



# Legality of Personality Tests Under the Americans with Disabilities Act

By Joshua A. Hawks-Ladds

## Introduction

If an employer intends to have an employee or an applicant undergo a personality assessment, the employer must know how to avoid an unintended “medical examination” from taking place. Since at least the middle of the last century, many employers have utilized psychological tests (in one form or another) to make hiring decisions. The tests became popular with the military in the early twentieth century and have flourished since then.<sup>1</sup> These tests are often valuable tools to screen out candidates who may lack the aptitude for a given job or may not have the personality traits that the job requires. The tests typically include multiple choice questions where the candidate must indicate his or her preference for a number of statements. In theory, the choices demonstrate the candidate’s personality type and character traits.

Significantly, the Americans with Disabilities Act (ADA)<sup>2</sup> prohibits employers from using tests or questionnaires that are meant to, or that incidentally, result in discrimination against disabled individuals.<sup>3</sup> On the other hand, assessment tools that merely measure personality traits such as honesty, preferences, and habits do not violate the ADA.

This article explores the ADA’s impact on personality testing in the workplace, and discusses what type of assessment tools will withstand ADA scrutiny and when these tools can lawfully be implemented.

## The Americans with Disabilities Act

Why are psychological tests subject to scrutiny under the ADA? Because they could be used to eliminate employment

candidates with mental disabilities, as opposed to merely screening them for personality traits. Individuals with disabilities<sup>4</sup> often face barriers to joining and succeeding in the workforce, including attitudinal barriers resulting from unfounded stereotypes and prejudice.<sup>5</sup> People with psychiatric disabilities have suffered as a result of such attitudinal barriers, experiencing an employment rate dramatically lower than people without disabilities and far lower than people with other types of disabilities.

Congress enacted the ADA to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>6</sup> Congress recognized that “the nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>7</sup> The

ADA's definition of disability includes actual or perceived mental impairments, not just physical impairments.<sup>8</sup>

Significantly, the ADA forbids employers from discriminating against employees or applicants during the application process or during consideration for advancement, due to the individual's disability.<sup>9</sup> Towards that end, the ADA explicitly limits the ability of employers to use "medical examinations and inquiries" as a condition of employment in three circumstances: (1) pre-employment medical examinations are prohibited; (2) using medical examinations that lack job-relatedness and business necessity is prohibited; (3) using medical examinations which screen out (or tend to screen out) people with disabilities is forbidden.<sup>10</sup> Thus, if a personality assessment tool is considered a "medical examination" under the ADA and is not job-related or could reveal a disability, it may violate the ADA.

Psychological tests that are "designed to identify a mental disorder or impairment" may be considered medical examinations under the ADA and, therefore, may be prohibited—or at least limited—under that law. Importantly, the ADA explicitly permits "inquiries" (but not examinations) as to an employee's ability to "perform job-related functions."<sup>11</sup> However, the ADA is unclear as to whether examinations (rather than inquiries) are permissible if intended to evaluate the employee's ability to perform job-related functions, even if such examinations are not intended to discover whether an employee is "disabled" within the meaning of the ADA.

This is where the ADA's limits on medical examinations comes into play when evaluating the validity of a personality assessment tool.

## Medical Examinations vs. Personality Tests

In considering whether to administer a specific personality assessment tool, an employer faces a multi-faceted inquiry. First, an employer must determine whether the assessment tool is a "disability-related inquiry."<sup>12</sup> In brief, a "disability-related inquiry" is a question (or series of questions) that is likely to elicit information about a disability. This type of inquiry is almost always impermissible under the



**Employers must be careful in choosing the proper assessment tool and in confirming that how and when it is used does not violate the Americans with Disabilities Act.**

ADA until after the applicant has been given a conditional job offer, and even then, there are numerous limitations. A disability-related inquiry must always have some relationship to the job in question.<sup>13</sup> Second, the employer must consider whether the test or procedure is, or could be considered, a "medical examination." If the assessment may be considered a "medical examination," then it must be "job-related and consistent with business necessity" or it is not permitted by the ADA.<sup>14</sup> If the assessment is neither a "disability-related inquiry" nor a "medical examination," then the ADA will not apply to its application.

The EEOC provides guidance on distinguishing between a "medical examination" and a personality assessment. It defines "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairments or health."<sup>15</sup> And while psychological tests that are "designed to identify a mental disorder or impairment" qualify as medical examinations, tests that merely "measure personality traits such as honesty, preferences, and habits" do not.<sup>16</sup> In other words, if the intended personality test is merely a character assessment and not a medical inquiry, it is permissible.

But what factors can an employer use to evaluate the difference between a "medical examination" and a personality test? According to the EEOC, factors to consider in determining whether a particular test is a "medical examination," as opposed to a per-

sonality assessment, include the following:

- (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 an impairment of physical or mental health;
- (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.<sup>17</sup>

And, while the EEOC states that "in many cases, a combination of factors will be relevant in figuring out whether a procedure or test is a medical examination," in some cases, "one factor may be enough to determine that a procedure or test" is a medical examination as opposed to a personality assessment.<sup>18</sup> Key factors also include the purpose of the test and the employer's intent in giving the test.<sup>19</sup>

The EEOC offers three examples of tests given pre-employment (they may also apply to a test given for a promotion)<sup>20</sup> that are intended to demonstrate the difference between medical and non-medical examinations:<sup>21</sup>

Example: A psychological test is designed to reveal mental illness, but a per-

*(Please see next page)*

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ticular employer says it does not give the test to disclose mental illness (for example, the employer says it uses the test to disclose just tastes and habits). However, the test also is interpreted by a psychologist and is routinely used in a clinical setting to provide evidence that would lead to a diagnosis of a mental disorder or impairment (for example, whether an applicant has paranoid tendencies or is depressed). Under these facts, this test is a medical examination.

Example: An employer gives applicants the RUOK Test (hypothetical) This examination reflects whether applicants have characteristics that lead to identifying whether the individual has excessive anxiety, depression, and certain compulsive disorders (DSM-listed conditions). This test is medical.

Example: An employer gives the IFIB Personality Test (hypothetical). This examination is designed and used to reflect only whether an applicant may be likely to lie. The test, as used by the employer, is not a medical examination.

Therefore, a psychological test that is designed, at least in part, to reveal mental illness would violate the EEOC's first example, stated above. But a test that only measures personality traits, and is not designed to disclose mental illness will withstand scrutiny for an ADA violation if it is not interpreted by a psychologist. For example, one popular psychological test, the Minnesota Multiphasic Personality Inventory (MMPI),<sup>22</sup> may not withstand judicial scrutiny as a personality test for several reasons. At least one court has held that the MMPI is a medical exam that if used to screen candidates violates the ADA. In *Karraker v. Rent-A-Center, Inc.*, the court held that because the scoring methods for the MMPI may employ a clinical protocol that could be used for

medical purposes it violated the ADA's prohibition against screening for mental disabilities.<sup>23</sup> The court stated that while a vocational scoring protocol would focus more on personality traits of potential employees, a test like the MMPI can be utilized for more than solely discerning personality traits, it can, and has been, used to discern psychological disorders.

The *Karraker* Court stated that the mere fact that a psychologist may not interpret the MMPI is not dispositive. The problem with the use of the MMPI is that whether or not an employer (like Rent-a-Center in the *Karraker* case) uses the test to weed out applicants with certain disorders, the use of the MMPI likely has the effect of excluding employees with disorders from promotions. It is therefore unlawful. The reason for this is even if the scoring system used "does not diagnose or detect any psychological disorders," an elevated score on parts of the MMPI (the "Pa Scale") may contribute to a diagnosis of certain personality disorders.<sup>24</sup> In other words, even if a high score on certain portions of the MMPI does not necessarily mean that the person has paranoid personality disorder, it is likely that a person who does, in fact, have paranoid personality disorder would register a high score on that portion of the MMPI.<sup>25</sup> That person is therefore protected under the ADA, and that high score could end up costing the applicant any chance of a job or a promotion.<sup>26</sup> Therefore, "because it is designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of one with a mental disability," the *Karraker* court held that the MMPI is a medical examination, and its use to evaluate employees for promotion violated the ADA.<sup>27</sup>

The *Karraker* decision's lesson is that irrespective of a psychological test's *intended* purpose, if it could have the effect of weeding out persons with mental impairments, it may be considered a medical examination under the ADA and unlawful due to its impact on individuals with disabilities.

## Time Limits on Medical Examinations and Disability Inquiries

Assuming that an employer has a legitimate business-related need to make a disability-related inquiry or require a medical examination, under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment.

1. Prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.<sup>28</sup>
2. After an applicant is given a conditional job offer, but before commencing work, an employer may conduct medical examinations, as long as it does so for all entering employees in the same job category.<sup>29</sup> However, if an individual is screened out because of a disability, the employer must show that the exclusionary criterion is job-related and consistent with business necessity.<sup>30</sup> For example, after a conditional offer of employment is made to an applicant, the ADA allows examinations or inquiries as to whether an employee has a disability or as to the severity of a disability. If the examination discloses the fact that the applicant has a disability or condition that could impact on the performance of the job, the employer will have an obligation to determine whether a reasonable accommodation is required or whether the disability excludes the applicant from the job.<sup>31</sup>
3. After employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.<sup>32</sup> For example, a request for such an appropriately-tailored examination may be made when

an employer harbors doubts (not certainties) with respect to an employee's ability to perform a particular job.<sup>33</sup>

## Conclusion

Therefore, an employer inquiry that is merely a personality assessment and not a medical examination or disability-related inquiry, may be permitted at any time. However, a medical examination that may reveal a mental illness is not permitted before a conditional job offer, and it may never be permitted unless it is shown to be job-related and consistent with business necessity and not intended to screen out individuals with disabilities.

While a personality assessment may be a useful tool in evaluating applicants or making other personnel decisions, employers must be careful in choosing the proper assessment tool and in confirming that how and when it is used does not violate the Americans with Disabilities Act. **CL**

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## Notes

1. See, e.g. Gregory R. Vetter, "Is A Personality Test a Pre-Job-Offer Medical Examination Under the ADA?", 93 NW. U. L. Rev. 597, 598 (1999).
2. 42 U.S.C. §§ 12101 et seq.
3. See 42 U.S.C. § 12112(d); *Bassett v. Rent-A-Center*, 80 Fed. Appx. 776; 2003 U.S. App. LEXIS 23296 (3rd Cir. 2003)
4. A "disability" is defined as:  
(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;  
(B) a record of such an impairment; or  
(C) being regarded as having such an impairment.  
42 U.S.C. § 12102(2). Although the statute does not define the term "major life activities," the EEOC regulations explain that major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999).
5. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 834 (7th Cir. 2005).
6. 42 U.S.C. § 12101(b)(1).
7. 42 U.S.C. § 12101(a)(8).
8. 42 U.S.C. §§ 12111 and 12102(2).
9. The ADA's exact words prohibit a "covered entity" from "discriminating against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).
10. 42 U.S.C. § 12112(d)(1). The ADA provisions, have been described as "not a model of legislative clarity... (that) may leave an odd 'gap' in setting out the scope of permissible examinations and inquiries." *Tice v. Centre Area Transportation Authority*, 247 F.3d 506, 514 (3rd Cir. 2001) citing *Yin v. California*, 95 F.3d 864, 868 (9th Cir. 1996).
11. 42 U.S.C. § 12112(d)(4)(B).
12. See, e.g. EEOC "Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act" ("EEOC Guidance Disability-Related Inquiries").
13. See EEOC "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" (1995) ("EEOC Guidance Preemployment Disability-Related Questions").
14. 29 C.F.R. § 1630.14(c).
15. EEOC Guidance Disability-Related Inquiries.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. See *Karraker v. Rent-A-Center, Inc.*, 411 F.3d at 835 (but while MMPI test given in that case was for consideration for promotion of current candidates, employer stipulated that court could consider it a "pre-employment examination" for purposes of that case.)
21. See, e.g. *Karraker*, 411 F.3d at 836.
22. The MMPI was originally designed in 1942 as a screening tool to help identify personal, social, and behavioral problems in psychiatric patients, but has since "transcended its original purpose." M. Mulvihill, "Note: *Karraker v. Rent-A-Center*: Testing the Limits of the ADA, Personality Tests and Employer Preemployment Screening," 37 Loy. U. Chi. L.J. 865 (2006). The test helps provide relevant information to aid in problem identification, diagnosis, and treatment planning for the patient. It has been used for screening soldiers, for social security applicant verifications and in the employment context for job screening and other non-clinical assessments.
23. *Karraker*, 411 F.3d at 836.
24. *Id.* at 837.
25. *Id.*
26. A separate issue that is currently in dispute in the courts is whether an individual who is not in fact disabled, but who nonetheless is required to take a psychological assessment, has a right to sue for discrimination under the ADA claiming that he or she is perceived as disabled. See, e.g. *Tice v. Centre Since Area Transportation Authority*, 247 F.3d 506, 514 (3rd Cir. 2001). To state a claim for employment discrimination under the ADA, a plaintiff must demonstrate that he or she is a "qualified individual with a disability" within the meaning of the Act, and that he or she has suffered an adverse employment decision as a result of the discrimination. See *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 306 (3d Cir. 1999). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). That topic, however, goes beyond the scope of this article.
27. *Id.*
28. EEOC Guidance Disability-Related Inquiries. However, according to the ADA Enforcement Guidance, "where an applicant has an obvious disability, and the employer has a reasonable belief that s/he will need a reasonable accommodation to perform specific job functions, the employer may ask whether the applicant needs a reasonable accommodation and, if so, what type of accommodation. These same two questions may be asked when an individual voluntarily discloses a nonvisible disability or voluntarily tells the employer that s/he will need a reasonable accommodation to perform a job." 42 U.S.C. § 12112(c)(B)(1994); 29 C.F.R. § 1630.13(a)(1998); See also EEOC Guidance Preemployment Disability-Related Questions, note 2, at 6-8.; EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities at 13-15 [hereinafter *The ADA and Psychiatric Disabilities*]; Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at 20-21 [hereinafter *Reasonable Accommodation Under the ADA*]. Under certain circumstances, an employer also may ask applicants to self-identify as individuals with disabilities for purposes of its affirmative action program. See EEOC Guidance Preemployment Disability-Related Questions, *supra* note 2, at 12-13.
29. *Id.* citing to 42 U.S.C. § 12112(d)(3)(1994); 29 C.F.R. § 1630.14(b)(1998).
30. *Id.* citing to 42 U.S.C. § 12112(b)(6)(1994); 29 C.F.R. §§ 1630.10, 1630.14(b)(3)(1998).
31. *Id.* See 42 U.S.C. § 12112(d)(4)(A).
32. *Id.* citing 42 U.S.C. § 12112(d)(4)(A)(1994); 29 C.F.R. § 1630.14(c)(1998).
33. *Tice*, 247 F.3d at 515. See also *Cody v. Cigna Healthcare of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998) (request for a mental examination of an employee who had exhibited strange behaviors does not establish that the employer "regarded" the employee as disabled because "employers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims").