

C O M M E N T A R Y A N D A N A L Y S I S

Hiring Minds Want to Know

Increasingly Popular Psychological Testing of Job Applicants May Violate ADA

BY RUTH EISENBERG
AND DEBRA S. KATZ

We were taught that if we go to the right law school, earn top grades, make law review, and land a judicial clerkship, the job we've always dreamed of is in the bag. What no one ever suggested is that the dream job might rest on how we answer questions on tests designed to assess our personality and behavioral traits. Whether we agree or disagree with statements such as "I have a good appetite," "I am easily awakened by noise," "I have never indulged in any unusual sexual practices," or "I have strange and peculiar thoughts" may play a significant role in our careers.

Sound frightening? These are just a few of the statements on the Minnesota Multiphasic Personality Inventory (MMPI), a standardized exam consisting of 567 statements with which the test-taker is asked to agree or disagree. The MMPI, along with other psychological tests, is increasingly being used by employers—including law firms (as *The National Law Journal* reported on Dec. 7, 1998)—to screen potential employees.

Employers say they are simply trying to ensure that the personality of a new employee "fits" with a particular position and with the company as a whole. The problem is that, while psychological tests may well reveal personality traits (such as whether a person is outgoing or trustworthy), some of these tests are meant to reveal much more. According to Dr. Steven Heidel, a member of the Occupational Psychiatry Committee of the American Psychiatric Association, the MMPI is designed to aid in the clinical diagnosis of mental disorders. And the use of the MMPI seems to be on the rise, particularly for jobs that are executive level or require attention to public safety.

Clearly, employers who utilize such tests could be in serious legal trouble. Psychological tests are particularly vulnerable to misinterpretation and misuse. The information revealed raises serious privacy concerns. Perhaps most important, the administering of psychological tests can very easily run afoul of the Americans With Disabilities Act.

The difficulties of psychological testing begin with how the tests are administered and the results interpreted. While some employers hire industrial relations firms to handle testing of job applicants, it is relatively easy to administer the

MMPI in-house. When the test is given by, say, a human resources office, the potential for misuse is acute. Says Dr. Steven Bisbing, a clinical and forensic psychologist who has administered psychological tests in a variety of employment settings: "It is not uncommon that nonpsychologists are administering psychological tests, and are making decisions based on their 'interpretation' of the results."

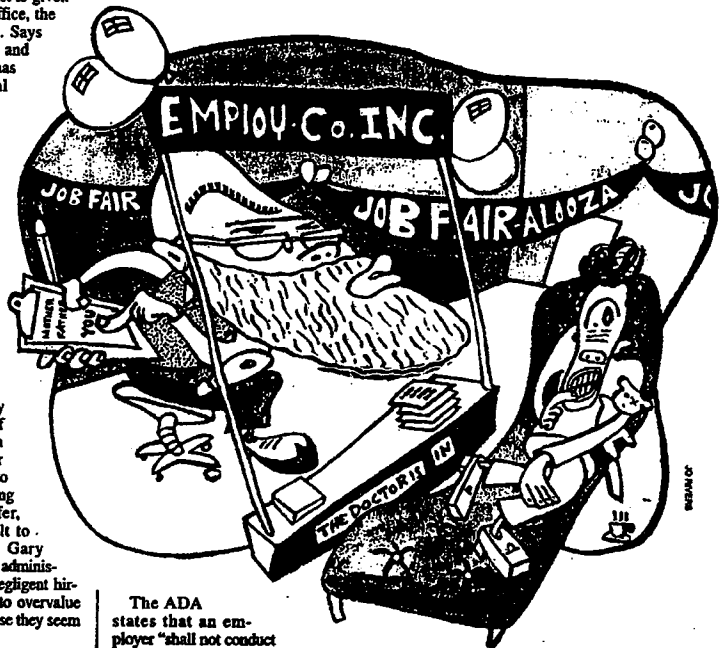
The MMPI is particularly prone to such misuse because copies are fairly easy to obtain, it has simple instructions, and the answer form can be mailed to commercial companies for computerized scoring and interpretation. These companies will generally provide a detailed narrative of the results, often including a clinical diagnosis. Even for employers who do not intend to use this diagnosis in determining whether to extend a job offer, such information is difficult to ignore. According to Dr. Gary Schoener, a psychologist who administers psychological testing in negligent hiring disputes, employers tend to overvalue computerized test results because they seem to be objective and scientific.

Regardless of who administers and interprets the test, employers usually have access to the results. As Schoener notes, "It is extremely difficult for human resources personnel to resist revealing the information when pressured by upper management to do so, even when the information is supposed to be confidential." Besides, says Bisbing, "There is no doctor-patient relationship here—the clinician is performing the test for the employer."

Bisbing also notes that "increasingly, employers seem to want more information, not necessarily for any job-related purpose. Moreover, some employers are requesting that pre-employment mental health examiners render a diagnosis of the applicant." In Bisbing's experience, some employers are also requesting evaluations of prospective employees' general "mental fitness" for certain sensitive positions or jobs that involve public safety.

PRE-OFFER INQUIRIES LIMITED

How do inquiries into the "mental fitness" of job applicants comport with the protection of disabled individuals under the Americans With Disabilities Act? The ADA prohibits medical examinations and disability-related inquiries of job applicants until after a conditional offer of employment has been extended. A major purpose of this provision is to prevent employers from using pre-offer inquiries to exclude persons with "hidden" disabilities—such as certain psychological problems.



The ADA states that an employer "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." It may, however, "make pre-employment inquiries into the ability of an applicant to perform job-related functions."

Equal Employment Opportunity Commission regulations clarify that at the pre-offer stage an employer "may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." In other words, at this stage of the application process, the employer may undertake a limited inquiry into an applicant's ability to perform the job, but specific inquiries into the details of an applicant's disability are prohibited.

Medical examinations and disability-related inquiries are permitted after the employer has extended a job offer. That offer can be conditioned on the results of the examination only if all entering employees, regardless of disability, are subjected to the examination and the information is kept confidential. At the post-offer stage, employers can require medical examinations and ask disability-related questions, including questions about sick leave usage, illnesses, and diseases. Questions do not have to be job-related. But if an employer withdraws an offer after such testing or inquiries, the criteria used to screen out the potential employee must be job-related and consistent with business

necessity, and must not tend to screen out individuals with disabilities.

The post-offer testing provisions recognize that in some industries, such as nuclear power and transportation, applicants are chosen based on criteria that appropriately include physical and psychological factors. For example, it is clearly consistent with the ADA to engage in post-offer testing to comply with Department of Transportation regulations requiring professional drivers to obtain medical certification that they do not have certain clinical diagnoses that would interfere with their ability to safely operate a vehicle. See, e.g., *EEOC v. Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996).

WHEN IS A TEST 'MEDICAL'?

Neither the ADA nor the EEOC regulations define "medical examination." However, the EEOC's "Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations" makes clear that psychological tests such as the MMPI are medical examinations. The guidance defines a "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairment, or health."

Among the factors the EEOC considers in determining whether a test is medical are whether it is administered by a health care

Ruth Eisenberg is a partner in D.C.'s Harmon, Curran, Spielberg & Eisenberg specializing in employment litigation and counseling. Debra S. Katz is a partner in D.C.'s Bernabei & Katz specializing in employment discrimination matters. The authors wish to thank Meredith Burrell, a litigation associate with Bernabei & Katz, for her assistance with this article.

