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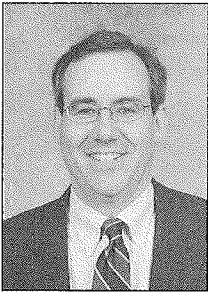
Reflecting Back, Looking Forward



MICHAEL NEWMAN AND FAITH ISENHATH

The Americans with Disabilities Act and Medical Examinations

The Americans with Disabilities Act (ADA) limits an employer's ability to make inquiries about applicants' and employees' disabilities or to require them to have medical examinations. The ADA states, in relevant part, "[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 ... unless such examination or inquiry is shown to be job-related and consistent with business necessity."¹ This month's column provides an overview of when an employer's tests or procedures constitute a medical examination under the ADA.



The ADA defines a medical examination as a "procedure or test that seeks information about an individual's physical or mental impairments or health."² The Equal Employment Opportunity Commission (EEOC) provides guidance on how to determine whether a test or procedure is a medical examination. Medical examinations include, but are not limited to, any one of the following factors or combination of factors:



- whether the test is administered by a health care professional;
- whether the test is interpreted by a health care professional;
- whether the test is designed to reveal an impairment or the condition of one's physical or mental health;
- whether the test is invasive;
- whether the test measures an employee's performance of a task or measures his or her physiological responses to performing the task;
- whether the test normally is given in a medical setting; and
- whether medical equipment is used to perform the test.

The EEOC also provides a list of examples of medical examinations:

- vision tests conducted and analyzed by an ophthalmologist or optometrist;
- blood, urine, and breath analyses to check for alcohol use;
- blood, urine, saliva, and hair analyses to detect disease or genetic marks (for example, to check for conditions such as sickle cell trait and breast cancer);

- blood pressure screening and cholesterol testing;
- nerve conduction tests (for example, tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);
- range-of-motion tests that measure muscle strength and motor function;
- pulmonary function tests (for example, tests that measure the capacity of the lungs to hold air and to move air in and out);
- psychological tests that are designed to identify a mental disorder or impairment; and
- diagnostic procedures such as X-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

In addition, the EEOC lists a number of procedures and tests that employers may require and are generally *not* considered a medical examination:

- tests to determine current use of illegal drugs;
- physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (for example, measuring heart rate or blood pressure);
- tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;
- psychological tests that measure personality traits such as honesty, preferences, and habits; and
- polygraph examinations.

Determining whether a test or procedure is a medical examination is an important inquiry for employers. For example, if an employer requires a job applicant to lift a 30-pound box and carry it 20 feet, that analysis is not a medical examination; instead, it is a test designed to determine whether the applicant can perform a particular task. However, if the employer takes the applicant's blood pressure or heart rate after such lifting and carrying, the test *would* be considered a medical examination, because it is used to measure the applicant's physiological response to lifting and carrying, as opposed to the applicant's ability to lift and carry.³ As another example, if an employer requires a psychological test to disclose tastes and hab-

its, but a psychologist interprets the test, which is routinely used in a clinical setting to provide evidence that would lead to diagnosis of a mental disorder or impairment, then the test is a medical examination.

In a recent case—*Indergard v. Georgia-Pacific Corp.*—the U.S. Court of Appeals for the Ninth Circuit analyzed whether an employer's test was a medical examination. In this case, the employer had required employees to undergo a physical capacity evaluation (PCE) before returning to work from medical leave.⁴ The employer contracted with an independent occupational therapy provider to conduct the PCEs. On the first day of Indergard's PCE, Vicky Starnes, a state-licensed occupational therapist, recorded Indergard's weight, height, blood pressure, resting pulse, medical history, and current pain level as well as her use of medication, alcohol, tobacco, and assistive devices. Starnes also measured the range of motion in Indergard's arms and legs; performed muscle testing; and observed her gait, balance, and posture.

Starnes then measured Indergard's ability to lift different amounts of weight at various levels and her ability to carry increasing amounts of weight over a set distance. Starnes had Indergard lift and pour five-gallon buckets filled with 45 pounds of sand, place nuts and bolts in a box, then climb stairs, stand, sit, kneel, squat, and crawl. Starnes also recorded details about Indergard's vision, communication, cognitive ability, hearing, attitude, and behavior. The second day of the PCE included Starnes' measurement and recording of Indergard's heart rate after she walked on a treadmill, during which Starnes noted that Indergard had required increased oxygen and demonstrated "poor aerobic fitness." Starnes ultimately concluded that Indergard was unable to perform the lifting requirement of her job and recommended that she not be permitted to return to work. Because Indergard could not return to work and no other positions were available for which she was qualified, the employer terminated her employment.

Indergard brought various ADA claims against the employer in the U.S. District Court for the District of Oregon. The district court granted summary judgment for the employer, because the court found that the PCE was not a medical examination under the ADA.⁵ Indergard then appealed to the Ninth Circuit, where the main issue before the court was whether the PCE was a medical examination under the ADA. The Ninth Circuit first analyzed the EEOC factors that are included in a medical examination and found that at least four of the factors weighed in Indergard's favor. The court found that Starnes was a health care professional who had administered the test to Indergard and had interpreted it. The court noted that it was significant that Starnes had submitted the test results to Indergard's orthopedic surgeon, who had agreed with Starnes' recommendation.

In addition, the court found that the PCE was broad enough to have the capability of revealing impairments of Indergard's physical and mental health, specifically because of the subjective reports regarding her current pain level and use of medication and assistive devices

as well as her communication, cognitive ability, attitude, and behavior.⁶ The court also decided that Starnes' recording of Indergard's heart rate and breathing pattern after the treadmill test were measurements of Indergard's physiological response to her performance and therefore went beyond the mere collecting of information necessary to determine whether she was physically capable of performing the job. The court further noted that Starnes used medical equipment, such as the blood pressure cuff. The court held that the EEOC factors weighed in Indergard's favor, and that the PCE was therefore a medical examination for purposes of the Americans with Disabilities Act.

The Ninth Circuit also considered the limited case law on this issue and found that it also weighed in favor of Indergard. The court found Indergard's case similar to that of *Medlin v. Rome Strip Steel Co.*,⁷ which held that the employer's functional capacity examination (FCE) was a medical examination under the ADA, "because the sole purpose of the FCE was to determine whether Medlin 'could physically return to work without any restrictions' and was 'in essence and in reality, a fitness for duty exam.'"

The court also compared Indergard's situation to the case of *Conroy v. New York Dep't of Corr. Serv.*, 333 F.3d 88 (2d Cir. 2003), and found that the employer's PCE involved tests and inquiries that were capable of revealing whether Indergard suffered from a disability. *Conroy* involved an employer who had required that employees returning from sick leave had to provide medical certification that included a "brief general diagnosis that is sufficiently informative as to allow the Department of Correctional Services to make a determination concerning the employee's entitlement to leave," which the court in *Conroy* decided may tend to reveal a disability.

After comparing the case law and the EEOC guidance, the Ninth Circuit held the following: "The purpose of the PCE may very well have been to determine whether Indergard was capable of returning to work. The substance of the PCE, however, clearly sought 'information about [Indergard's] physical or mental impairments or health' ... and involved tests and inquiries capable of revealing to [the employer] whether she suffered from a disability. Therefore, we hold that the PCE was a medical examination under 42 U.S.C. § 12112(d)(4)(A)."⁸

Indergard v. Georgia-Pacific Corp. provides an example of how courts analyze the issue of what constitutes a medical examination under the Americans with Disabilities Act—particularly the emphasis federal courts place on the EEOC's factors. Employers must be aware of this issue when administering tests to determine whether an applicant or employee is able to perform the requisite tasks of a job. **TFL**

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Endnotes

¹42 U.S.C. § 12112(a).

²U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, available at www.eeoc.gov/policy/docs/guidance-inquiries.html (July, 27, 2000).

³U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, available at www.eeoc.gov/policy/docs/preemp.html (Oct. 10, 1995).

⁴582 F.3d 1049, 1050 (9th Cir. 2009).

⁵*Id.* at 1052. Note that even though the district court granted summary judgment for the employer, it also found that the employer was not entitled to summary judgment on the basis of the business necessity defense because it failed to show that the PCE was limited to the essential functions of Indergard's positions.

⁶*Indergard*, 582 F.3d at 1055.

⁷294 F. Supp. 2d 279, 294 (N.D.N.Y. 2003).

⁸*Indergard*, *supra*, n.6.