Employers can salvage valuable human resources by allowing employees who test positive to keep their jobs while they get help from substance abuse programs. Many employers provide employee assistance programs (EAPs) to help employees with substance abuse and other problems and give them second chances; however, after an employee who is addicted to illegal drugs has been allowed to undergo treatment in a rehabilitation program or has successfully completed such a program, that employee is protected by the Americans with Disabilities Act (ADA). *Employers must not decide to terminate, fail to promote, or otherwise discriminate against an employee who has undergone treatment for drug addiction and is no longer using illegal drugs.* A "one-strike" rule, under which employees who test positive for illegal drugs are never again considered for employment, is apparently lawful. In a case raising this issue,[25] the court said that such a rule excludes all candidates who test positive for any reason and not simply those who are addicted to drugs. Although the rule might tend to have adverse impact against disabled persons, the plaintiffs in this case failed to show that recovered drug addicts were disproportionately excluded from the employer's workforce.

Practical Considerations Would you advise an employer that operates retail clothing stores to drug test? If so, under what circumstances? Using what procedures? What should be done regarding applicants or employees who test positive?

Medical Examinations

A **medical examination** is any "procedure or test that seeks information about an individual's impairments or health."[26] As the *Kroll v. White Lake Ambulance Authority* case that follows illustrates, the distinction between medical exams and other procedures that broadly relate to health is not always clear.

Kroll v. White Lake Ambulance Authority
691 F.3d 809 (6th Cir. 2012)

OPINION BY CIRCUIT JUDGE MOORE:

Emily Kroll ("Kroll") appeals the district court's grant of summary judgment in favor of White Lake Ambulance Authority ("WLAA"), Kroll's former employer, on claims under the Americans with Disabilities Act ("ADA"). Kroll argues that the district court erred in holding as a matter of law that the counseling WLAA ordered Kroll to attend does not constitute a "medical examination" under [the ADA]. * * *This dispute presents an issue of first impression in the Sixth Circuit as to the meaning of "medical examination" under [the ADA]. For the reasons that follow, we VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

* * * In September 2003, Kroll began working for WLAA as an Emergency Medical Technician ("EMT") specialist. Kroll was generally considered to be a "good EMT" and a "good employee" by her direct supervisor, Brian Binns ("Binns"). However, after Kroll became romantically involved with one of her co-workers at WLAA, Binns and the office manager, Jean Dresen ("Dresen"), received reports of concerns from WLAA employees about Kroll's well being [sic].

Kroll maintains that on April 21, 2008 Dresen "requested" that Kroll "receive psychological counseling." Dresen informed Kroll that she had spoken with . . . an administrative case manager . . . and that [he] had referred Dresen to Mark Graves ("Graves") regarding the availability of counseling. Dresen testified that she did not know Graves's title or whether he was a mental-health professional. Dresen told Kroll that she should contact the Red Cross regarding financial assistance for counseling, and also requested that Kroll authorize the release of her counseling records so that WLAA

[25] *Lopez v. Pacific Maritime Association*, 636 F.3d 1197 (9th Cir. 2011).
[26] U.S. Equal Employment Opportunity Commission. *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the ADA.* (July 27, 2000).

could monitor her attendance. Dresen stated that Kroll was receptive to the idea of counseling and informed Dresen that she would pursue it "right away." Kroll, on the other hand, testified that Dresen instructed her to seek counseling from Kim Jahn ("Jahn"), but that Kroll was not amenable because Jahn "was a neighbor and friend of" Dresen and Kroll had heard negative things about Jahn. There was no testimony as to Jahn's profession or qualifications.

A few days later on April 28, 2008, . . . Binns[] met with Kroll and Kroll's father following a dispute between Kroll and another WLAA employee. Binns told Kroll that he had received a "complaint in regards to [Kroll] screaming at a male acquaintance [on the phone] . . . while . . . driving a vehicle loaded with a patient . . . [in] emergency status with lights and sirens." Because Binns was concerned about Kroll's ability to perform her job safely, he told Kroll that she must attend counseling in order to continue working at WLAA. Binns testified that he didn't "think" that he "used the term 'psychological' " in describing the counseling that he asked Kroll to attend. However, when asked whether it would "be fair to say" that Binns requested that Kroll "see a psychologist to discuss issues related to her mental health," Binns responded affirmatively. Kroll told Binns that she would not attend the counseling, left the meeting, and did not return to work at WLAA. At her deposition, Kroll testified that because WLAA told her that she would have to pay for the counseling out of pocket, she "told them [she] did not have the monetary funds to seek counseling," although she would have been willing to attend the counseling if it was provided to her free of charge.

* * * The . . . question presented in this appeal is whether the counseling that Kroll was instructed to attend constitutes a "medical examination" under [the ADA]. The district court concluded that it does not and, as a result, granted WLAA's motion for summary judgment. The district court reached this conclusion by determining categorically that "counseling alone does not constitute a medical examination under the ADA." Construing the facts in the light most favorable to Kroll, we conclude that this decision was in error for the reasons that follow.

[The ADA] prohibits employers from "requir[ing] a medical examination" or "mak[ing] inquiries of an employee as to whether such employee is an individual with a disability . . . unless such examination or inquiry is shown to be job-related and consistent with business necessity." Thus, employees can be instructed to undergo medical examinations by employers only "in certain limited circumstances," confined by the "job-relatedness" and "business necessity" requirements. The EEOC has explained that this restriction "reflect[s] Congress's intent to protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs." In essence, the restriction strikes a balance between competing interests.

* * *The EEOC . . . defines "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairments or health." It provides a seven-factor test for analyzing whether a test or procedure qualifies as a "medical examination" and notes that "one factor may be enough to determine that a test or procedure is medical":

(1) whether the test is administered by a health care professional;
(2) whether the test is interpreted by a health care professional;
(3) whether the test is designed to reveal an impairment or physical or mental health;
(4) whether the test is invasive;
(5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task;
(6) whether the test normally is given in a medical setting; and,
(7) whether medical equipment is used.

The guidance further explains that "psychological tests that are designed to identify a mental disorder or impairment" are "medical examinations," while "psychological tests that measure personality traits such as honesty, preferences, and habits" are not. This explanation is in keeping with the EEOC's recognition . . . that "[t]raits or behaviors are not, in themselves, mental impairments."

Thus, the EEOC instructs that to determine whether something constitutes a "medical examination" one must consider whether it is likely to elicit information about a disability, providing a basis for discriminatory treatment. The EEOC explains that prohibiting such inquiries prevents discrimination by precluding employers from obtaining information about "nonvisible disabilities, such as . . . mental illness," and then taking adverse employment actions "despite [an individual's] ability to perform the job." The importance of [this section of the ADA] in preventing discrimination is

underscored by the fact that, in contrast to many other provisions of the ADA, all individuals—disabled or not—may bring suit in aid of its enforcement.

Examples provided by the EEOC suggest that an employer's intent is not dispositive as to whether something qualifies as a "medical examination" under the ADA. Instead, the employer's purpose must be considered in the larger factual context of a particular test or assessment's typical uses and purposes. Consider the following example provided by the EEOC . . . :

> *A psychological test is designed to reveal mental illness, but a particular employer says it does not give the test to disclose mental illness (for example, the employer says it uses the test to disclose just tastes and habits). But, the test also is interpreted by a psychologist, and is routinely used in a clinical setting to provide evidence that can be used to diagnose mental health (for example, whether an applicant has paranoid tendencies, or is depressed). Under these facts, this test is a medical examination.*

* * * We can generalize from this scenario that when an employer's purported intentions mismatch the predominant purpose and design of a particular test or assessment, which is to uncover mental-health defects or disabilities, those intentions are accorded less weight and significance in the analysis.

The Seventh Circuit decision in *Karraker v. Rent-A-Center* is a useful example of the application of the EEOC's guidance directives. In Karraker, the Seventh Circuit held that an evaluation administered to employees seeking a promotion that included the Minnesota Multiphasic Personality Inventory (MMPI) constituted a "medical examination" under the ADA because the MMPI "is designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of one with a mental disability." The Seventh Circuit reached this decision in spite of the fact that the employer claimed to be administering the MMPI solely for the purpose of measuring personality traits, that the test was not being scored by a psychologist, and that the employer was only using "a vocational scoring protocol" as opposed to "a clinical protocol." The Seventh Circuit determined that the fact that a high score on the test could be "one of several symptoms which may contribute to a diagnosis of paranoid personality disorder" was enough to conclude that the test was "best categorized as a medical examination" subject to the ADA's restrictions.

With this legal backdrop we now consider Kroll's claims. Admittedly, our task is distinct from that undertaken by the Seventh Circuit in Karraker as the exact substance of the "counseling" Kroll was instructed to attend remains unclear and somewhat in dispute by the parties. Kroll alleges that WLAA required her to "receive psychological counseling" and "to see a mental health counselor as a condition to keeping her employment." In addition, Kroll points to testimony from Binns in which he agreed that it would "be fair to say" that WLAA requested that Kroll "see a psychologist to discuss issues related to her mental health." WLAA admits that it instructed Kroll to attend "counseling" as a condition of her continued employment, but contends that WLAA did not specify that the "counseling" be "psychological" in nature. * * *

The Oxford English Dictionary defines "counseling" in the psychological sense as "a form of psychotherapy in which the counsellor adopts a permissive and supportive role in enabling a client to solve his or her own problems." Merriam Webster's English Dictionary defines "counseling" as "professional guidance of the individual by utilizing psychological methods especially in collecting case history data, using various techniques of the personal interview, and testing interests and aptitudes." Taber's Cyclopedic Medical Dictionary defines "counseling" as "[t]he providing of advice and guidance to a patient by a health professional" and defines "psychological" as "[pertaining] to the study of the mind in all of its relationships, normal and abnormal." Dorland's Medical Dictionary defines "counseling" as the "provision of information, advice, and support," and "psychology" as "the branch of science that deals with the mind and mental processes, especially in relation to human and animal behavior."

No clear or precise meaning emerges from these definitions. Some definitions suggest that "psychological counseling" is more or less passive, with the counselor serving only as an aide in the individual's own problem-solving process. Other definitions, however, tie "psychological counseling" to the science of psychology implicating the diagnosis and treatment of mental illness. Accordingly, we must consider the evidence presented by Kroll and employ the EEOC's seven-factor test to determine whether a reasonable jury could conclude that the "psychological counseling" Kroll was instructed to attend constitutes a "medical examination" . . . .

It is clear that both factors one and two—administration and interpretation by a health-care professional—weigh in favor of the "psychological counseling" Kroll was instructed to attend being a "medical examination."

Kroll specifically alleged, and Binns provided support for the conclusion, that Kroll was instructed to attend counseling administered by a psychologist. Regardless of whether the psychologist would have acted in a passive, facilitating role, or a test-oriented, diagnostic role a reasonable jury could conclude that the psychologist would have, at minimum, done some interpretation of the content of the counseling in order to assist Kroll with her problems; indeed, this was the reason why WLAA insisted that Kroll attend the counseling. Accordingly, we conclude that a reasonable jury could find that factors one and two weigh in favor of concluding that the "psychological counseling" Kroll was instructed to attend constituted a "medical examination."

This brings us to factor three, arguably the most critical in this analysis: whether the "psychological counseling" was designed to reveal a mental-health impairment. As previously suggested, the answer in the abstract is somewhat ambiguous. The definitions suggest that sometimes "psychological counseling" is used for the diagnosis and treatment of mental illness; the ADA recognizes as much in stating that "psychologists" are among the "variety of health professionals [that] may provide documentation regarding psychiatric disabilities" for ADA purposes. However, psychological counseling need not always be targeted to mental-health diagnosis—sometimes patients seek psychological counseling and specifically request that no mental-health diagnosis be made. In this instance, based on the evidence presented by Kroll, a reasonable jury could conclude that the psychological counseling Kroll was instructed to attend was the type designed to uncover a mental-health defect. WLAA does not dispute that it was concerned about Kroll suffering from depression, to the point of suicidal ideation, and Binns stated in his deposition that he instructed Kroll to go to the counseling "to discuss issues related to her mental health." These facts are sufficient for a reasonable jury to conclude that WLAA intended for Kroll to attend counseling to explore her possible affliction with depression, or a similar mental-health impairment, so that she could receive the appropriate corresponding treatment. This uncovering of mental-health defects at an employer's direction is the precise harm that [the ADA] is designed to prevent absent a demonstrated job-related business necessity.

With respect to factors four, five, six, and seven, the paucity of information with which we have to evaluate their application makes it difficult to decide whether they weigh in favor of or against concluding that the counseling Kroll was instructed to attend constituted a "medical examination" under the ADA. Rather than speculate, we decline to comment on these factors because ultimately none is dispositive to our analysis. Upon considering factors one, two, and particularly three, we conclude that Kroll has presented sufficient evidence such that a reasonable jury could conclude that the "psychological counseling" Kroll was instructed to attend did constitute a "medical examination" under the ADA. We reach this conclusion, consistent with the reasoning of the Seventh Circuit, because the "psychological counseling" in question was likely to probe and explore whether Kroll suffered from a mental-health disability, regardless of whether this was WLAA's intention.

We recognize that even if Kroll's instruction to undergo "psychological counseling" is governed by [the ADA], WLAA may still be entitled to summary judgment if such counseling was "job related" and consistent with "business necessity." Because the district court did not decide this question in the first instance, the parties have not briefed it on appeal. Accordingly, the proper course is to remand the case to the district court for decision in the first instance. * * *

Dissent by Circuit Judge Sutton:

* * * I cannot agree that a requirement to obtain psychological counseling amounts to a requirement to obtain a medical examination.

The relevant provision says:

> *A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.*

The determinative words are "require" and "medical examination," not just "medical examination." The law bars a required medical examination—and that did not happen. When Kroll, an emergency medical technician, showed on-the-job distress over an affair with a married co-worker, principally through several outbursts at work, her employer, the White Lake Ambulance Authority, understandably tried to do something about it. The employer, however, did not compel Kroll to take a medical examination. It compelled her to obtain psychological counseling, allowing her to obtain it on her own terms and with any counselor she wished.

The employer had no interest in the outcome of the counseling, no interest in any potential diagnosis, no interest in the type of counseling she received, no interest in anything at all save verification that she obtain some form of counseling if she was going to continue providing EMT services for the ambulance company.

By any definition, compelled counseling does not compel a medical examination. * * * The breadth of services encompassed by a psychological-counseling requirement resolves this claim. For it means that Kroll, not the company, controlled her destiny—controlled in other words whether she sought counseling that included a medical examination or did not. No doubt, she might meet this requirement by seeing a psychologist or psychiatrist who used a medical examination. But, if so, that was her choice, not the company's. If a trying boss insists that an employee arrive at work by eight o'clock the next morning, it is not the boss's fault if the employee opts to meet the requirement by staying overnight in the office. So it is here. Kroll had the right to meet this counseling requirement on her own terms, some of which could lead to a medical examination and others of which would not. Because White Lake Ambulance did not "require" Kroll to obtain a "medical examination," I must respectfully dissent.

CASE QUESTIONS

1. What was the legal issue in this case? What did the appeals court decide?
2. What factors does the EEOC use to determine whether a procedure constitutes a "medical examination" under the ADA? How does the appeals court apply these factors in this case?
3. Why does it matter whether the "psychological counseling" that the plaintiff was ordered to undergo was a medical examination? On remand, do you think that the counseling will be found to be job-related and consistent with business necessity? Why or why not?
4. What is Justice Sutton's argument in his dissenting opinion? Are you more persuaded by the majority opinion or the dissenting opinion? Why?
5. What are some practical implications of this decision for employers dealing with employees who appear to be having emotional or behavioral problems?

Table 6.1 provides examples of tests that are and are not considered medical exams. The significance of this distinction is that medical exams are subject to a number of limitations under the ADA.

Medical Examinations and The ADA

The ADA governs whether medical exams can be conducted, what types of exams can be performed, and to what uses the information gleaned from medical exams can be put. These rules are outlined in Table 6.2.

TABLE 6.1 EXAMPLES OF TESTS THAT ARE AND ARE NOT CONSIDERED MEDICAL EXAMINATIONS

MEDICAL EXAMINATION	NOT A MEDICAL EXAMINATION
Test to check for use of alcohol	Drug test limited to a search for use of illegal drugs
Blood pressure screening	Physical fitness/agility test
HIV test	Polygraph exam
Genetic test	Honesty test
Psychological test used to diagnose mental illness	Psychological test assessing personality in the normal range
Vision test analyzed by an ophthalmologist or optometrist	Vision test for ability to read or recognize objects
Diagnostic procedure (e.g., MRI) or medical checkup	Demonstrations of ability to perform specific job tasks

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