention to relevant state and federal laws, employers can create employment applications that are both lawful and effective.

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A Winning Personality

Tests given to prospective employees to determine whether they are suited to the job, such as personality and integrity tests, can be

used effectively by employers. However, companies risk violating federal regulations if their tests discriminate against an employee on the basis of race, sex, or even political views.

For example, a case involving a preemployment personality test was settled out of court late last year. Borg-Warner Protection Services paid more than $2.1 million to settle a class action lawsuit alleging that its preemployment test was discriminatory. The test, which was administered to all applicants, contained true-or-false questions such as: "Most companies make too much profit" and "Marijuana should be legalized." Those who answered the questions "incorrectly," claimed the plaintiffs, were not hired.

We welcome your comments on this article. Please e-mail the editor atsharowitz@asisonline.org.

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