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Physical Agility Tests Can Be Deemed Medical Examinations Under the Americans with Disabilities Act (“ADA”)

When does a physical agility test measuring an employee’s ability to perform actual or simulated job tasks qualify as a medical examination under the ADA? The question is important for employers because, if the test is deemed a medical examination, the ADA mandates that it be job-related and consistent with business necessity. Recently, the U.S. Court of Appeals for the Ninth Circuit addressed this question in *Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009).

FACTS

In *Indergard*, the plaintiff, a paper mill worker, took medical leave to undergo knee surgery and was eventually cleared to work with restrictions. After the restrictions were lifted, Georgia-Pacific (“GP”) referred the plaintiff to an occupational therapist for a physical capacity evaluation (“PCE”) in order to determine whether she could return to work in either of two available positions. Over the course of two days, the therapist recorded the plaintiff’s medical history, use of medication, and subjective reports of her pain level; evaluated the plaintiff’s range of motion in her arms and legs, checked her knees, and assessed her balance, posture, and ability to lift various amounts of weight; had the plaintiff walk for twenty minutes on a treadmill; measured the plaintiff’s heart rate and blood pressure after a second treadmill test, and noted that the plaintiff had poor aerobic fitness and required increased oxygen. Ultimately, the therapist

concluded that the plaintiff was not qualified for either available position because she could not meet the 65-pound lifting requirement. As a result, GP terminated the plaintiff’s employment.

The plaintiff then sued GP alleging in part that the PCE was a medical examination under the ADA that was not job-related and consistent with business necessity, and hence unlawful. GP denied that the PCE was a medical examination and argued that even were it otherwise, there was a legitimate business need to conduct the PCE. On appeal, the court agreed with the plaintiff that the PCE was a medical examination and remanded the case for consideration of whether she could prove the PCE was not justified under the circumstances.

COURT’S REASONING

The Ninth Circuit turned to the Equal Employment Opportunity Commission’s *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations* (“EEOC Guidance”) to help delineate the distinction between a medical examination and a PCE or a physical agility test. The EEOC Guidance (available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>) enumerates seven factors that are relevant to the analysis, namely whether the test: (1) is administered by a health care professional; (2) is interpreted by a health care professional; (3) is designed to reveal a physical or mental impairment; (4) is invasive; (5) measures an employee’s

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performance of a task as opposed to the employee's physiological responses to performing the task; (6) is given in a medical setting; and (7) uses medical equipment. In addition to articulating these factors, the EEOC Guidance lists a series of tests that will always be considered medical examinations, including range of motion and muscle strength tests, heart-rate monitoring, and recording observations about an employee's breathing.

Applying the EEOC Guidance, the court concluded that the PCE satisfied four of the seven factors in that the therapist who administered and interpreted the PCE was a state-licensed health care professional, the therapist recorded the plaintiff's use of medication and subjective reports of her pain level which could reveal whether she suffered from any physical or mental impairment, and the therapist reported the plaintiff's physiological response to the second day's treadmill test by noting her heart rate, breathing pattern, and pain and stiffness, as opposed to only reporting whether the plaintiff could complete the treadmill test. On balance, the court found these attributes of a medical examination outweighed the fact that the PCE was non-invasive, the lone factor favoring GP's position. The court alternatively noted that even apart from the seven factor test, the PCE constituted a medical examination because the range of motion test conducted by the therapist on the first day and the heart rate monitoring and observation of the plaintiff's breathing on the second day were "tests within the EEOC's description of tests that are considered medical examinations."

LESSONS FOR EMPLOYERS

- Before directing an employee to take any examination for purposes of determining whether he or she is still able to perform the essential duties of his or her job, employers should familiarize themselves with the EEOC Guidance to gain a better understanding as to which tests are considered medical examinations under the ADA. For example, vision tests conducted by an ophthalmologist or optometrist, blood or urine tests, pulmonary exams to measure lung capacity, measuring heart rate, blood pressure screenings, cholesterol tests, psychological tests to identify mental disorders, and diagnostic procedures, such as x-rays or magnetic resonance imaging (MRI) tests, are all deemed medical examinations under the EEOC Guidance. Thus, before referring an employee for any of these tests, an employer must make sure the test is job-related and a business necessity.
- The EEOC Guidance lists a series of tests that are generally not considered medical examinations, including physical agility tests measuring an employee's ability to perform actual or simulated job tasks, physical fitness tests to measure an employee's performance of tasks such as lifting or running, and tests that evaluate an employee's ability to read labels or distinguish objects. Whenever possible, employers should assign supervisory personnel to conduct these simple, physical agility tests at the worksite and interpret the results. Under the EEOC Guidance's seven-factors, having a supervisor conduct a



physical agility test at the worksite (as opposed to having a health care professional conduct the test at a medical office) will reduce the likelihood that a court will find that the test is a medical examination subject to the ADA.

- Employers should use physical agility tests to determine only whether employees are physically able to perform their job tasks. That is, employers should avoid collecting

information about employees' physiological responses to the tests. For example, if a simulation establishes that an employee is able to lift the required amount of weight to perform a job, the employer should not subsequently ask whether the employee is sore or stiff after lifting the weight. Once it is established that the employee can do the job, the employer has the answer it needs and the physical agility test should end.

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