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LEGAL ALERT

Legal Alert: Eleventh Circuit Finds that Job Applicant Need Not Be Disabled Under the ADA to Sue for Prohibited Pre-Offer Medical Inquiry

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Employers should be aware of a recent decision by the Eleventh Circuit (the federal appeals court with jurisdiction over Alabama, Georgia, and Florida) holding that a job applicant need not be "disabled" under the Americans with Disabilities Act ("ADA") to sue an employer for making a prohibited, pre-offer medical inquiry. *See Harrison v. Benchmark Elecs. Huntsville Inc*. (11th Cir. 2010). In Harrison, the Eleventh Circuit reversed a trial court's decision in favor of the employer and held that the plaintiff should be permitted to take his ADA claim to trial.

Background

John Harrison worked as a temporary employee for Benchmark Electronics Huntsville, Inc. ("Benchmark"). He submitted an application for a permanent position and, per Benchmark's policy, was required to take a drug test. Unbeknownst to Benchmark at the time, Harrison suffered from epilepsy and had a lawful prescription to take barbiturates to control his medical condition.

Harrison tested positive for barbiturates and was called into his supervisor's office to discuss the results of his drug test. Harrison told his supervisor that he had a lawful prescription for barbiturates. The supervisor then had Harrison speak to the company's Medical Review Officer ("MRO") on the telephone. The MRO asked Harrison a series of questions regarding his medication, including how long he had been taking it, how much he took, and how long he had been disabled. The supervisor remained in the room during Harrison's conversation with the MRO and heard Harrison state that he was diagnosed with epilepsy at the age of two and took barbiturates to control the condition.

Human resources had already received authorization to hire Harrison for the position and the MRO subsequently cleared the results of his positive drug test. However, Harrison's supervisor told human resources not to prepare an offer letter. Benchmark asked the temporary agency who had assigned Harrison to Benchmark not to allow him to return. The temporary agency then terminated Harrison for an alleged performance and attitude problem and for allegedly threatening his Benchmark supervisor.

Harrison filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging various violations of the ADA

including improper medical inquiries. However, the EEOC determined that he was not disabled under the ADA and dismissed his claims without investigating the alleged improper medical inquiries. Harrison nevertheless sued in federal court in Alabama, alleging, among other things, that Benchmark engaged in an improper medical inquiry.

The trial court ruled in favor of Benchmark, finding that "we have never held that a private right of action exists for [pre-employment medical inquiry] claims." The court further held that, even if a private cause of action does exist for such claims, the plaintiff tested positive for barbiturates and therefore Benchmark was authorized to ask him whether "he had a legitimate use for such medication."

Eleventh Circuit Decision

The Eleventh Circuit first held that a non-disabled individual can state a private cause of action for a prohibited, pre-offer medical inquiry. Specifically, the court stated, "we now explicitly recognize that a plaintiff has a private right of action under the [ADA], irrespective of his disability status," citing Congressional intent, the statute's plain language, and the EEOC regulations and guidelines. In so holding, the Court noted that other circuit courts of appeal (covering New York, Vermont, Connecticut, Illinois, Indiana, Wisconsin, North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Missouri, Arkansas, Washington, Oregon, Idaho, Montana, Nevada, California, Arizona, Alaska, Wyoming, Utah, Colorado, Kansas, New Mexico, and Oklahoma) had already reached the same conclusion.

The ADA provides that "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." 42 U.S.C §12112(d)(2)(A). An employer may, however, inquire into the "ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B).

The Court explained that "the [EEOC and ADA] 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 to make targeted disability-related inquiries. The Court further explained that disability-related questions are those likely to elicit information about a disability."

Although the Court recognized the exception under the ADA regulations that "employers may conduct follow-up questioning in response to a positive drug test," it reversed the trial court's decision because the lower court "failed to acknowledge any limits on this type of questioning."

"A jury may find that [the MRO's] questions exceeded the ADA especially considering…that to answer the MRO's questions [Harrison] was forced to disclose the fact and extent of his epilepsy. A reasonable jury could infer that [the supervisor's] presence in the room was an intentional attempt likely to elicit information about a disability in violation of the ADA's prohibition against pre-employment medical inquiries."

Lessons Learned

The Eleventh Circuit has joined several other federal appeals courts in recognizing a cause of action under the ADA for an improper, pre-offer

medical inquiry, irrespective of the applicant's disability status. Therefore, employers must be very careful when conducting pre-offer medical inquiries, especially if such inquiries extend beyond the scope an applicant's ability to perform job-related functions. Employers should avoid any questions that could be viewed as likely to elicit information about a disability. While this case involved a pre-employment medical inquiry, the ADA also regulates medical inquiries and examinations at the post-offer and other later phases of the employment relationship. Employers must be careful to comply with those restrictions as well.

If you have any questions about the issues addressed in this Alert, please contact the authors, Andy Hament, ahament@fordharrison.com or Jordan Kramer, jkramer@fordharrison.com or the Ford & Harrison attorney with whom you usually work.