



Employment Law Alert

Legal developments affecting human resource management

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Ninth Circuit reverses summary judgment for employer on ADA claim, and finds that employer subjected employee to medical examination rather than physical agility test

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The Ninth Circuit has held that an employer that terminated an employee after her own doctor conceded she was unable to meet her job's physical lifting requirement was not entitled to summary judgment on the employee's Americans with Disability Act ("ADA") claim, because the employer's fitness for duty test was a medical examination rather than a mere physical agility test.

In *Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009), the court provided important and detailed rules regarding whether a test will be considered a permissible agility test or a medical examination requiring further justification to avoid employer liability. The court drew a crucial distinction between testing a person's ability to perform physical tasks such as lifting, running, etc., and gauging a person's physiological response to performing such physical tasks, such as blood pressure or heart rate. The court also found that a test could be considered medical even if not performed by a doctor and even if there was no showing that any "medical" portion of the tests were related to an adverse employment action.

Factual background

Indergard's employer, Georgia-Pacific Corp., required her to undergo a "physical capacity examination" required of all employees returning from medical leaves. Indergard worked in a Georgia-Pacific mill, where her job required an ability to lift sixty-five pounds. The "physical capacity examination" consisted of a series of tests and questionnaires monitored by an occupational therapist over two days. These included recording Indergard's medical history, her use of medication, alcohol, tobacco, and medical devices, and her weight, blood pressure, and pulse. The occupational therapist also examined and manipulated Indergard's knees, and recorded Indergard's ability to lift various amounts, crawl, kneel, squat, sit, stand, and climb stairs. The occupational therapist also recorded Indergard's heart rate both before and after Indergard performed a treadmill test.

Based on the physical capacity examination, the occupational therapist determined that Indergard could not perform the position's lifting requirement. She also sent the test results to Indergard's own doctor, who agreed that Indergard could not meet the position's lifting requirement. Georgia-Pacific terminated Indergard's employment as there were no other positions available for which she was qualified, and the applicable collective bargaining agreement allowed the employer to discharge employees on leaves longer than two years.

The Americans with Disabilities Act

Under the ADA, an employer may not require an employee to submit to a medical examination unless the examination “is shown to be job-related and consistent with business necessity.” 42 U.S.C. Sec. 12112(d)(4)(A).¹ However, the ADA’s implementing regulations allow an employer to “make inquiries into the ability of an employee to perform job-related functions.” 29 C.F.R. Sec. 1630.14(c). Thus, in *Indergard*, the issue before the Ninth Circuit was whether Georgia-Pacific had required Indergard to undergo a medical examination, or only inquired into her ability to perform the physical requirements of her job.

A divided Ninth Circuit panel finds that Georgia-Pacific required employee to undergo a medical examination under the ADA.

The Ninth Circuit found that the series of tests Georgia-Pacific required Indergard to take constituted a “medical examination” under the ADA. Following the EEOC’s noncontrolling guidelines, it found that where an otherwise purely physical agility test also includes medical components, such as measuring heart rate or blood pressure, it can be considered a medical exam. In making its finding, the court applied the EEOC interpretative guidelines, which list the following seven factors:

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 response to performing the task
6. Whether the test normally is given in a medical setting
7. Whether medical equipment is used

See the EEOC’s *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act*, available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

The Ninth Circuit agreed with the EEOC’s guidelines that “one factor may be enough to determine that a test or procedure is medical.” Here, it found that measuring Indergard’s heart rate and breathing after she had performed physical ability tests was by itself enough to turn the test into a medical examination.

The court also applied the other EEOC factors, and found that four of the seven factors established that Indergard underwent a medical examination. Specifically, and in addition to the factor dealing

¹ Although not analyzed by the Ninth Circuit in this case, whether a medical examination is “job-related” and “consistent with business-necessity” requires a potentially onerous showing by the employer, and may present a “question of fact” requiring a jury determination.

with the employee's physiological response, the court found that the occupational therapist, although not a doctor, was a "health care professional." The court also analyzed the third factor in the employee's favor, noted the portions of the test designed to solicit medical information from the employee, and found that these could reveal impairments to the employee's health.

No proximate causation between medical portion of test and adverse employment action necessary

The dissent pointed to the fact that the employee's own doctor agreed she could not meet the lifting requirements of her position. Thus, there was no link between any medical portions of the employer's physical capacity examination and her termination—the employee was discharged because she could not meet her job's lifting requirement.

However, the majority dismissed this seemingly logical argument. First, it insisted that the battery of tests must be considered as a whole, rather than as individual tests. Since some portions of the tests were medical, that was enough to make the whole two days of testing medical as well—including the purely physical lifting component. The majority also observed that the circuit had not adopted a proximate-causation requirement for this ADA statutory provision regarding medical examinations and did not take the apparently appropriate opportunity to rule on that question.

Lessons for employers

The lesson of this case is clear—don't inadvertently turn a test of an employee's physical capability to do a job into a medical examination. To the extent possible, have supervisory or other nonmedical employees monitor employees' ability to perform their jobs' essential physical requirements, such as lifting. Don't combine medical tests, like blood pressure or heart rate tests, with physical agility tests.

More broadly, this case requires employers to perform a difficult and delicate balancing act—they must avoid seeking medical information from employees while still ensuring that they can safely perform their essential job functions. Employers should consider having legal counsel review agility test procedures and any attempt to gather medical information from employees or applicants before problems arise.

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