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National Institute of Justice

Research in Action

October 1994

The Americans With Disabilities Act and Criminal Justice: Hiring New Employees

NCJRS

DEC 5 1994

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ACQUISITIONS

The Americans with Disabilities Act (ADA) was created to eliminate barriers to equal employment opportunity and provide equal access to public accommodations and the programs, services, and activities delivered by government entities. Under the ADA, employers must reevaluate their personnel application and selection processes to ensure that they do not adversely affect persons with disabilities, either intentionally or unintentionally. The requirements of the ADA have significant consequences for the criminal justice system. Many of the tests and screening devices commonly used to hire public safety personnel, as well as the order in which these tests may be administered, must be scrutinized in light of the law.

The ADA and hiring: Some general principles

Appreciating the impact of the ADA on hiring requires an understanding of the law itself. Simply put, the ADA prohibits discrimination against *qualified* individuals with a disability. Having a disability, in and of itself, does not entitle a person to protection under the law. A job applicant also must be qualified, i.e., must meet established prerequisites of the position such as education, experience, and skills, and must be able to perform the essential functions of the job.

Whether an applicant with a disability is otherwise qualified for the job is a central issue in making legal hiring decisions under the ADA. Some questions to be considered are: How are these determinations made? What constitutes an essential function of the job? Are performance standards permitted?

Thus, hiring decisions should be made on a case-by-case basis and not based on generalized assumptions, stereotypes, or myths. Limiting, segregating, or classifying applicants so that persons with disabilities are adversely affected should be avoided.

Under the ADA, blanket exclusions of individuals with a particular disability are, in most cases, not permissible.¹ For example, to exclude "all applicants with diabetes ignores the varying degrees of severity of this disease and the ability to control its symptoms"² and would be forbidden. On the other hand, the "ADA does not require quotas, it...requires that employers not reject applicants with disabilities because of their disabilities."³ In addition, the ADA requires employers to provide applicants with reasonable accommodations so that they can apply for jobs.

Qualifications and standards

Under the ADA, standards and qualifications that screen out, or tend to screen out,

individuals or groups of individuals on the basis of disability must be related to the job to be performed.

An analysis of job qualifications begins with three questions:

- Do qualifications or standards that screen out persons with disabilities relate to essential functions of the job?
- Are qualifications and standards that screen out persons with disabilities job-related and consistent with business necessity?
- Is a reasonable accommodation available that enables an applicant, who would not be qualified because of a disability, to meet the qualification standards?

Fundamental, not marginal, job functions are considered essential for purposes of the ADA. Functions are essential: a) when employees are required to perform them and b) when their elimination would fundamentally alter the job. Even when a function is rarely performed, it may nevertheless be essential. For example, most police officers rarely make forcible arrests, but departments that can demonstrate serious consequences of an officer's inability to do so may establish this ability as an essential function.

There is nothing to prevent employers in criminal justice agencies from using qualifying standards. Indeed, it is permissible to

Highlights

NIJ's initiative to examine the implications of the Americans with Disabilities Act (ADA) for criminal justice agencies at the State and local levels was created to respond to the need for understanding of the Act in the criminal justice field and the new opportunities it offers persons with disabilities. This Research in Action, the second in a series designed to explain how the Americans with Disabilities Act (ADA) will affect the criminal justice system, focuses on the ADA's effect on criminal justice hiring practices. Key highlights include:

- Hiring decisions must be made on whether an applicant meets the established prerequisites of the position (e.g. education, experience) and whether the applicant is able to perform the essential functions of the job.
- A job function is considered essential when an employee is required to perform it and when its elimination would fundamentally alter the job.
- The ADA requires employers to provide applicants with reasonable accommodations so they can apply for jobs.
- A job applicant must be given a conditional offer of employment before being required to provide medical information or take a medical exam; the ADA expressly prohibits preemployment medical examinations and disability related inquiries.
- Agility tests may be given at any point in the hiring process if they are job-related, but the ADA forbids disability-related inquiries or medical exams to establish a person's fitness to take agility tests.
- Tests for illegal use of drugs are not considered a medical exam under the ADA; employers may make hiring decisions based on these test results.
- Since some preliminary questions asked in conjunction with polygraph tests are medical in nature, these exams can only be administered prior to making a job offer without making such inquiries. One option is to administer a second polygraph test, which includes medical inquiries, after the job offer is made.

These issues and their implications are detailed in this Research in Action.

"establish physical or mental qualifications that are necessary to perform specific jobs (for example, jobs in the transportation and construction industries; police and fire fighters jobs; security guard jobs) or to protect health and safety."⁴

What happens, however, if the qualifying standards eliminate someone on the basis of disability or a group of individuals with disabilities? Under the ADA, standards must be shown to be job-related and consistent with business necessity.⁵ This requirement "underscores the need to examine all selection criteria to ensure that they not only provide an accurate measure of an applicant's actual ability to perform the essential functions of the job, but that even if they do provide such measure, a disabled applicant is offered a 'reasonable accommodation' to meet the criteria that relate to the functions of the job at issue."⁶

A qualification standard is *job-related* when it is "a legitimate measure or qualification for the specific job it is being used for."⁷ Section 4.3 of the Equal Employment Opportunity Commission's (EEOC) *Technical Assistance Manual* explains:

A qualification standard for a secretarial job of 'ability to take shorthand dictation' is not job-related if the person in the particular secretarial job actually transcribes taped dictation.

Business necessity means that the selection relates to an essential function of the job. Thus, "if a test or other selection criterion excludes an individual with a disability and does not relate to the essential function of the job, it is not consistent with business necessity."⁸

However, even if a standard is job-related it may nevertheless be inappropriate if it does not relate to an *essential* job function. For example, requiring a driver's license may be job-related for both patrol officers and corrections officers. However, the requirement relates to an essential function of the job of a patrol officer. Typically, a corrections officer is not required to drive in the course of business. Therefore, if re-

quiring a driver's license screens out a person with a disability it may be justified for the job of patrol officer but not for that of corrections officer if driving is not an essential function of the job.

Reasonable accommodations during the hiring process

Employers have a duty to reasonably accommodate persons with disabilities during the application process to give otherwise qualified applicants an equal opportunity to be considered for the job.⁹ However, an employer is permitted to ask applicants whether they need reasonable accommodation in order to participate in the application process or take a screening test.¹⁰

Reasonable accommodations during the hiring process can include providing qualified interpreters or readers. It can also mean revising or modifying exams or tests. Section 3.3 of EEOC's *Technical Assistance Manual* offers these examples:

A person who uses a wheelchair may need an accommodation if an employment office or interview site is not accessible. A person with a visual disability or a person who lacks manual dexterity may need assistance in filling out an application form. Without such accommodations, these individuals may have no opportunity to be considered for a job.

On the other hand, unlike the kinds of reasonable accommodations afforded *employees* with disabilities — such as job restructuring or changing work schedules — employers do not have to find a job for an applicant with a disability who is not otherwise qualified, or consider an applicant for a job for which he or she did not apply. Likewise, while reassignment to another position might be a reasonable accommodation for an employer to make for an *employee*, this would not apply to *applicants* for a position. In addition, there is no requirement that employers lower performance standards.

Medical examinations and disability-related inquiries

Under the ADA, job applicants must be given a conditional offer of employment before being required to provide medical information or take a medical exam¹¹ even though law enforcement and corrections agencies routinely administer medical and psychological exams to applicants prior to making a job offer. "As a result, this provision of the ADA will significantly change hiring practices in the country."¹² This requirement is designed to prevent medical information from being considered before nonmedical qualifications.

The EEOC's Enforcement Guidelines define medical examinations as "...procedures or tests that seek information about the existence, nature, or severity of an individual's physical or mental impairment, or that seek information regarding an individual's physical or psychological health."¹³ Sometimes it is easier to say what "medical" is *not* rather than what it is. For instance, "tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions on such examinations."¹⁴ Similarly, "physical agility tests are not medical examinations and so may be given at any point in the employment application process."¹⁵

A good rule of thumb is that questions that would disclose information regarding a disability, whether asked on an application or during an interview, may be construed as a medical exam or disability-related inquiry. This holds true for any test, procedure, or performance exam that would disclose information regarding a disability. Therefore, criminal justice agencies that customarily use psychological exams, polygraph tests, background checks, and medical exams will need to evaluate their hiring process in light of the ADA.

Application procedures and requirements

The ADA expressly prohibits preemployment medical examinations and disability-

related inquiries.¹⁶ "...[A]n employer may not ask or require a job applicant to take a medical examination before making a job offer."¹⁷ Inquiry into the existence, nature, or severity of a disability is also forbidden at this stage in the hiring process.

However, employers may ask applicants questions regarding their ability to perform specific job functions "and may, with certain limitations, ask an individual with a disability to describe or demonstrate how he or she would perform these functions."¹⁸ On the other hand, hiring practices that focus on disabilities rather than abilities will, in most instances, be considered discriminatory. Section 6.3 of EEOC's *Technical Assistance Manual* provides an example relevant to criminal justice agencies:

A policy that prohibits employment of *any* individual who has epilepsy, diabetes, or a heart condition from a certain type of job, and which does not consider the ability of a *particular* individual, in most cases would violate the ADA.

The ADA does take into consideration an employer's need to ensure that job applicants can perform the job effectively and safely, and specifies how this can be done. Section 6.1 of EEOC's *Technical Assistance Manual* provides guidance:

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be 'job-related' or 'consistent with business necessity.' Questions also may be asked about previous injuries and workers' compensation claims.

Questions that are prohibited before a conditional offer may be posed in the post-offer phase of the hiring process. Such post-offer medical examinations are legal only if the following requirements are met:

- All entering employees in a particular category are required to submit to the same examination regardless of disability.
- Information concerning the offeree's medical condition must be maintained on separate forms.
- The information must be maintained in separate medical files.
- The information must be treated as a confidential medical record.¹⁹

If a post-offer medical exam or disability-related inquiry reveals a disability, the reason for withdrawing a conditional offer of employment must be job-related and consistent with business necessity. The withdrawal of the offer may be permissible where the medical inquiry discloses facts pertinent to the applicant's qualifications. That is to say, the employer must show that the applicant cannot perform the essential functions of the job, with or without a reasonable accommodation, and must demonstrate that there is no reasonable accommodation available to enable the applicant to perform the essential functions of the job.

In addition, "a post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a 'direct threat' in the workplace (i.e., a significant risk of substantial harm to the individual or others) that cannot be eliminated or reduced below the 'direct threat' level through reasonable accommodation."²⁰ However, a "direct threat" cannot be speculative or remote and must be based on current medical knowledge.

Section 6.4 of EEOC's *Technical Assistance Manual* offers this example:

If a medical examination reveals that an individual has epilepsy and is seizure-free or has adequate warning of a seizure, it would be unlawful to disqualify this person from a job operating a machine because of fear or speculation that he might pose a risk to himself or others. But if the examination and other medical inquiries reveal that an individual with epilepsy has sei-

zures resulting in loss of consciousness, there could be evidence of significant risk in employing this person as a machine operator. However, even where the person might endanger himself by operating a machine, an accommodation such as placing a shield over the machine to protect him, should be considered.

Quick Quiz

Now, under the ADA, it is unlawful to make medical inquiries prior to extending a conditional offer of employment to a job applicant. Yet, the law does not define terms such as "medical examinations" or "medical inquiry."

What kind of questions, then, are off-limits before extending a job offer? Here are some common questions asked on applications and during interviews. Which questions should be asked only after making a conditional offer of employment?

Place an "X" by those questions which could be construed as a medical inquiry.

- _____ 1. Have you ever filed a claim for workers' compensation?
- _____ 2. How did you become disabled?
- _____ 3. How often were you absent from your last job?
- _____ 4. Have you ever been injured on-the-job?
- _____ 5. Are you taking any medication at this time?
- _____ 6. Please describe how you would perform the following functions of the job...
- _____ 7. Are you willing to submit to a drug test at this time?
- _____ 8. How many sick days did you use on your last job?
- _____ 9. How much time off will you need because of your disability?
- _____ 10. Do you need any reasonable accommodation to participate in our agility test?

[Answers appear on page 7.]

Implications for criminal justice

The ADA unquestionably has had an enormous impact on the hiring process in criminal justice. "The development of selection procedures which are in compliance with the ADA appear to be somewhat reversed to current arrangements."²¹

Prior to the enactment of the ADA, most departments required applicants to pass written exams, agility tests, a polygraph exam, a background investigation, a medical exam, and a psychological exam before being offered a position of employment. However, with the ADA prohibition against disability-related inquiry prior to making a conditional offer of employment, many of these testing and screening devices must be postponed until after an offer is made.

Thus, a "department cannot even remotely investigate an applicant's disability or potential disability until the applicant's other qualifications have been evaluated and a contingent offer of employment has been made to the candidate."²² "Under the ADA, *bona fide* job offers do not always need to be limited to currently available vacancies but also may, under certain circumstances, be given to fill reasonably anticipated openings."²³

For example:

A police department may be able to demonstrate that it needs to make offers to 50 applicants for 25 available positions because: (1) for public safety reasons it needs to have police officers who are ready and able to begin work when a vacancy occurs on the force; and (2) it is likely that approximately half the offers will be revoked based on post-offer medical tests and/or the results of security checks, and be cause some applicants may withdraw from consideration.²⁴

However, if more offers are made than positions exist, individuals must be hired from the pool based on pre-established objective standards. An example of such a standard includes using the date of applica-

tion. Moreover, if applicants are re-ranked based on post-offer inquiry or procedures, the agency must inform persons in the pool of their overall rankings *before* the post-offer re-ranking and must notify all persons in the pool of any changes made as a result of such post-offer re-rankings. The Enforcement Guidance offers this example:

A police department gives a post-offer psychological examination, which is designed to analyze an individual's mental stability and is, therefore, a medical examination. The department re-ranks the individuals in its pool based on scores on this examination, placing those individuals who score most favorably at the top of the hiring priority list. In this case, the department must inform individuals in the hiring pool of their initially-determined hiring rank order; after the post-offer medical examination, the department must inform the individuals in the hiring pool whether their rank was changed (in whole or in part) on the post-offer medical examination.²⁵

Can agencies have a qualified pool of candidates? While some jurisdictions have used this method, EEOC has not specifically addressed this issue yet. Agencies planning this should consider exhausting the number of candidates in the pool before adding to it. In addition, agencies employing such a method should ensure that *all* candidates advance equally through the pool as hirings are made.

Screening devices

Agility tests. These may be "given at any point in the application or employment process so long as employers can demonstrate that they are job-related and consistent with business necessity."²⁶ However, departments may not measure an applicant's physiological/biological responses to performance because that would be considered medical.²⁷

The ADA also forbids disability-related inquiries or medical exams to establish a person's fitness to take the agility test.

"Agencies will not be permitted to screen applicants for medical conditions, such as heart disease, prior to giving them a physical agility test."²⁸ One solution to this problem is to provide applicants with a detailed written description of the test and require that they get a note or certification from their doctor that they are able to take the agility test.

Drug tests. Since a test for the illegal use of drugs is not considered a medical examination under the ADA, employers may conduct such testing of applicants or employees and make employment decisions based on the results. On the other hand, if an applicant tests positive for illegal drug use, the test may be validated by asking the applicant about any lawful drug use that may have resulted in the positive result.

However, certain drug tests may reveal the use of *prescription* drugs. This could lead to problems for employers. For example, what if the results of a drug test reveal that the applicant is taking AZT, a drug used in conjunction with treatment for HIV infection and AIDS? Persons with HIV infection or AIDS are protected under the ADA. Therefore, this information, in and of itself, could not be used to eliminate the applicant.

In the event secondary medical information is obtained, agencies should treat it in accordance with ADA requirements relating to all medical information. It should be treated as a confidential medical record, maintained separately from the individual's personnel file, and steps should be taken to guarantee the security of the information.

Polygraph tests. Polygraph tests are not addressed specifically by the ADA. However, preliminary questions asked in conjunction with a polygraph exam are often medical in nature. For instance, asking a person "Are you currently on any medication?" would be impermissible prior to extending a conditional offer.

What does this mean for criminal justice agencies? "Pre-offer, there will be no medical questions on the polygraph examination allowed."²⁹ Such inquiries include:

- Whether the individual has sought or is currently seeking mental health services.
- Inquiries about the extent of prior illegal drug use.
- Most inquiries about prior or current lawful drug use.
- Inquiries reflecting the extent of prior or current alcohol use.³⁰

In addition, the EEOC Enforcement Guidance offers this example:

"R., a police department, may not ask as part of a pre-offer polygraph examination such questions as: 'Do you have any mental disorders which would hamper your performance as a police officer?' or 'Have you ever been treated for drug addiction?'"³¹

Thus, employers are faced with delaying the polygraph exam until after an offer is made; conducting the polygraph without the initial medical inquiries often asked to ensure the validity of the exam; or conducting one polygraph test pre-offer, without the preliminary medical questions, and a second exam, post-offer, which includes medical exams.

Background checks. To the extent that background checks involve medical inquiry, they must be delayed until after an offer is made. FBI checks, national credit checks, and high school or college transcripts can be procured at the pre-offer stage. However, agencies cannot ask prior employers or others any questions that the employer cannot ask the applicant directly.

Medical exams. The ADA permits medical exams once a conditional offer of employment is made, and it would be useful to give a list of essential job functions to the doctor who will conduct the exam.³²

What if the employer gets unsolicited medical information before extending a conditional offer? Can this information be used to exclude the applicant? This depends on whether the information is relevant to the applicant's qualifications. If an applicant is otherwise qualified, the information cannot be so used. If an applicant

volunteers information about a disability that renders him or her unqualified for the job, then no offer need be made.

No decision should be made on the basis of speculation or assumptions. For example, if an applicant discloses that he or she has epilepsy, such information, in and of itself, would not disqualify the applicant. Blanket exclusions of a particular disability should be avoided. But should an applicant reveal that he or she has epilepsy that cannot be controlled by medication and continues to have seizures on a regular basis, it may be permissible to eliminate the candidate if the reasons are job-related and consistent with business necessity.

Psychological exams. Whether a psychological exam is also a medical exam depends on the type of exam administered. Criminal justice agencies will need to make this determination on a case-by-case basis. "To the extent that a test is designed and used to measure only such factors as an applicant's honesty, tastes, and habits, it would not normally be considered a medical examination."³³ However, exams or tests which provide evidence that a candidate has a mental disorder or impairment would be considered a medical examination.

In addition, for example, many departments have historically used tests such as the Minnesota Multiphasic Personality Inventory (MMPI), which includes questions that might be considered disability-related. For example:

- I am bothered by an upset stomach several times a week.
- I have a cough most of the time.
- During the past few years I have been well most of the time.
- I have never had a fit or convulsion.
- I have had attacks in which I could not control my movements or speech but in which I knew what was going on around me.³⁴

Not all psychological tests include questions that are disability-related. With careful screening they might be utilized prior to extending a conditional offer of employment.

Prior to making a conditional offer, employers may assess personality traits, knowledge, skills, and abilities as they apply to job qualifications. Once an offer has been made, employers are free to administer psychological exams which include medical questions.

Notes

1. EEOC's *Technical Assistance Manual* ("TAM"), Section 4.4.
2. Snyder, D., *The American With Disabilities Act*, Labor Relations Information System (1991), p. 212.
3. Id. at 210.
4. "ADA Questions and Answers," Bureau of National Affairs, *Americans with Disabilities Manual* (ADAM), (Washington, D.C., monthly), Section 90:0233. TAM, Section 4.4.
5. TAM, Section 4.4.
6. House Labor and Education Report to the ADA, p. 72.
7. TAM, Section 4.3(1).
8. TAM, Section 4.3(2).
9. TAM, Section 3.3.
10. Snyder, p. 218.
11. Americans With Disabilities Act, Section 12112 (d).
12. Snyder, p. 228.
13. "Enforcement Guidelines: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission, May 1994, *Volume II, Compliance Manual No. 915.002*.
14. TAM, Section 6.1.
15. EEOC Regulations Interpretive Guidance, Section 1630.14.
16. Americans with Disabilities Act, Section 12112.
17. "ADA Questions and Answers," Bureau of National Affairs.
18. Id.
19. Snyder, p. 232-233.
20. "ADA Questions and Answers," Bureau of National Affairs.
21. Schneid, T., and L. Gaines, "The Americans with Disabilities Act: Implications for Police Administrators," *Police Liability Review*, Winter 1991. p.4.
22. Id. at 4.
23. "Enforcement Guidance: Pre-employment Disability-related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission. p. 38.
24. Id.
25. Id. at 40.
26. Vaughn, C. Roland III. "IACP's Response to the Americans with Disabilities Act," *The Police Chief*, December 16, 1991.
27. "Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission. p. 30.
28. *Crime Control Digest*, Vol 25, No. 50, December 16, 1991.
29. Id. at 7.
30. "Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission. p.34.
31. Id. at 35.
32. *Crime Control Digest*, December 23, 1991. p.7.
33. "Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990," the Equal Employment Opportunity Commission. p. 32.
34. "Minnesota Multiphasic Personality Inventory - 2," The University of Minnesota Press, 1989, #28, #36, #141, #143, and #182.

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Supported under award number 92-IJ-CX-0009 from the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the author and do not necessarily represent the official position of the U.S. Department of Justice.

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Answers to Quiz

1. Questions about workers compensation history are not permitted prior to making a conditional offer of employment because it could require an applicant to disclose a disability or a record of a disability.
2. The ADA prohibits questions about the nature, origin, or severity of a disability at this stage in the hiring process.
3. Questions about attendance, in general, are permitted so long as they do not relate to absences due to illness. [See question 8.]
4. Questions regarding on-the-job injuries are another way of asking about workers compensation claims and therefore are not permitted.
5. This question is often asked prior to administration of a polygraph and is considered a medical inquiry. Since this question cannot be asked prior to extending a conditional offer of employment, polygraph exams should either be pushed back until the post-offer phase or, alternatively, conducted without these "pre-polygraph" inquiries.
6. Questions about how a particular applicant would perform specific job functions, and with what accommodation(s), are allowed. Employers are permitted to determine whether the applicant can perform the essential functions of the job and questions like this one focus on the applicant's *abilities*, not his or her *disabilities*.
7. Drug tests are not considered medical exams under the ADA. Therefore, a drug test may be administered at any time.
8. Questions about absences due to illness would be considered a medical inquiry. Likewise, questions regarding conditions or illnesses for which treatment was sought, or regarding treatment by a psychiatrist or psychologist or for a mental condition would also not be permitted at the pre-offer stage of the hiring process.
9. Even if an applicant voluntarily discloses a disability which is not manifestly obvious, employers may not then use this information to inquire into otherwise impermissible areas. Remember, exploration into what accommodation to provide should focus on the applicant's abilities, not disabilities.
10. Employers have a duty to reasonably accommodate participants in the application, the interview and any performance exams to be administered.

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