
Conditional Job Offers and Medical Examinations: An ADA Landmine?

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The federal appeals court in California recently found that American Airlines violated federal and state disability discrimination law by conditioning employment upon passing medical examinations before extending “real” job offers to applicants. The court, in reaching that decision, applied the Americans with Disabilities Act’s (“ADA”) mandate which only permits employers to conduct medical examinations after making “real” job offers. The court determined that a job offer is “real” only if the employer evaluates *all* relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer.

The ADA’s purpose for postponing medical examinations until after extending a real job offer is to ensure that any hidden disability is not considered before the employer evaluates an applicant’s non-medical qualifications. Under the ADA, an employer may lawfully condition the applicant’s employment upon passing of a medical examination when, 1) all entering employees in the same job category are subjected to such an examination regardless of disability, 2) the information obtained regarding an applicant’s medical condition or history is collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, and 3) if any resulting criteria are used to screen out an applicant with a disability, the exclusionary criteria must be job-related and consistent with business necessity and there must be no reasonable accommodation which would allow performance of the essential job functions.

In the California case, three individuals with human immunodeficiency virus (“HIV”) applied for flight attendant positions with American Airlines (“American”). During the hiring process, none of the individuals disclosed the fact that they were HIV positive. American made each of the individuals a job offer contingent upon the successful completion of a drug test, a medical examination and a background check. The medical examinations administered by American revealed that these three applicants had elevated levels of mean corpuscular volumes, which is common in individuals taking medication for HIV. After discovering the applicants lied concerning their medical backgrounds, American withdrew the conditional offers and the applicants filed suit. The Court held that the conditional offers American made to the applicants were not “real” because they were subject to both medical and non-medical conditions (*i.e.*, the background check). As a result, the court held that American could not penalize the applicants for failing to disclose their HIV status because the medical examination was premature. The court rejected American’s argument that it did not violate the ADA because it evaluated the applicants non-medical information before it considered their medical information, finding that the ADA regulates the sequence in which employers collect information, not the order in which they evaluate it.

In a similar case in Massachusetts, a federal court found that an employer failed to extend a “real” job offer to an applicant when the employer’s offer form specifically provided that the applicant still had to pass a criminal background check. As a result, the Court found that the employer violated the ADA when it subjected the employee to a medical exam and asked him questions regarding his workers’ compensation and medical history.

In contrast, the federal appeals court in Chicago found that an employer properly conditioned employment upon

passing a medical examination because it had previously extended the applicant a "real" job offer. In that case, the applicant applied for a job with the City. After the applicant had successfully completed a written examination, personal interview, polygraph, psychological examination, and a background history, the City conditionally offered him a job contingent upon passing "the statewide medical examination and the statewide mental examination, as well as any local medical and mental examination requirements." The applicant's medical examination revealed that he could not fulfill the job's requirements; therefore, the City withdrew its job offer. After filing suit, the applicant argued that the City's conditional offer was not "real" because the mental examinations were not medical examinations under the ADA. The court disagreed. It found that those tests were medical tests under the ADA and, therefore, the City had complied with the ADA by only requiring them after having made a conditional offer of employment.

These cases serve as an important reminder to employers that they need to tread carefully when administering a medical examination as a condition of employment. While employers may condition employment upon passing such a medical examination, they can only do so if they have previously extended a "real" job offer. A job offer is "real" only if the employer has collected and evaluated all relevant non-medical information that it reasonably could have obtained and analyzed prior to giving the offer. As a result, employers must make sure that they have completed reference checks, credit checks, background checks, criminal records checks, etc. *before* extending an offer of employment contingent upon successful completion of a medical examination. By ensuring a consistent and proper procedure, employers can avoid stepping on any ADA landmines.

If you have any questions or would like a specific situation explored in more detail, please contact David N. Michael at (or by email at dmichael@gouldratner.com).

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