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TESTING

As the workplace and workforce evolve, some employers are placing more attention on evaluating candidates' workplace personalities as part of their screening programs, Akin Gump attorneys Esther G. Lander and Ashley Keapproth and candidate assessment firm president David Jones say in this BNA Insights article.

Although employment-related personality tests have gained popularity, they also have come under scrutiny by workforce advocates and civil rights groups concerned with the impact such tests may have on groups protected by federal law, particularly people with disabilities covered by the Americans with Disabilities Act. The authors discuss how employers can ensure that they test only for those personality traits that truly predict successful job performance within their organization.

Hiring a 'Will Do' Workforce: ADA Challenges to Personality Tests

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Evolution in the workplace, and workforce, places more and more attention on employers evaluating candidates' workplace personalities as part of their screening programs. Today, employers use personality tests to find applicants with the qualities they hope will predict future job success, workplace engagement, and retention of the best workers. According to a recent ar-

ticle in the Wall Street Journal (Lauren Weber and Elizabeth Dwoskin, *Are Workplace Personality Tests Fair?*, Wall St. J., Sept. 29, 2014) for example, employment-related personality testing has become a \$500 million-a-year business, growing by 10 to 15 percent each year.

Although this form of applicant testing has gained popularity, it has also come under scrutiny by workforce advocates and civil rights groups concerned with the impact such tests may have on groups protected by federal law. In particular, the Wall Street Journal reported that discrimination charges have been filed with the EEOC alleging personality tests discriminate against persons with disabilities in violation of the Americans with Disabilities Act.

First, some background—employers began assessing candidates' workplace personalities with growing intensity in the 1980s. The 1990s saw the focus continue to grow. Today, most test vendors put more focus on selling personality tests ('will do' tests) than ones that focus on evaluating candidates' skills and abilities ('can do' tests). There are two reasons.

First, the economy, operating costs, and competition in today's workplace make it essential for employers to know whether candidates both 'can do' and 'will do' a job. Assessing a candidate's knowledge, skills, abilities,

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and past training can help ensure the individual ‘*can do*’ the job. Much design, development, and continuous improvement research shows that ‘*can do*’ tests forecast a candidate’s learning capabilities, work quality, productivity, and potential for advancement—all essential to success on the job.

Today’s workplace, though, calls for evaluating more than just skills and abilities when making hiring decisions. For example, recent research shows that the longer employees remain in a job, the more their ‘*will do*’ personality qualities shape their work behavior, grow the likelihood they will engage with the job, and decrease the likelihood of ‘walk away turnover.’

Here enters the need to evaluate qualities that are much more related to personality. As a result, today’s employers set out to be sure those they hire will learn the job, engage with it, show a drive to succeed, work well with others, hit quality and productivity targets, and not violate work rules, steal, or produce workplace violence. In doing so, they draw on ‘*can do*’ tests to meet some of their needs and ‘*will do*’ tests to meet others. Bottom line—finding candidates whose workplace behavior and job performance meet an employer’s objectives calls for assessing qualities typically viewed as both ‘mental ability’ and ‘workplace personality’ in nature.

The second factor driving the growth in ‘*will do*’ testing tools, is that such tools typically create far less adverse impact on ethnic and gender protected groups than ‘*can do*’ assessments. Some employers have actually moved to assessing ‘*will do*’ requirements far more heavily than ‘*can do*’ qualities to help avoid adverse impact challenges based upon gender, race, and national origin. There is very sound evidence that many of the ‘*will do*’ assessment tools available today produce very small differences among the qualifying rates of these protected groups versus non-protected groups.

But what about the relationship between personality tests and persons with disabilities? Could ‘*will do*’ tests violate the ADA? While there have been no successful challenges under the ADA to date, there are four possible theories as to why a personality test could violate the law.

As explained in this article, personality tests do not fit neatly into any of these theories. That does not mean, however, that private plaintiffs or the EEOC will not bring such claims. Employers should be prepared by ensuring that they test only for those personality traits that truly predict successful job performance within their organization.

ADA Legal Theories for Challenging Personality Tests

The ADA makes it unlawful for an employer to “discriminate against a qualified individual with a disability because of the disability of such individual” during the hiring process. 42 U.S.C. § 12112(a). There are four possible discrimination challenges that could be made to personality tests under the ADA: (1) unlawful medical inquiry; (2) discrimination by failing to provide a reasonable accommodation; (3) intentional discrimination; and (4) disparate impact discrimination.

UNLAWFUL MEDICAL INQUIRY

The ADA prohibits employers from making disability-related inquiries or requiring medical exami-

nations prior to an offer of employment, even if the inquiry or examination is related to the job. 42 U.S.C. § 12112(d)(2)(A) (1994). At the pre-offer stage, the employer is entitled to ask only about an applicant’s ability to perform the essential functions of the job. *Id.* at § 12112(d)(2)(B).

The EEOC defines a “medical examination” as “a procedure or test that seeks information about an individual’s physical or mental impairments or health.” See EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examination of Employees Under the Americans with Disabilities Act (ADA), July 27, 2000, available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_17_ (145 DLR AA-1, 7/27/00). For example, the EEOC provides that psychological tests that are “designed to identify a mental disorder or impairment” qualify as medical examinations, but psychological tests “that measure personality traits such as honesty, preferences, and habits” do not.

The EEOC provides seven factors to consider when determining whether a personality test is a medical examination, including: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal a physical or mental impairment; (4) whether the test is invasive; (5) whether the test measures an employee’s performance of a task or measures his/her physiological responses to performing the task; (6) whether the test normally is given in a medical setting; and (7) whether medical equipment is used during the test. The EEOC notes that a single factor may be enough to determine that a test is a medical examination.

Whether an employer’s pre-employment personality test is, in actuality, a medical examination turns on the individual questions used in the design of the test. For example, requiring an applicant to agree or disagree with statements, such as “I do not really like when I have to do something I have not done before” or “I believe others have good intentions,” may simply measure personality and personal preferences.

However, the Seventh Circuit found that a pre-employment psychological test was a medical examination where it included 502 questions, such as whether applicants agree that they “commonly hear voices without knowing where they are coming from,” taken from the Minnesota Multiphasic Personality Inventory, which was used to diagnose certain psychiatric disorders. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 16 AD Cases 1441 (7th Cir. 2005) (116 DLR AA-1, 6/17/05). The court reasoned that, because the test was “designed, at least in part, to reveal mental illness,” the test was properly considered a medical examination and prohibited in a pre-employment setting.

Therefore, employers should be mindful of the types of questions asked, as well as the design and creation of the test. If questions are not designed to diagnose or predict mental disorders, it is unlikely a pre-screening personality test would be considered a medical examination.

FAILURE TO PROVIDE REASONABLE ACCOMMODATION

The ADA requires an employer to provide reasonable accommodation to qualified applicants or employees with disabilities, unless it would cause undue hardship. 42 U.S.C. § 12112(b)(5)(A). Although it may be difficult for employers to discern who is a “qualified applicant”

at the outset of the application process, a qualified applicant generally meets the employer's minimum requirements for the job, such as experience, education, training, skills, or licenses, and is able to perform the essential functions of the job, either with or without a reasonable accommodation. See EEOC, Job Applicants and the Americans with Disabilities Act, available at <http://www.eeoc.gov/facts/jobapplicant.html>.

In the hiring context, "reasonable accommodations" include "[m]odifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires." 29 CFR § 1630.2. Examples of possible accommodations related to a personality test could include, for example, being allowed to take the test in a quiet environment, having additional or unlimited time to take the test, taking the test in an alternate format, such as orally or in Braille, or possibly offering a reasonable alternative to taking the test, such as a demonstration of skills.

Critical to analyzing the lawfulness of administering personality tests to applicants with mental disabilities, the ADA requires that employers administer pre-employment tests in a manner that does not require use of an applicant's impaired skill, unless the test is intentionally designed to measure that skill and the skill is a necessary job requirement.

For example, an employer would be required to provide a personality test to a dyslexic applicant for a customer service associate position in an oral format or to give the applicant additional time to complete the written test, because the test is not intended to measure an applicant's ability to read quickly and the ability to read quickly is not a necessary job requirement.

However, an employer should not be required by the ADA to allow an applicant to forgo a personality test that measures job-related and necessary interpersonal skills simply because the applicant fears that his disability will cause him to perform poorly on the test. If the test measures interpersonal skills and possessing strong interpersonal skills is proven to be a necessary job requirement, i.e., properly validated, the employer should not be required to modify the test to accommodate the applicant.

Additionally, an employer's obligation to provide a reasonable accommodation applies only to known physical or mental disabilities. See 42 U.S.C. § 12112(b)(5)(A). In the application process, an employer may gain knowledge of a disability in one of two ways—the applicant may disclose the disability or the disability may be obvious. See EEOC, The ADA: Your Responsibilities as an Employer, available at <http://www.eeoc.gov/facts/ada17.html>. If a disability is obvious, such as if an applicant is blind, the employer is deemed to have knowledge of the disability, even if the applicant never expressly informs the employer.

Mental disabilities are often not obvious to an employer. See *Hedberg v. Indiana Bell Telephone Co., Inc.*, 47 F.3d 928, 4 AD Cases 65 (7th Cir. 1995). Thus, where an applicant "fails" a personality test, the employer would still be unaware of any actual or diagnosed disability unless the applicant voluntarily disclosed it. Until such a disability becomes known, the employer has no duty to accommodate the applicant. See 42 U.S.C. § 12112(b)(5)(A).

It is possible, of course, that an applicant may voluntarily disclose a mental disability, especially if the appli-

cant fears that he or she performed or will perform poorly on the test. If a qualified applicant discloses a disability, this would trigger an employer's duty to engage in the interactive process and provide a reasonable accommodation. But, as noted above, an employer should not be required to modify, or accommodate around, critical and important job functions assessed by a personality test that has been properly validated.

INTENTIONAL DISCRIMINATION

An ADA intentional discrimination challenge to a personality test would be highly unlikely to succeed. Intentional discrimination under the ADA requires proof that an employer's use of a selection procedure was motivated by the intent to exclude persons with actual or perceived disabilities. In *Raytheon Co. v. Hernandez*, 540 U.S. 44, 14 AD Cases 1825 (2003) (37 DLR AA-1, 2/25/03), the Supreme Court explained that a neutral selection procedure "is, by definition, a legitimate non-discriminatory reason under the ADA," 540 U.S. 44, 51-52 (2003). Thus, the only remaining question becomes whether the employer used the test as a pretext to reject disabled applicants. See *id.* (citing *McDonnell Douglas*).

Personality tests are designed to identify applicants who will be successful employees. Absent additional evidence that an employer's real motivation for using such tests is to exclude persons with mental disabilities, an ADA disparate treatment challenge could not succeed.

DISPARATE IMPACT DISCRIMINATION

Both disparate treatment and disparate impact claims are actionable under the ADA. See 42 U.S.C. § 12112(b) (defining "discriminate" to include "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability" and "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability."). A disparate impact claim involves evidence that a neutral employment practice, such as a personality test, disproportionately excludes a protected group.

An employer can defend against such a claim either by showing that the selection procedure did not result in adverse impact, or by proving that the procedure is job-related and consistent with business necessity. In fact, the ADA expressly provides an affirmative business necessity defense to employment tests shown to be job related for the position in question and consistent with business necessity, as long as the job cannot be accomplished by reasonable accommodation. See 42 U.S.C. § 12113(a).

The first step in any disparate impact analysis is establishing through statistics that the manner in which a test is used by the employer results in adverse impact on a protected group. If an employer uses a personality test as a pass/fail screening device, for example, a plaintiff must show that nondisabled applicants passed the test at a statistically significant higher rate than persons with disabilities.

Here lies the first problem. Employers do not track, nor are they required or permitted to track, applicant information about disabilities. Although contractors may request voluntary self-identification for affirmative action purposes, they may not delve into the nature or scope of a disability. Therefore, unless a court were willing to simply assume that personality tests result in

disparate impact on disabled persons, plaintiffs will not be able to establish the first prong of the analysis.

Moreover, in the case of personality tests, the alleged disparate impact would fall upon only a subset of disabled persons—those with certain mental disabilities—not all disabled persons. It is unclear whether a court would consider a proper comparison group a subset of mentally disabled individuals versus all applicants without the particular disability at issue, as opposed to disabled versus non-disabled applicants; if the latter, a personality test may not result in adverse impact at all.

The second obstacle to a disparate impact challenge is that, if the test is properly validated, the employer has an affirmative defense under the ADA that is not subject to reasonable accommodation. Employers are not required to accommodate or reassign essential or critical functions of the job. As explained below, a properly validated exam would identify and test only for those traits and characteristics that are necessary and predictive of job success. In doing so, employers not only will hire the most qualified applicants, they also will have a strong defense to any ADA legal challenge.

Minimizing Risk

There are many ways employers can set out to evaluate the ‘will do’ qualities so key in accomplishing today’s jobs, while minimizing legal risk through validation. Some are basic, some take work, but all should involve consultation with an Industrial Organizational (I/O) psychologist with a background in testing validation (either the test developer or an outside consultant), along with experienced legal counsel familiar with this area of the law to advise the company throughout the process under the protection of attorney-client privilege.

First, employers should avoid personality test vendors who make a simple claim—‘trust us, our test works, it’s valid and defensible.’ If challenged, employers need to show exactly why the personality test they use was implemented and how it works for their business, specifically. Both federal agency and professional guidelines set specific standards for what is needed to document that a test works for an employer’s jobs. The information assembled needs to be user-specific.

A vendor’s promise that ‘our test has been validated,’ or ‘our test has been shown to work for jobs like yours,’ or ‘it meets professional standards’ will not defeat a challenge. If a vendor claims to have done work to defend the use of their personality testing tools with other employers, they need to make all the reports and research studies available to the new employer. They also need to document the similarity of the new employer’s jobs to those where the test has been used before, and present the arguments they will make to defend the new employer’s use of the same test, if challenged. In short, the ‘trust us’ argument needs to be supported by a good deal of hard data and technical reports assembled and provided to the new employer.

Second, the employer needs to spend time identifying just what ‘will do’ qualities their jobs really require. Choosing specific personality tests to help guide hiring decisions should draw on details about the qualities the employer’s jobs demand. Done well, such reviews identify the personality dimensions needed to execute the

job (e.g., drive to succeed, dependability, team player, people focus, etc.).

Based on the information about job requirements that is collected, the focus should then be on assessing practical workplace behaviors, rather than the ‘overall mental makeup’ of candidates. Some of today’s personality tests, for example, take 20 to 30 minutes to complete, but then produce profiles showing how candidates scored on vast numbers—20 to 30—different personality dimensions. Does an employer really need to see a personality test profile that reports a candidate’s *worrying*, *relaxation*, or *modesty*? Does an employer really need to see a profile that assesses whether a candidate is *colorful* or *imaginative*? Some vendors offer such information, which intuitively sounds interesting, but can be unrelated to actually performing many jobs.

To avoid challenges, employers need to identify personality qualities that really predict job performance, and avoid ones that sound like the employer is performing a mental diagnosis. The traits targeted should focus on aspects of the candidate that link clearly to the makeup and demands of the job. In short, the tool used to assess a candidate’s fitness for the job’s personality requirements should link both rationally and quantitatively with what the job really demands.

Third, employers need to demand that their test vendor implement a means to track results and document that the test actually predicts job success; again, avoiding ‘trust us, it works.’ The cost should not grow beyond what the personality test costs to administer. An employer should track its new hires’ performance, turnover, terminations, etc., and then link the results with employees’ scores on the personality test as candidates.

If the test actually works, scores on the test should correlate with outcomes on the job (performance, turnover, termination, advancement, etc.). Done well, such work not only confirms, and defends, use of the personality test, it also lays a foundation to explore ways to refine use of the tool. The data collected can suggest different ways to score, weight, set standards, or ‘raise the bar’ in candidate screening; all based on hard, objective data that drive the defense of a selection procedure if challenged. Good bye to ‘trust us, it works’ and hello to ‘here’s exactly *how* it works.’

Fourth, the employer needs to make sure to blend both ‘can do’ and ‘will do’ candidate assessments in making hiring decisions. Even if all the above steps are taken in rolling out a personality assessment, refining its use, and preparing to defend any challenge, it is still important to use both ‘can do’ (ability) and ‘will do’ (personality) testing tools in candidate screening. Placing all of the focus on personality alone pulls down the accuracy in candidate screening, overemphasizes the concept of personality testing and, more seriously, is likely to bring in new hires whose personalities are fine, but who simply lack the ability to do the job.

Today, no matter what the job, both ‘can do’ and ‘will do’ assessments need to be part of the hiring process. Not only is the payoff enhanced, but the defensibility will be much more clearly understood. True—the need to evaluate ‘will do’ qualities has grown. False—the need for ‘can do’ capabilities has shrunk. Truest of all—employers should track just how they screen and hire employees not only to defend their decisions legally, but to build a workforce that helps deal with growing competition.