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This Week's Double Feature

Who Says You Have to Be Disabled to File an ADA Claim?
The Eleventh Circuit and Five Other Circuit Courts
By Anne R. Yuengert
***Bradley Arant Boult Cummings, LLC*, Birmingham, Alabama**

Can a non-disabled person sue you for a violation of the American with Disabilities Act? The short answer is "sometimes." In *Harrison v. Benchmark Electronics Huntsville, Inc.*, 22 AD Cases (BNA) 1281 (11th Cir. 2010), the Eleventh Circuit considered whether a non-disabled applicant can pursue an ADA claim that the potential employer made improper pre-offer medical inquiries. In this recently issued opinion, the Eleventh Circuit joined the five federal appellate courts that have considered the issue in finding that such a cause of action is available.

John Harrison was a temporary worker at Benchmark Electronics Huntsville, Inc. (BEHI) for about seven months when his supervisor, Don Anthony, requested that he submit an application for permanent employment. BEHI had a practice of test driving temporary employees and requesting the ones who worked out to apply. As part of the application process, Harrison submitted to a drug screen, which revealed that he took barbiturates.

For some reason, Don Anthony (rather than Human Resources) was the person who told Harrison that his drug screen came back positive for barbiturates. Harrison said he had a prescription, so Anthony called the Medical Review Officer and handed the telephone to Harrison. Although he did not participate in the conversation with the MRO, Anthony did not leave the room and, so, heard Harrison answer the MRO's questions about his prescription. The facts on exactly what was said are in dispute: Harrison said, in answering the MRO's questions about his prescription, he described his medical condition (epilepsy) while Anthony testified he did not know Harrison had epilepsy.

Shortly thereafter, the MRO cleared Harrison's drug screen and Human Resources approved the hire. At this point, Anthony had a change of heart and decided not to hire Harrison and to tell the temporary agency not to send Harrison back to BEHI as a temporary employee (so Harrison lost the temporary position, as well). Not surprisingly, Harrison believes these events were

related to his disclosure of his epilepsy and filed an EEOC charge alleging a violation of the ADA. This occurred in 2006 (pre-ADAAA), and the EEOC concluded Harrison was not disabled. Harrison filed a lawsuit in the federal district court alleging three claims under the ADA: (1) an improper pre-offer medical inquiry; (2) failure to hire because of a perceived disability; and (3) termination because of a perceived disability. The district court granted summary judgment on all claims.

Harrison appealed the summary judgment only on the medical inquiry claim. The Eleventh Circuit had not previously ruled on the issue of whether the ADA's section prohibiting pre-offer medical inquiries (42 U.S.C. § 12112(d) (2)) created a private cause of action regardless of the plaintiff's status as a person with a disability. All other federal circuits that had considered the issue ruled that there was such an action. *See Murdock v. Washington*, 193 F.3d 510, 512 (7th Cir. 1999); *Fredenburg v. Contra Costa County Dep't of Health Servs*., 172 F.3d 1176, 1182 (9th Cir. 1999); *Griffin v. Steeltek*, 160 F.3d 591 (10th Cir. 1998); *see also Conroy v. N.Y. State Dep't of Corr. Svcs*., 333 F.3d 88, 94-95 (2d Cir. 2003) (stating the same in the context of § 12112(d)(4)); *Cossette v. Minn. Power & Light*, 188 F.3d 964, 969-70 (8th Cir. 1999) (same).

The court noted that, unlike the discrimination sections of the ADA (that are found in § 12112(a) and refer to "qualified individuals with disabilities"), the medical inquiry prohibition section refers only to "applicants." Given Congress' intent to "curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment", the court noted that allowing non-disabled persons to pursue a medical inquiries claim will enhance the prohibition. *Harrison*, 22 AD Cases (BNA) 1285. Additionally, the court pointed out that such a ruling is consistent with EEOC guidance on the issue. *Id.* Accordingly, the court explicitly recognized "that a plaintiff has a private right of action under 42 U.S.C. § 12112(d)(2), irrespective of his disability status." *Id*. The court also joined the other circuits in finding that the plaintiff in such a medical inquiry claim must show some damages to overcome summary judgment. It noted that Harrison presented sufficient evidence for a reasonable jury to find that he suffered damages—he was not hired as a permanent employee of BEHI because of his responses to allegedly unlawful questions. It appears, therefore, that Harrison may be able to get the same damages under his medical inquiry claim that he was denied when his failure to hire claim was dismissed.

BEHI argued that Harrison had not properly pled a claim under § 12112(d)(2). The court pointed out that the "complaint alleged that BEHI questioned him about his seizures following a pre-employment drug test, and he claimed damages for these allegedly prohibited medical inquiries." *Id.* at 1286. The court distinguished Harrison's allegations from those in *Grimsley v. Marshalls of MA, Inc*., 284 F. App'x 604 (11th Cir. 2008), in which the plaintiff's improper medical inquiry claim was "part of a laundry list of facts that supported his hostile work environment claim." *Id*. at fn.8. The court found that Harrison's specific reference to pre-employment medical inquiries satisfied the liberal pleading standard.

Finally, BEHI argued that the alleged pre-employment inquiry was related to a test to determine the illegal use of drugs, which the ADA specifically permits. Not only may employers test for illegal drug use, they also may ask follow up questions about a

positive drug test. 42 U.S.C. § 12114. The Eleventh Circuit held that the district court had failed to consider that, in following up on a permissible drug test, an employer may only ask questions to determine if the drug test is the result of a lawful prescription. The Eleventh Circuit noted that the ADA required that BEHI's follow up questions not be disability-related nor likely to elicit information about a disability. The court pointed out that a jury could determine that Anthony's presence in the room during the MRO conversation violated the ADA's medical inquiry prohibition. The court ruled that "A reasonable jury could infer that Anthony's presence in the room was an intentional attempt *likely to elicit* information about a disability in violation of the ADA's prohibition against pre-employment medical inquiries." *Id.* at 1287.

What can employers do to avoid this result? Hiring personnel should avoid any information about an applicant's medical or disability information. Even if Anthony had to be the person to deliver the news about the positive drug screen, he should not have been present for Harrison's conversation with the MRO. Because he was in the room during the conversation, although Anthony never asked Harrison anything about his disability, a jury may conclude he was using the MRO to make impermissible inquiries. Had he removed himself from the situation, Harrison would have a much tougher job connecting his disability to Anthony's decision not to hire him, and this case likely would not be going to trial.

Anne R. Yuengert (ayuengert@babc.com)
Bradley Arant Boult Cummings, LLC
Birmingham, Alabama

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