

**HIRING ISSUES, DISABILITY-RELATED INQUIRIES  
AND MEDICAL EXAMINATIONS UNDER THE ADA**

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It seems as if the courts have picked over every clause of the Americans with Disabilities Act of 1990.<sup>1</sup> However, one area of the ADA left relatively unscathed are its provisions governing hiring. The fact that the hiring provisions have received relatively little judicial attention in no way lessens their importance. In truth, the ADA has made profound changes in the way employers hire both disabled and non-disabled<sup>2</sup> employees.

Before the enactment of the ADA, employers commonly requested information about an applicant's physical and medical restrictions. On the basis of this information, employers often screened out people with disabilities at an early stage in the application process, before their ability to perform a job could be determined. The ADA removes this barrier to the disabled's employment by restricting the circumstances under which an employer can inquire about applicants' disabilities or can subject applicants to medical examinations.

This article discusses the protections that the ADA and its implementing regulations afford individuals with disabilities in the hiring process. The article examines, in particular, restrictions on the use of disability-related inquiries and medical examinations.

Three Categories of Disability-Related Inquiries and Medical Examinations

The ADA restricts, but does not ban, an employer from inquiring about an

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applicant's disability or from administering a medical examination. The statute provides applicants and employees different levels of protection from disability-related inquiries and medical examinations depending upon how far along the individual is in the application and employment process. For purposes of determining whether a disability-related inquiry or medical examination is permissible, the ADA recognizes three stages of employment: 1) before an offer of employment is made, or the "pre-offer" stage; 2) after an offer is made but before the commencement of employment duties, or the "post-offer, pre-employment" stage; and 3) during the course of the individual's employment, also called the "post-employment" stage.<sup>3</sup>

(i) The Pre-Offer Stage

Before it has tendered a job offer, an employer may not ask a job applicant whether he or she has a disability or about the nature and severity of the disability. Similarly, it may not subject an applicant to a medical examination.<sup>4</sup> In order to understand the scope of the statutory proscription, it is necessary to answer the threshold questions of what are meant by a "disability-related inquiry" and "medical examination"?

According to the United States Equal Employment Opportunity Commission, an inquiry concerning the existence, nature or severity of a disability means "an inquiry (or series of inquiries) that is likely to elicit information about a disability."<sup>5</sup> Examples of prohibited disability-related inquiries at the pre-offer stage are:

- Using an application that requires a job applicant to list current or past medical conditions;<sup>6</sup>
- Asking an applicant about his or her workers' compensation history;<sup>7</sup>

- Asking an applicant how many days he or she was sick last year;<sup>8</sup>
- Asking an applicant whether he or she is currently taking any prescription drugs or medications or whether he or she has taken such drugs or medication in the past;<sup>9</sup>
- Asking whether an applicant will need a reasonable accommodation if hired.

The reason for prohibiting questions about the need for reasonable accommodation is that generally only people with disabilities will have such a requirement. Therefore, a question about the need for a reasonable accommodation is likely to elicit information about whether an applicant has a disability. However, in situations where an applicant either has an obvious disability or voluntarily discloses information about a disability, at the pre-offer stage the employer may ask the applicant whether he or she would need a reasonable accommodation and, if so, what type.<sup>10</sup> Further, when an employer reasonably believes that a known disability will interfere with the performance of a job-related function, it may ask the applicant how he or she would perform the function with or without reasonable accommodation.<sup>11</sup>

The EEOC, in its Interpretative Guidance of the ADA, uses an instructive example: An employer may ask an individual with one leg applying for a job as a home washing machine repair person to show how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs. However, if the known disability would not seem to interfere with the performance of an essential job function, the employer may not inquire about the disabled applicant's ability to perform the job duty unless it routinely asks the same

question to all applicants in that job category. Accordingly, an employer may only ask the one legged applicant how he would assemble small parts while sitting at a table if it regularly asks the same question to all applicants for that job.<sup>12</sup>

At the pre-offer stage, examples of permissible inquiries not considered "disability-related" include:

- Questions about an applicant's ability to perform essential and marginal job functions;<sup>13</sup>
- Questions about non-disability-related impairments (e.g. "How did you break your arm?").<sup>14</sup>
- Questions about an applicant's current, as opposed to past, illegal drug use, since current illegal drug use is not a protected disability under the ADA;<sup>15</sup>
- Questions to a pregnant employee about how she feels or when the baby is due, since the ADA does not recognize pregnancy as a disability.<sup>16</sup>
- Questions about whether an employee can meet the employer's attendance requirements. However, an employer is prohibited from asking if an applicant's prior absences were due to sickness.<sup>17</sup>
- Questions about whether an applicant has certifications or licences related to essential or marginal job functions.

As to the statute's use of the term "medical examination," the EEOC's definition, accepted by at least one appellate court, is a procedure or test that seeks information about the existence, nature, or severity of an individual's physical or mental impairments, or that seeks information regarding an individual's physical or

psychological health.<sup>18</sup>

The following questions should be addressed in order to determine whether a test or procedure is a medical examination: a) is the test administered by a health care professional? b) is the test interpreted by a health care professional?; c) is the test designed to reveal an impairment of physical or mental health?; d) is the test invasive?; e) does the test measure an employee's performance of a task or, instead, measure his or her physiological responses to performing the task?; f) is the test normally given in a medical setting? and g) is medical equipment used?<sup>19</sup>

Proscribed pre-offer medical examinations include:

- vision tests conducted and analyzed by an ophthalmologist or optometrist;
- blood, urine, saliva and hair analyses to detect alcohol use, disease or genetic markers;
- blood pressure screening and cholesterol testing;
- range-of-motion tests;
- diagnostic procedures such as x-rays, CAT scans and MRI.
- psychological tests that are designed to identify a mental disorder or impairment.<sup>20</sup>

Courts are divided on the question of whether a psychological test is a medical examination. The governing distinction seems to be that if the test is aimed at identifying a mental disorder it is considered a prohibited pre-employment examination, whereas if the test elicits information about disfavored mental or personality characteristics, such as emotional instability, but not about mental impairments, then it is not a medical examination.<sup>21</sup>

Procedures and tests that are not considered medical examinations include:

- tests to determine current illegal drug useage;
- physical agility tests (however, if a physical agility test screens out individuals with disabilities, the employer must demonstrate that the test is job-related and consistent with business necessity and that performance of the job functions cannot be achieved with reasonable accommodation);<sup>22</sup>
- physical fitness tests (however, the tests may not include an examination that could be considered medical, such as measuring heart rate or blood pressure);
- tests designed to measure the applicant's ability to perform actual job functions.<sup>23</sup>

Finally, where an applicant with a known disability seeks re-employment, an employer's request for a medical release from a treating physician is not a prohibited "medical examination," but rather a permissible "medical inquiry" about a person's ability to perform the job. Likewise, an employer does not violate the proscription against pre-employment medical examinations by requiring a former employee with a known disability, who applies for re-employment, to provide medical certification as to his or her ability to work with or without reasonable accommodation, and the type of accommodation needed.<sup>24</sup>

#### Post-Offer, Pre-Employment Inquiries and Examinations

After an employer extends a conditional offer of employment, but before the individual starts working, the employer is permitted to make disability-related inquiries,

require a medical examination, and condition employment upon the inquiry and examination results. However, before an employer is given licence to make these otherwise unlawful demands upon an applicant, the conditional offer of employment must be *bona fide*. In this context, *bona fide* means that the employer evaluated all relevant non-medical information regarding the applicant before it made the offer. That way, if the employer withdraws the offer at the post-offer, pre-employment stage upon learning that the applicant is disabled, it later cannot justify its action by pointing to additional non-disability-related information that it learned after the offer was tendered; presumably, it knew all the relevant non-disability-related information about the applicant when it initially extended the offer.<sup>25</sup>

Once an employer makes a *bona fide* job offer, it may require that the applicant respond to a disability-related inquiry or undergo a medical examination, including questions about the applicant's workers compensation history, prior sick leave usage, illnesses and general physical and mental health. The post-offer, pre-employment questions and examinations need not be related to the job in question or justified by business necessity.<sup>26</sup> However, if the employer uses information from the inquiry or examination to exclude an individual because of his medical condition, the employer must show that it is doing so for job-related reasons, consistent with business necessity, and that the applicant could not perform the job with reasonable accommodation.<sup>27</sup>

Post-offer, pre-employment inquiries and examinations must comport with the ADA's general prohibition against discrimination.<sup>28</sup> Accordingly, an employer must give all employees in the same job category, regardless of disability, the same post-offer

pre-employment inquiry or examination.<sup>29</sup> Further, if an employer relies on the results from pre-employment questions or an examination to not hire a disabled applicant, it must show that its inquiry was individualized and used objective, medical and scientific evidence. Thus, the Sixth Circuit, in Holiday v. City of Chattanooga, 206 F.3d 637 (6<sup>th</sup> Cir. 2000), reversed summary judgment where the examining doctor disqualified a HIV-positive applicant without any showing that his medical condition impeded his ability to perform as a police officer.

#### Post-Employment Medical Examinations and Disability-Related Inquiries

An employer is free to inquire into its employees' ability to perform job-related functions.<sup>30</sup> However, a disability-related inquiry or medical examination administered to a current employee must be job-related and consistent with business necessity.<sup>31</sup>

An inquiry or examination is considered job-related and consistent with business necessity if an employer has a reasonable belief that 1) an employee's ability to perform essential job functions is impaired by a medical condition; or 2) an employee poses a direct threat due to a medical condition. The employer's belief must be based upon reasonable medical judgment using current medical knowledge and/or the best available objective evidence, not on general assumptions about a disability.<sup>32</sup>

An example of a fit-for-duty test that passed judicial muster, and in the process casts attorneys in an unflattering light, is found in Fritsch v. City of Chula Vista, 2000 U.S. Dist. LEXIS 14820, 11 Am. Disabilities Cas. (BNA) 273 (S.D. Calif. 2000). There, the district court held that a staff attorney's visible agitation and emotional outbursts in response to an adversary's rude behavior and personal attacks justified the employer's requirement that she take a fitness-for-duty examination. The court noted that "[i]t is



reasonable for an employer to expect a litigation attorney to withstand the pressures inherent in a legal dispute, including an opponent's occasional boorish behavior."<sup>33</sup>

Where an employer withdraws an offer or denies an employment opportunity to an applicant or employee because of safety concerns based upon information learned from a disability-related inquiry or medical examination, it must show that the applicant posed a "direct threat to the health or safety of other individuals in the workplace."<sup>34</sup> To sustain its burden, the employer must show that the applicant's presence would create a substantial risk of substantial harm to others that cannot be eliminated or reduced by reasonable accommodation. This determination must be based on factual, objective and current medical knowledge and on a particularized assessment of the individual's present ability to safely perform essential job functions, focusing on 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm.<sup>35</sup>

Two recent circuit court cases underscores that generalized fears about a disability are insufficient to sustain a "direct threat" defense. In Lowe v. Alabama Power Co., 244 F.3d 1305 (11<sup>th</sup> Cir. 2001), the court found that the doctor's examination of an employee with two amputated legs was "cursory," had taken place 17 months before he applied for the job and failed to assess the employee's actual capabilities. Therefore, the court ruled that the employer's exclusion of the employee from a mechanic's position on the basis of the examination was unwarranted. In contrast, in Hutton v. Elf Atochen North America, Inc., 273 F.3d 884 (9<sup>th</sup> Cir. 2001), the Ninth Circuit upheld the lower court's determination that a diabetic, who worked as a liquid chlorine machine operator, posed a direct threat to others where none of the examining or consulting physicians

could rule out the occurrence of a hypoglycemic attack that would affect the plaintiff's ability to remain conscious, alert and communicative.

It remains an open question whether the "direct threat" defense is available where the employer has a reasonable belief that a disabled applicant or employee would pose a direct threat to him or herself, rather than to others. The statute refers only to a direct threat to "others," but the EEOC has interpreted the defense more expansively to include a threat to the disabled individual.<sup>36</sup> The Supreme Court is expected to resolve the conflict later this year.<sup>37</sup>

Finally, an employer may conduct voluntary medical examinations as part of an employee health program.<sup>38</sup>

#### Reasonable Accommodation in the Application Process

It is well known that employers are required to make reasonable accommodations to qualified disabled employees. It is less well appreciated that employers are equally obligated to make reasonable accommodations to job applicants with known disabilities in order to assist them in applying for positions. The ADA requires that employers make "appropriate adjustment or modifications of examinations,"<sup>39</sup> and provides that an employer commits unlawful discrimination by

    failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant ... who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant ... that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).<sup>40</sup>

The ADA obligates employers to modify, in appropriate circumstances,

employment tests in order to assure that disabled applicants are not unfairly screened from positions simply because their disabilities caused them to fail tests that measure skills inessential for the job in question. An example cited by the EEOC makes the point:

it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he is disabled with dyslexia and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual.<sup>41</sup>

However, if the dyslexic individual applies for a job where reading is an essential function, he could be required to take a written test that measures the ability to read.

In a case brought under Section 504 of the Rehabilitation Act, Stutts v. Freeman,<sup>42</sup> the Tennessee Valley Authority's denied the entry of an individual with dyslexia into its heavy lift operators apprenticeship program because he flunked a written entrance exam. The individual challenged the TVA's action as violating his right to reasonable accommodation. As noted by the Eleventh Circuit, the written test was the TVA's main hiring criteria for the lift operator job, even though it did not accurately measure applicants' ability to perform the lift operator duties. Indeed, regardless of his reading limitations, there was little dispute that Stutts could ably perform the lift operator job – although he might need help with the training program's reading requirements. The Court of Appeals ruled that the TVA's sole reliance on the written test to judge Stutts' qualifications violated the duty of reasonable accommodation: "To eliminate Mr. Stutts without implementing an alternate test (oral) administered by outside professionals or TVA's staff or by failing to 'adjust' the entry requirements to

accommodate his dyslexia, TVA has failed to comply with the statute."<sup>43</sup>

In a case closer to home, Bartlett v. New York State Bd. of Law Exam'rs,<sup>44</sup> a law school graduate with a learning disability had failed the bar examination six times allegedly because the Board of Law Examiners refused to accommodate her disability when administering the test. After prodigious litigation, including a 21-day trial and two trips to the Court of Appeals, the district court's initial order for injunctive relief was upheld. The order shows the potential breadth of the obligation to reasonably accommodate entrance examinations. The district court directed the Board to give the plaintiff double time so as to take the examination over four days, the use of a computer, permission to circle multiple choice answers in the examination booklet and large print examination booklets.

Other types of reasonable accommodations in the administration of employment tests include:

- accessible test sites;
- modified testing equipment
- qualified readers or interpreters;<sup>45</sup>
- assistance in filling out job application forms.<sup>46</sup>

#### Confidentiality Requirements

An employer must protect the confidentiality of employees' medical information when it is obtained through 1) a post-offer, pre-employment medical examination<sup>47</sup>; 2) a post-employment medical examination that is job-related and consistent with business necessity;<sup>48</sup> and 3) a voluntary medical examination that is part of an employer's employee health program.<sup>49</sup> Medical information obtained through any of the three

methods must be collected and maintained on separate forms and in separate medical files. An employer may not place medically-related material in an employee's non-medical personnel files.<sup>50</sup> At least one circuit court has ruled that all employees, disabled and non-disabled alike, have a cause of action under the ADA for unauthorized disclosure of confidential medical information.<sup>51</sup>

Where an employer learns medical or disability-related information through means other than the above three protected methods, the ADA's confidentiality obligation does not attach.<sup>52</sup> The ADA expressly permits the disclosure of an employee's confidential medical information in the following circumstances: 1) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodation; 2) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; 3) government officials investigating compliance with the ADA shall be provided relevant information on request.<sup>53</sup>

### Conclusion

\_\_\_\_\_The ADA has established wide-ranging statutory and regulatory protections for disabled job applicants. The hiring provisions are vital to achieving one of the ADA's primary purposes, facilitating the entry of the disabled into the workforce and thereby promoting their economic self-sufficiency. Given the importance of the ADA's hiring provisions, it is likely that in the coming years they will emerge as a major battleground for those involved in enforcing the statute.

1. 42 U.S.C. §§ 12101 et seq.
2. The prevailing view is that all employees and applicants, not just those with disabilities are covered by the ADA's protection against unauthorized disability-related inquiries and medical examinations. See Roe v. Cheyenne Mt. Conf. Resort, Inc., 124 F.3d 1221, 1229 (10<sup>th</sup> Cir. 1997) ("it makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability"); Fredenburg v. Contra Costa County Dept. of Health Servs., 172 F.3d 1176 (9<sup>th</sup> Cir. 1999) (requiring plaintiffs to prove that they are persons with disabilities to challenge a medical examination would render §12112(d)(4)(A) of the ADA "nugatory"); Griffin v. Steeltex, Inc., 160 F.3d 591 (10<sup>th</sup> Cir. 1998), cert. denied, 526 U.S. 1065 (1999); but see Armstrong v. Turner Indus., 141 F.3d 554, 562 (5<sup>th</sup> Cir. 1998) (holding that a non-disabled applicant did not have a cause of action for being asked impermissible medical questions since the denial of employment was unrelated to the medical information obtained by the employer and therefore the plaintiff did not suffer a cognizable injury).
3. See Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1273 (9<sup>th</sup> Cir. 1998).
4. 42 U.S.C. § 12112(d)(2)(A).
5. Equal Employment Opportunity Commission Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (EEOC Notice 915.002) (July 27, 2000) ("2000 Enforcement Guidance") at text accompanying n. 18. (This and other EEOC guidances are available through the Internet at <http://www.eeoc.gov>).
6. EEOC, Appendix to Part 1630, Interpretative Guidance on Title I of the Americans with Disabilities Act (hereinafter referred to as 29 CFR pt. 1630, app. \_\_\_\_") § 1630.11.
7. See Griffin, 160 F.3d 591 (10<sup>th</sup> Cir. 1998) (on its application for employment, the employer unlawfully asked: "Have you received worker's compensation or disability payments? If yes, describe").
8. See EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (EEOC Notice 915.002) (Oct. 10, 1995) ("1995 Enforcement Guidance") ("These questions relate directly to the severity of an individual's impairments. Therefore, these questions are likely to elicit information about a disability").
9. See Roe v. Cheyenne Mt. Conf., 124 F.3d 1221 (finding unlawful employer's policy requiring all employees to report every drug they are taking, including legal

prescription drugs).

10. See 1995 Enforcement Guidance.
11. 29 CFR pt. 1630, app. § 1630.14(a); Hoffman v. Fidelity Brokerage Servs., 959 F. Supp. 452 (S.D. Ohio 1997).
12. 29 CFR pt. 1630, app. § 1630.14(a).
13. 42 U.S.C. § 12112(d)(2)(B).
14. See 1995 Enforcement Guidance.
15. 42 U.S.C. § 12114(a)(1994); 29 C.F.R. §1630.3(a).
16. 29 CFR pt. 1630, app. § 1630.2(h).
17. 29 CFR pt. 1630, app. § 1630.14(a).
18. See Grenier v. Cyanamid Plastics, Inc., 70 F. 3d 667, 675 (1<sup>st</sup> Cir. 1995) (citing 1995 Enforcement Guidance, § V.A). The First Circuit cautioned that the Enforcement Guidance "is not binding law, but as a detailed analysis of relevant ADA provisions, it aids our interpretation of the statute." Grenier, 70 F.3d at 673.
19. 2000 Enforcement Guidance at text accompanying n. 30.
20. 2000 Enforcement Guidance at text accompanying n. 31-32.
21. Compare Barnes v. Cochran, 944 F. Supp. 897 (S.D. Fla. 1996), aff'd without op. sub nom, Barnes v. Broward Cty. Sheriff's, 130 F.3d 443 (11<sup>th</sup> Cir. 1997) (finding that a pre-employment psychological examination which included a clinical evaluation and standardized personality tests was an unauthorized pre-employment medical examination) with Thompson v. Borg-Warner Protective Servs. Corp., 1996 U.S. Dist. LEXIS 4781 (N.D. Cal. 1996) (holding that a multiple-choice test, the PASS-III D.A.T.A. Survey, was not an unlawful pre-offer medical examination, since the test did not seek to reveal mental disorders or impairments).
22. 29 CFR pt. 1630, app. § 1630.14(a).
23. 1995 Enforcement Guidance.
24. See Harris v. Harris & Hart, Inc., 206 F.3d 838, 842-44 (9<sup>th</sup> Cir. 2000); Grenier, 70 F.3d at 678.
25. See Buchanan v. City of San Antonio, 85 F.3d 196, 199 (5<sup>th</sup> Cir. 1996) (where the offer of employment was contingent on a host of factors, of which a medical exam was just one, the employer did not make a *bona fide* offer of employment, and the

administration of a medical exam was impermissible); Downs v. Mass. Bay Transport. Auth., 13 F. Supp. 2d 130 (D. Mass. 1998) (same).

26. 29 CFR § 1630.14(b)(3).

27. 42 U.S.C. § 12112(b)(6); 29 CFR § 1630.10; see also Rowles v. Automated Prod. Sys., 1999 U.S. Dist. LEXIS 21605 (M.D. Pa. 1999) (holding that the employer's post-offer, pre-employment drug test violated the ADA where its results were used, without business necessity, to exclude all applicants and employees using legally prescribed controlled substances).

28. 42 U.S.C. § 12112(a).

29. 42 U.S.C. § 12112(d)(3)(A).

30. 42 U.S.C. § 12112(d)(4)(B).

31. 42 U.S.C. § 12112(d)(4)(A).

32. 29 CFR § 1630.2(r); but see EEOC v. Blue Cross Blue Shield of Connecticut, 30 F. Supp. 2d 296, 307 (D. Conn. 1998) (approving the employer's exclusion of an applicant on the basis of a post-employment medical examination, notwithstanding the absence of a definitive diagnosis of the applicant's condition; the employer was not required to do follow-up testing to ascertain the precise nature of the applicant's condition so long as it had sufficient reliable information on which to form a reasonable medical judgment).

33. See also Larsen v. Miller-Dwan Medical Ctr. Inc., 2001 U.S. Dist. LEXIS 17807, 12 Am. Disabilities Cas. (BNA) 590 (D. Minn. 2001) (rejecting claim that employer's demand for a staff social worker to undergo psychiatric evaluation was an unlawful post-hiring medical examination, since the request was reasonable in light of the social worker's behavior).

34. 42 U.S.C. § 12113(b); see Hutton v. Elf Atochen North America, Inc., 273 F.3d 884 (9<sup>th</sup> Cir. 2001). But see EEOC v. Amego, Inc., 110 F.3d 446, 447 (1<sup>st</sup> Cir. 1997) (placing the burden on the applicant/employee to show that he or she does not pose risks to others as part of demonstrating his or her qualifications for employment); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11<sup>th</sup> Cir. 1996) (per curiam) (same).

35. 29 CFR § 1630.2(r).

36. Compare 42 U.S.C. § 12113(b) with 29 CFR § 1630.2(r).

37. See Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9<sup>th</sup> Cir. 2000), cert. granted, 122 S.Ct. 456 (U.S. 2001).



38. 42 U.S.C. § 12112(d)(4)(B).
39. 42 U.S.C. § 12111(9).
40. 42 U.S.C. § 12112(b)(7).
41. 29 CFR pt. 1630, app. § 1630.11.
42. 694 F.2d 666 (11<sup>th</sup> Cir. 1983).
43. 694 F.2d at 796 n.3.
44. 970 F. Supp. 1094 (S.D.N.Y. 1997), aff'd in part and vacated in part for other reasons, remanded, 156 F.3d 321 (2d Cir. 1998), and vacated, remanded, New York State Bd. of Law Exam'rs v. Bartlett, 527 U.S. 1031 (1999), and aff'd in part and vacated in part, remanded, in part, 226 F.3d 69 (2d Cir. 2000), on remand, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. Aug. 15, 2001).
45. 29 CFR pt. 1630 § 1630.14(a).
46. But see Kemar v. Johnson, 900 F. Supp. 677 (S.D.N.Y. 1995), aff'd without op., 101 F.3d 683 (2d Cir.), cert. denied, 519 U.S. 985 (1996) (holding that the employer met its obligation of reasonable accommodation when it gave the applicant the deficient application he had submitted and a blank one and invited him to properly complete and resubmit the blank application).
47. 42 U.S.C. § 12112(d)(3)
48. 42 U.S.C. § 12112(d)(4)(A); see, e.g., Cossette v. Minnesota Power & Light, 188 F.3d 964 (8<sup>th</sup> Cir. 1999) (reversing summary judgment where the employer disclosed confidential information about plaintiff's back injury and lifting restrictions to a prospective employer to whom the plaintiff had submitted a job application).
49. 42 U.S.C. § 12112(d)(4)(B).
50. 42 U.S.C. §§ 12112(d)(3)(B),(4)(B); see, e.g., Pollard v. City of Northwood, 161 F. Supp.2d 782 (N.D. Ohio. 2001) (City Administrator made an unauthorized disclosure of confidential information to the press by saying he was "afraid" of plaintiff because he did not want a police officer "on Prozac").
51. Cossette, 188 F.3d 964.
52. See Ballard v. Healthsouth Corp., 147 F. Supp.2d 529 (N.D. Tx. 2001) (holding that the employer did not breach employee's right of confidentiality where it learned of employee's HIV-positive status through employee's voluntary disclosure, and not job-

related medical examination); Yoder v. Ingersoll-Rand Co., 31 F. Supp.2d 565 (N.D. Oh. 1997) aff'd without op., 172 F.3d 51 (6<sup>th</sup> Cir. 1998).

53. 42 U.S.C. §§ 12112(d)(3)(B),(4)(C); 29 CFR § 1630.14(b)(1).