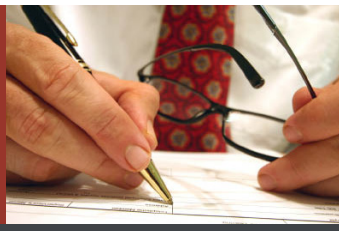
Labor & Employment Update



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Who Says You Have To Be Disabled to File An ADA Claim? Not the Eleventh Circuit (or 5 Other Circuit Courts)

By Anne R. Yuengert

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.*, 593 F.3d 1206 (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 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 7 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, 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 (before the ADA Amendments Act of 2008), and the EEOC concluded Harrison was not disabled. Harrison filed a lawsuit in the federal district court alleging 3 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 dismissed all claims on summary judgment.

Harrison appealed the dismissal of his pre-offer medical inquiry claim only. 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. Servs.*, 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.

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In This Issue

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Harrison, 593 F.3d at 1213-14. Additionally, the Court pointed out that such a ruling is consistent with EEOC guidance on the issue. *Id.* at 1214. 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.* The Court distinguished Harrison's allegations from those in *Grimsley v. Marshalls of MA, Inc.*, 284 Fed. Appx. 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 1216.

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 the Anthony's decision not to hire him and this case likely would not be going to trial.

Wage and Hour Cases Continue to Proliferate

While employers continue to defend themselves against a variety of discrimination and retaliation claims, even those cases can seem "run of the mill" as compared to the increasing number of wage and hour cases filed under the Fair Labor Standards Act ("FLSA"), most notably claims certified as class actions.

According to reports, in 2009 the number of class action wage and hour cases exceeded all other types of employment class actions. Furthermore, the news is rife with articles on the number of class claims that have settled for extraordinary amounts. For example, in December 2009 a subsidiary of UPS settled a class claim alleging that it had misclassified couriers and drivers as independent contractors for $12.8 million involving some 280 California class members and 380 FLSA members. In November, a Nevada court granted final approval of an $85 million settlement against Wal-Mart that involved more than 30 lawsuits that were consolidated into a class action impacting over 3 million current and former employees who were paid incorrectly for the hours they worked. In Iowa, Casey's General Stores agreed to pay $11.7 million to settle two class actions brought by current and former assistant managers claiming failure to pay overtime and minimum wage.

A variety of reasons are associated with the rise in FLSA claims. For one, class certification is easier under the FLSA than it is under other employment claims under the Federal Rules of Civil Procedure. The basic requirement is to show that the people in the proposed class are "similarly situated". This easier standard allows plaintiffs' attorneys to get the class certified quicker and move the case forward with less time required. Because of this ability to get a class certified early, employers are pressured to settle.

Another factor is the ever changing work force and workplace environment. The increased technology made available by employers has freed many employees from the "trappings" of the office, but created additional working time after leaving the office. Responding to late night emails or memos at home via an employee's BlackBerry or laptop has added potential "hours" for nonexempt employees that employers might not have originally envisioned. The convenience of technology may have the impact of extending the work day, and thus, an employer's liability for potential overtime pay.

While the three main categories of exempt employees have remained largely unchanged, there is still difficulty in properly classifying workers under the professional, executive and administrative exemptions. Of these three, the administrative exemption appears to be the one most commonly cited in misclassifying employees. The requirement that the administrative employee's primary duty be work directly related to the management or general business operations and include the exercise of discretion and independent judgment on important matters as the primary duty, still catches many employers. This has happened frequently in

businesses involving claims adjusters, assistant managers, loan originators, on site "working managers", and other quasi professional/administrative positions. This becomes particularly troublesome when you realize that many of these employees are paid salaries at amounts that employers never envisioned would be paid to employees entitled to overtime. Imagine the overtime liability on a group of misclassified exempt employees with salaries of $70,000 per year. Further, as employers look to cut costs, the idea of hiring independent contractors to replace existing employees has gained popularity. One Department of Labor ("DOL") study found that from ten to thirty percent of employers audited had misclassified at least some of their employees as independent contractors. The IRS has estimated that fifteen percent of employers might be misclassifying as many as 3.4 million workers as independent contractors, yielding a potential loss of $1.6 billion in income taxes and other taxes.

Finally, even if one thinks they may not be the target of the private plaintiffs' bar, the DOL has increased its enforcement efforts by hiring additional investigators and increasing its scrutiny on employee misclassifications and independent contractor reviews. Accordingly, employers are encouraged to carefully review what their exempt employees are doing and not just rely on written job descriptions that may or may not accurately reflect what their duties are. Under the FLSA, what employees do is more important than what the job description says they do. Furthermore, training and professional guidance are the keys to properly classifying employees and understanding what is considered compensable work time.

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