

Medical Inquiries Prior to a Conditional Offer of Employment The ADA differs from other federal antidiscrimination laws in directly prohibiting preemployment inquiries that might reveal the existence, nature, or severity of an applicant's disability.³⁶ Congress recognized the particular importance of this provision in the context of disability discrimination. Otherwise, it would be all too easy for the fact of an applicant's disability to overwhelm consideration of her qualifications. But does this prohibition also protect employees who are not disabled? *Harrison v. Benchmark Electronics Huntsville* addresses this question in the context of medical inquiries following from a drug test.

Harrison v. Benchmark Electronics Huntsville 593 F.3d 1206 (11th Cir. 2010)

OPINION BY CIRCUIT JUDGE SILER:

John Harrison sued Benchmark Electronics Huntsville, Inc. ("BEHI"), alleging . . . that BEHI engaged in an improper medical inquiry, in violation of the Americans with Disabilities Act of 1990 ("ADA"). The district court granted summary judgment in favor BEHI. . . . We reverse.

In November 2005, Aerotek, a company that places temporary workers at BEHI, assigned Harrison to work at BEHI. Harrison worked as a "debug tech," and his responsibilities included identifying problems with, repairing, and testing electronic boards. Although he suffers from epilepsy and takes barbiturates to control his condition, the Equal Employment Opportunity Commission ("EEOC") determined that he did not have a disability as defined under the ADA.

At the time Harrison commenced his temporary position at BEHI, the company had a practice of screening temporary employees for potential permanent employment. If a supervisor believed that a temporary employee would meet BEHI's needs, he would invite that employee to submit an application for employment and complete the necessary drug testing and background check. * * * On May 19, 2006, Harrison submitted an application for permanent employment, at the request of his supervisor, Don Anthony. Along with his application, he consented to a drug test. * * * In July 2006, Lena Williams, employed in BEHI's human resources department, was notified that Harrison's test had come back positive and was awaiting review by a Medical Review Officer ("MRO"). She called Anthony and asked him to "send [Harrison] her way." She stated that she did not tell Anthony about the positive drug screen at

any time, because she had a duty to keep such information confidential. * * *

Regardless of how he found out about the drug test results, Anthony informed Harrison that he had tested positive for barbiturates. Harrison responded by claiming to have a prescription, which Anthony instructed him to retrieve. Anthony then called the MRO and passed the phone to Harrison, who answered a series of questions about the medication. The MRO asked him how long he had been disabled, what medication he took, and how long he had taken it. He replied that he had epilepsy since he was two years old, he took barbiturates to control it, and he stated the amount of his dosage. Anthony did not ask any questions, but he remained in the room during this colloquy and heard Harrison's responses to the MRO's questions.

On July 19, 2006, the MRO reported to Williams that Harrison's drug test had been cleared. By this time, Williams had also received clearance to hire Harrison, information she passed on to Anthony. However, Anthony told human resources not to prepare an offer letter for Harrison. Anthony then asked Aerotek not to return Harrison to BEHI. On August 18, 2006, Aerotek informed Harrison that he would not be returning to BEHI, because he had a performance and attitude problem, and because he had been accused of threatening Anthony. He was fired from Aerotek that same day.

Through the course of the litigation, Anthony has asserted three reasons to support his decision not to hire Harrison: (1) he was too busy preparing for a company-wide audit to extend the offer; (2) Harrison had made threats against him; and (3) several employees had expressed concern to him about Harrison's

³⁶ 42 U.S.C.S. § 12112 (d)(2)(A) (2013).

competence. Anthony maintains that, in light of these concerns, he simply needed more time to evaluate Harrison. * * *

. . . Harrison allege[s] various violations of the ADA: namely, that (1) BEHI engaged in an improper medical inquiry, (2) he was not hired due to a perceived disability, and (3) he was terminated due to a perceived disability. * * * The district court granted BEHI's motion, as to both the preemployment medical inquiry and perceived disability claims. * * * Because Harrison "tested positive for barbiturates," the court held that BEHI was then authorized to ask Harrison whether he "had a legitimate use for such medication."

Before addressing the merits of Harrison's appeal, we must first examine whether he, a nondisabled individual, can state a private cause of action for a prohibited medical inquiry in violation of [the ADA]. * * * Harrison urges us to join our sister circuits who are unanimous in recognizing a private cause of action irrespective of the plaintiff's disability status. . . . In the pre-offer stage, which is at issue in this case, "a covered entity shall not conduct a medical examination or 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." * * * [T]he statutory language at issue in this case . . . does not predicate suit under the statute on an applicant's disability status. In contrast to the ADA's general prohibition of disability discrimination . . . which refers only to "qualified individuals with disabilities," [the preemployment medical examinations and inquiries section of the ADA] refers broadly to "applicants." An "applicant" is "[a] person who submits a formal application to do something or for a position, especially as part of recruitment or selection process; a candidate."

* * * [The language in the ADA prohibiting preemployment medical inquiries] does not limit coverage to applicants who are also "qualified individuals with disabilities," and we do not infer such a restriction. * * * Congress sought to prevent employers from using preemployment medical inquiries "to exclude applicants with disabilities—particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease, and cancer—before their ability to perform the job was even evaluated." The legislative history . . . indicates that "Congress wished to curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment. . . ." Allowing nondisabled applicants to sue will enhance and enforce Congress's prohibition.

Moreover, a contrary reading would vitiate [the ADA's] effectiveness: "It makes little sense to require an [applicant] to demonstrate that he has a disability to prevent his [potential] employer from inquiring as to whether or not he has [one]." * * * Thus, we now explicitly recognize that a plaintiff has a private right of action under [the section of the ADA prohibiting preemployment medical inquiries], irrespective of his disability status.

* * * Consistent with Congress's intent, the regulations adopted under the ADA by the EEOC provide that an employer may make "preemployment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform the job related functions." The regulations clarify that while it is appropriate for an employer to inquire into an applicant's ability to perform job-related functions, it is illegal for him to make targeted disability-related inquiries. The EEOC has defined "disability-related" questions as those "likely to elicit information about a disability." On the other hand, "if there are many possible answers to a question and only some of those answers would contain disability-related information, the question is not 'disability-related.'"

In addition to allowing inquiries directed at an applicant's ability to perform job-related functions, the ADA recognizes an exemption for drug tests. (" . . . a test to determine the illegal use of drugs shall not be considered a medical examination.") Employers may also ask follow-up questions in response to a positive drug test . . . ("[I]f an applicant tests positive for illegal drug use . . . the employer may validate the test results by asking about lawful drug use or possible explanations for the positive result other than the illegal use of drugs. [For example, the employer may lawfully ask questions such as, 'What medications have you taken that might have resulted in this positive test result? Are you taking this medication under a lawful prescription?' "). However, the regulations, coupled with the EEOC's guidelines, make clear that disability-related questions are still prohibited. * * *

While the district court correctly concluded that employers may conduct follow-up questioning in response to a positive drug test, it failed to acknowledge any limits on this type of questioning. * * * Harrison testified that Anthony told him his drug test was positive, that he disclosed his prescription, that he was then taken to Anthony's office where he answered questions about his medication, and that Anthony remained in

the room during this interview. Anthony denied ever knowing that Harrison suffered from epilepsy, and he acknowledged that it would be improper for him to be present during the MRO interview. Although BEHI was permitted to ask follow-up questions to ensure that Harrison's positive drug test was due to a lawful prescription, a jury may find that these questions exceeded the scope of the likely-to-elicited standard, and that Anthony's presence in the room violated the ADA, especially considering the conflict between Harrison's testimony—that to answer the MRO's questions he was forced to disclose the fact and extent of his epilepsy—and Anthony's—that he never knew Harrison suffered from the condition. A reasonable jury could infer that Anthony's presence in the room was an intentional attempt *likely to elicit* information about a disability in violation of the ADA's prohibition against preemployment medical inquiries. * * *

Finally, BEHI obliquely argues that even assuming an improper medical inquiry, Harrison cannot present evidence of damages sufficient to overcome summary judgment. * * * [O]ur sister circuits require that a nondisabled plaintiff at least show some damages . . . caused by a [an impermissible medical inquiry]. We agree. * * * Harrison has presented sufficient evidence

for a reasonable jury to find that he suffered damages—namely, that he was not hired as a permanent employee of BEHI because of his responses to allegedly unlawful questions. * * * [A] reasonable jury could infer that Anthony did base his decision not to hire Harrison on information gleaned from an improper medical inquiry. “[I]t may be that, at trial [BEHI] will be able convincingly to show that its proffered reason[s] [were] bona fide. In that case it will prevail.” We merely hold that summary judgment cannot be supported at this time; we must, therefore, reverse and remand.

CASE QUESTIONS

1. What were the legal issues in this case? What did the court decide? Why?
2. Would the purpose of prohibiting preemployment medical inquiries be defeated if the court had ruled that this requirement applied only to disabled job candidates?
3. What medical inquiries were made in this case? Why might they have violated the ADA?
4. What should an employer do to verify whether a positive drug test result was caused by a lawful prescription drug?

Employers must refrain from seeking medical information from all applicants, disabled or not. Medical inquiries include questions about disabilities, medical and psychological conditions, medical histories, medications taken, and workers' compensation claims filed. However, an employer who is concerned about a job candidate's ability to do a job is permitted to ask that candidate to demonstrate how he would do the job. Furthermore, the prohibition on medical inquiries applies only to preemployment inquiries. An employer who extends a “conditional offer of employment” to a job candidate (meaning that the person will be hired provided that the results of a medical exam are satisfactory) can make any type of medical inquiry or perform any type of medical exam (excluding genetic tests) at that point—provided that all persons hired to perform the same type of work are subjected to the same inquiries or exams. Thus, *employers who desire medical information from job candidates should seek that information only after job candidates have been conditionally offered employment based on their other qualifications.* However, such information still cannot be used to discriminate against qualified disabled persons who can perform the main parts of jobs (the “essential functions”) with or without reasonable accommodation.

Use of Social Media In Recruiting

The Internet generally, and social media (e.g., LinkedIn, Facebook, Twitter) in particular, are playing an increasing role in recruiting, as employers use these tools to identify and screen job candidates. One of the main legal concerns about this trend relates directly to the above discussion of preemployment inquiries. It is entirely possible that scrutiny of

these sources will cause employers to become privy to the protected class information of job candidates.³⁷ This might be especially true of social media, where much of the content tends to be pictorial and norms of self-disclosure are arguably looser. At least nine states (e.g., Maryland, California, Illinois, Michigan, Colorado) have enacted laws since 2012 regulating in some fashion employer access to the social media accounts of employees and job applicants.³⁸ Washington State's law generally prohibits employers from requiring employees or applicants to divulge their login credentials, access their accounts in the presence of the employer, add the employer as a "friend" or contact, or lessen their privacy settings.³⁹ In the absence of state law, employers must decide whether the information they obtain from social media is worth the potential discrimination and other claims and, if so, how to obtain and handle the information in a way that minimizes the chance that protected class information inadvertently obtained will taint hiring decisions.⁴⁰

Practical Considerations To the extent that doing so is permitted by state law, would you recommend that an employer use social media in the recruiting process? Why or why not? If you think that it should be used, how should that be done?

Statements by Employers

Recruitment entails not only extracting information from job candidates but also providing information and attempting to persuade candidates to accept job offers. These statements by employers can have legal consequences. Employers might be tempted to downplay negative information that would scare away prospective employees or make promises regarding the expected duration of employment, promotions, or pay raises when trying to entice desired candidates to take jobs. Later, when circumstances change and the honeymoon period is over, misrepresentations and unfulfilled promises can give rise to a number of different legal claims, including fraud, negligent misrepresentation, and breach of contract. The elements of a tort claim of **fraud** (distinct from types of criminal fraud) are outlined in the "Elements of a Claim" feature:

A successful fraud claim occurred when a medical practice specializing in coronary care sought to recruit a renowned specialist.⁴¹ Assurances were given that the specialist would

ELEMENTS OF A CLAIM

Fraud

1. A false representation of a material fact was made to another person.
2. The party making the statement knew that it was false at the time that it was made (or had reckless disregard for the truth).
3. The party making the statement intended the other person to rely on the false representation and to act or refrain from acting in a certain way.
4. The other person was, in fact, induced to act or refrain from acting.
5. The other person was harmed by reliance on the false representation.

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³⁷ Rhonda Smith. "Using Social Media During Hiring Process Seen Exposing Employers to Bias Claims." *Daily Labor Report* 118 (June 20, 2011), B-1.

³⁸ Michael O. Loatman. "Washington Becomes Ninth State to Limit Employer Access to Social Media Accounts." *Daily Labor Report* 100 (May 23, 2013), A-7.

³⁹ Loatman.

⁴⁰ Andrew R. McIlvaine. "Be Careful Out There." *Human Resource Executive Online* (September 5, 2012) Viewed September 10, 2012 (<http://www.hreonline.com/>).

⁴¹ *Mkparu v. Ohio Heart Care, Inc.*, 740 N.E.2d 293 (1999).