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**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

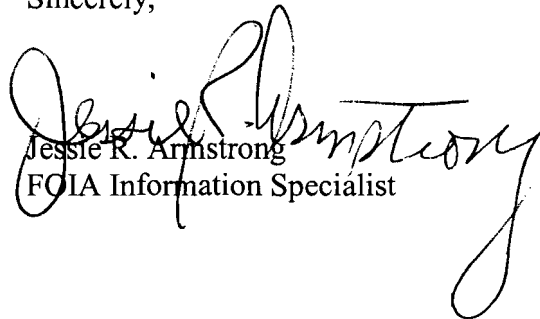
Office of  
Legal Counsel

APR 02 2008

Re: FOLLOW-UP TO FOIA No. A8-04-FOIA-114

Your check in the amount of \$77.00 was received in this office. Enclosed please find the responsive EEOC guidance letters for the period of January 1, 1997 through December 31, 1999, as promised.

Sincerely,

  
Jessie R. Armstrong  
FOIA Information Specialist

Enclosures



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JAN 09 1997

(b) 6 4(b) 7c

This is in response to your letter dated November 19, 1996, which was forwarded to my office by (b) 6 4(b) 7c. Your letter inquired about the obligations of your employer, a state agency, to provide you with an accessible parking space as a reasonable accommodation under the Americans with Disabilities Act (ADA).

Your letter states that, as a reasonable accommodation, you currently have a reserved, underground parking space close to the elevators. However, your agency is moving into a new building which has limited underground parking that will be reserved for management personnel. You state that you have been told that the ADA does not require employers to provide covered or protected parking to employees as a reasonable accommodation, and that you will be assigned a reserved, accessible space in an open parking lot. You inquire whether the agency should have considered the parking needs of persons with disabilities before leasing the new building, and whether the agency can provide you with less accommodation than you currently receive.

An individual with a disability receiving a reasonable accommodation is not necessarily entitled to receive it forever. There are several reasons why an employer may stop providing a specific accommodation, or change the type of reasonable accommodation being provided. For example, a person's disability may no longer necessitate a reasonable accommodation, or the accommodation might become an undue hardship on the employer. Thus, the fact that you currently receive a reserved, covered parking space does not mean that your employer automatically violates the ADA if it provides you with a less desirable parking space in the new building. Furthermore, there is no requirement under Title I of the ADA for employers to lease buildings that enable them to provide the same type of accessible parking currently provided to employees with disabilities. Of course, an employer could not lease an inaccessible building for the sole purpose of avoiding having to provide a reasonable accommodation.

Accessible, reserved parking may be a form of reasonable accommodation. See 29 C.F.R. pt. 1630 app. §1630.2(o) (1996). Generally, this means that if an employer provides parking spaces to all personnel, then an accessible space must be provided to an employee with a disability, unless it would pose an undue hardship. See 29 C.F.R. § 1630.2(o)(iii). The ADA, however, may be open to differing interpretations on the extent of an employer's obligation to provide covered accessible parking to an employee who is not otherwise entitled to a covered parking space. For example, it

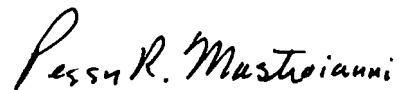
could be argued that if the employer provides covered parking only for management-level personnel, a clerical employee would not necessarily be entitled to a covered accessible space because s/he is not entitled to covered parking generally.

A decision by the Second Circuit Court of Appeals, however, may make it possible to argue that an employer must provide parking (including covered parking) that meets the needs of an individual with a disability, even if parking is not provided to other employees. The Second Circuit held that provision of a paid parking space may be a form of reasonable accommodation in Lyons v. Legal Aid Society, 68 F.3d 1512 (2d Cir. 1995). (The Second Circuit covers New York.) The case involved an employee with a disability who requested that her employer pay for a parking space near her office, even though the employer did not provide paid parking for any other employees. The district court had dismissed Lyon's complaint, stating that the ADA did not require an employer to provide paid parking. The Second Circuit disagreed, holding that a paid parking space was a form of reasonable accommodation. Furthermore, the Court suggested that the fact that other employees did not receive paid parking might be irrelevant to whether an employee with a disability could receive such parking. The Court, however, did not make a final decision in this case but instead returned it to the district court for a trial to determine whether the Legal Aid Society could show reasons why it would not be required to provide paid parking for Ms. Lyons.

The Lyons case does not make clear whether you would be entitled to an accessible space in the covered parking lot in your new building, but it does present an argument for providing you with such a space. Please be aware, however, that the ADA regulations could also be used to argue that the agency is meeting its obligation by providing you with an accessible space in the unprotected parking lot if this is where similarly-situated, non-disabled employees will be parking. See 29 C.F.R. §1630.2(o)(iii). The EEOC has not taken a position on the specific issues raised in your letter.

We hope this information is helpful to you. This letter is an informal discussion of the issues raised in your letter and is not an official opinion of the EEOC.

Sincerely,

A handwritten signature in cursive script that reads "Peggy R. Mastroianni".

Peggy R. Mastroianni  
Associate Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

OFFC

JAN 14 1991

(b) 6 7 C

This is in response to your inquiry of December 10, 1996, on behalf of (b) 6 7 (b) 7 C regarding the Americans with Disabilities Act of 1990 (ADA), as amended.

As you know, the Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA which prohibits employment discrimination against qualified individuals on the basis of disability. (b) 6 expressed concern that the EEOC's Enforcement Guidance on Workers' Compensation and the ADA (Enforcement Guidance) conflicts with Nevada's workers' compensation law. In particular (b) 6 cited the portion of the Enforcement Guidance that states that "[a]n employer cannot substitute vocational rehabilitation services in place of a reasonable accommodation required by the ADA for an employee with a disability-related occupational injury." Enforcement Guidance at 19. (b) 6 indicated that Nevada's workers' compensation law requires an employer to provide vocational rehabilitation for an occupationally injured employee who cannot return to work. He further indicated that this removes the employer's obligation to return the employee to work.

We note, initially, that the ADA is a federal law and, as such, supersedes any conflicting state law, including Nevada's workers' compensation law. With respect to the issue raised by (b) 6 (b) 7 C is not clear whether a conflict exists between the ADA and Nevada's workers' compensation law.

The ADA requires an employer to provide to a qualified individual with a disability a reasonable accommodation that enables him or her to perform the essential functions of the job, unless it would impose an undue hardship. An individual with a disability is "qualified" under the ADA if he or she is able to perform the essential functions of the job, with or without a reasonable accommodation. If an employer refuses to return to work an employee who is able to perform the essential functions of the position, with or without a reasonable accommodation, because of a disability-related occupational injury, it has discriminated against him or her on the basis of disability. If there is no reasonable accommodation that will enable the employee with a disability-related occupational injury to perform the essential functions of his or her original position, or the only accommodation will impose an undue hardship, the employer must reassign

him or her to an equivalent vacant position, if one exists, absent undue hardship. If no equivalent vacant position exists, the employer must reassign him or her to the next lower vacant position. If there is no vacancy in a lower position which the employee with a disability-related occupational injury can perform, then the employer may discharge him or her without violating the ADA.

According to (b) 6 letter, Nevada's workers' compensation law requires an employer to provide vocational rehabilitation "if an employer cannot return an injured worker to work." It is not clear whether this means that the employer cannot return the injured worker to his or her *original* position, only, or to *any* position with the employer. If Nevada's workers' compensation law requires an employer to provide vocational rehabilitation only if an injured worker cannot return to *any* position with the employer and releases the employer from further obligation to him or her, then it does not conflict with the ADA. The employer would have no further obligations under the ADA to the injured worker at the point he or she could not be accommodated in his or her original position or reassigned to a vacancy.

On the other hand, if Nevada's workers' compensation law requires an employer to provide vocational rehabilitation when an injured worker cannot return to his or her *original* position, regardless of whether he or she can be reassigned to a vacant position with the employer, then an employee with a disability-related occupational injury who cannot be accommodated in his or her original position may be entitled simultaneously to reassignment to a vacant position under the ADA and to vocational rehabilitation under Nevada's workers' compensation law. Since federal law supersedes state law, a state law cannot relieve an employer of its obligations under federal law. As the Enforcement Guidance states,

An employer cannot substitute vocational rehabilitation services in place of a reasonable accommodation required by the ADA for an employee with a disability-related occupational injury. An employee's rights under the ADA are separate from his/her entitlements under a workers' compensation law. The ADA requires employers to accommodate an employee in his/her current position through job restructuring or some other modification, absent undue hardship. [Footnote omitted.] If it would impose an undue hardship to accommodate an employee in his/her current position, then the ADA requires that an employer reassign the employee to a vacant position s/he can perform, absent undue hardship. [Footnote omitted.]

Enforcement Guidance at 19. Thus, an employer that provides vocational rehabilitation benefits to an employee with a disability-related occupational injury is not automatically relieved of its obligation to provide reassignment to a vacant position as a reasonable accommodation under the ADA. Moreover, an employer may not coerce an employee into giving up his or her ADA rights.

(b) 64 (b) 7C

Page Three

However, the ADA does not prohibit an employer and an employee from choosing vocational rehabilitation as an alternative to reassigning him or her to a vacant position, if *both parties* voluntarily agree that vocational rehabilitation is preferable. See Enforcement Guidance at 19, n.27.

We hope that this information is helpful to you.

Sincerely,

Claire Gonzales  
Director of Communications  
and Legislative Affairs



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JAN 17 1997

(b) 6 4 (b) 7C

This is in response to your letter of November 22, 1996, requesting the opinion of the Equal Employment Opportunity Commission (EEOC) regarding the questions on the Savannah Police Department's proposed application form.

As you know, the EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, and national origin; the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits employment discrimination based on age against persons who are forty years of age and older; and the Americans with Disabilities Act of 1990 (ADA), which prohibits employment discrimination based on disability.

Preemployment Inquiries Under the ADA

Under the ADA, an employer may not ask disability-related questions and may not conduct medical examinations until *after* it makes a conditional job offer to the applicant. 42 U.S.C. § 12112(d)(2); 29 C.F.R. §§ 1630.13(a), 1630.14(a),(b). A "disability-related question" means a question that is *likely to elicit* information about a disability. See EEOC ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, dated October 10, 1995 [hereinafter "Enforcement Guidance"] (enclosed) at 4. Under the ADA, the term "disability" is defined as "a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment." 42 U.S.C. § 12102(2)(a); 29 C.F.R. § 1630.2(g). The term "physical impairment" includes a "cosmetic disfigurement, or anatomical loss." 29 C.F.R. § 1630.2(h)(1).

Question number six on your employment application form asks applicants to identify any "scars" or "distinguishing marks." Although this question asks about an applicant's impairment, it is not likely to elicit information about whether an applicant has a disability. If, however, an applicant discloses the existence of a disability, such as a severe facial burn scar, in response to this question, the Department may not ask disability-related follow-up questions during a pre-offer interview. For example, the Department would be prohibited from asking, "What was the cause of the scar?" See Enforcement Guidance at 9.



An employer may ask applicants about their prior illegal drug use if the particular question is not likely to elicit information about a disability. Enforcement Guidance at 11. Past *addiction* to illegal drugs or controlled substances is a covered disability under the ADA (as long as the person is not a current illegal drug user), but past casual use is not a covered disability. *Id.*

Question number 30 on your application form asks applicants whether they have "ever possessed, smoked or ingested by any means, marijuana without legal authorization" or whether they have "ever possessed, injected, inhaled, swallowed or ingested by any other means, any illegal drugs without legal authorization." It also asks "when was the last time" an applicant used marijuana or any illegal drugs. These questions ask about drug use but not drug addiction and, therefore, are not disability-related.

However, Question number 30 also asks "how many times" applicants have "possessed, smoked or ingested marijuana" and "how many times" they have "possessed, injected, inhaled, swallowed or ingested by any other means, any illegal drugs." Questions that ask how much the applicant used drugs in the past are likely to elicit information about whether the applicant was a past drug addict. Therefore, such questions are impermissible at the pre-offer stage, and should be removed. *Id.* at 12.

#### Pre-employment inquiries under the ADEA and Title VII

It is unlawful to treat employees or applicants differently because of their race, color, sex, religion, or national origin (Title VII), or age (ADEA). Generally, making pre-employment inquiries which directly or indirectly disclose the applicant's race, age, or other protected basis does not constitute an automatic violation of Title VII or the ADEA. However, where an applicant of a particular race, age, or other protected basis is rejected following an inquiry concerning that protected basis, the inquiry may be important evidence of discriminatory selection since it is presumed that a pre-employment inquiry is for the purpose of making selection decisions. Moreover, independent of selection decisions, explicit pre-employment inquiries concerning a protected basis may also be evidence of the employer's animus toward that protected basis.

Additionally, the EEOC has interpreted both Title VII and the ADEA as prohibiting the use of selection criteria (e.g., pre-employment inquiries [written or oral] or tests) that disproportionately exclude members of a protected class where the selection criteria are not consistent with business necessity. See 29 C.F.R. § 1607.03 [Title VII] and 29 C.F.R. § 1625.7(d) [ADEA]. The EEOC's Uniform Guidelines on Employee Selection Procedures (UGESP) require that every selection procedure having an adverse impact on a Title VII protected group be validated. See 29 C.F.R. Part 1607. A validated selection procedure must be job related for the position in question and a valid predictor of successful job performance. See also, the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), amending Title VII to codify the rule that an employment policy or practice that has an adverse impact on members of a protected group cannot be used unless it is job related and consistent with business necessity. In short, if use of pre-employment inquiries

or questions as selection criteria is challenged and shown to disproportionately exclude members of a protected group(s) under Title VII, the employer would have to prove that it validly predicts job performance. We now analyze and address separately selected questions on your application that may raise questions regarding their lawful use under Title VII or the ADEA.

Question number four on your employment application form asks applicants to identify their "race" or "ethnicity." Making pre-employment inquiries which directly or indirectly disclose the applicant's race, color, religion, sex, or national origin does not in and of itself, violate Title VII, as long as the inquiries are made of all applicants regardless of race, color, national origin, religion, or sex. However, using that information to make unlawful employment decisions would constitute a violation of Title VII. On the other hand, it is permissible to obtain and use such information if it is needed for record keeping purposes or used in connection with legitimate affirmative action plans or programs.

Question number five makes inquiries about an applicant's "citizenship." Again, such an inquiry does not automatically violate Title VII. However, if citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII. See EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.5(a). Moreover, the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324 B, Pub. L. No. 99-603 (IRCA), prohibits discrimination based on citizenship. IRCA is enforced by the Office of Special Counsel at the United States Department of Justice (DOJ), at P.O. Box 27728, Washington, D.C. 20038-7728. You may wish to contact that Office for more information.

In question number six you ask for information regarding the height and weight of the applicant. The question, in and of itself, does not violate Title VII. However, imposing a height and weight requirement on applicants is likely to disproportionately exclude significant numbers of women, Hispanics, and certain Asians from consideration of employment. See § 621.1(b)(2), Height and Weight Requirements, of Volume II of the EEOC Compliance Manual. See also, *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (minimum height requirement violated Title VII).

The tenth question solicits information on the "marital status" of applicants. This question is not prohibited by Title VII. However, the use of such information to discriminate on one or more of the protected bases covered by Title VII would constitute unlawful discrimination. For instance, Title VII would be violated if an employer required pre-employment information regarding marital status from applicants of one sex or race only, or used such information to exclude only married individuals of one sex or race. Title VII would also be implicated if excluding people on the basis of marital status disproportionately affected more women than men or more men than women. In all cases of alleged discrimination, the EEOC will scrutinize the employer's request for information on marital status to assure that the request was for a permissible purpose. The same principles would also apply to information received pursuant to the related questions on marital status (e.g., "fiancee," "girl/boy friend," "prior spouses," and "annulment or divorce

decrees) found in numbers eleven through sixteen on your employment application form, and to questions about children and dependents in questions seventeen through twenty. For example, it is unlawful to refuse to hire a female applicant with children as a police officer where male applicants with children could be hired. See Decision No. 76-135, CCH Employment Practices Guide (1983) ¶ 6697.

Question number twenty-eight asks for information regarding whether an applicant has been arrested, detained, or involved in litigation. Again, asking the question does not violate Title VII. Although Title VII does not on its face prohibit discrimination on the basis of arrest or conviction, the EEOC and the courts have concluded that a policy or practice of excluding individuals from employment on the basis of their arrest or conviction records may have an adverse impact on certain minority groups in light of statistics showing that they are arrested or convicted at a rate disproportionately greater than their representation in the population. See *Gregory v. Litton Systems*, 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972). However, even if use of arrest or conviction records is shown to have disparate impact, such use is lawful if the employer can show that the criteria are job related for the job in question and consistent with business necessity.

We hope that this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,



Peggy R. Mastroianni  
Associate Legal Counsel

Enclosure (1)



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
Washington, D.C. 20507

JAN 21 1997

(b) 6 + (b) 7C

This is in response to your recent letter concerning the Americans with Disabilities Act (ADA) of 1990.

The Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA. Title I prohibits covered entities from discriminating against qualified individuals with disabilities with respect to job application procedures, hiring or discharge, compensation, advancement, training or other terms, conditions and privileges of employment.

The situation you describe appears to be a Title II issue under the ADA, which prohibits state and local governments from discriminating on the basis of disability in all programs, activities, and services. Accordingly, we have forwarded your letter to Mr. John Wodatch, Chief of the Disability Rights Section, at the following address:

Mr. John L. Wodatch, Chief  
Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
Post Office Box 66738  
Washington, D.C. 20035-6738.

We hope this information is helpful to you.

Sincerely,

A handwritten signature in cursive script, reading "Peggy R. Mastroianni".

Peggy R. Mastroianni  
Associate Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JAN 29 1997

(b) 64 (b) 7c

This is in response to your letter mailed January 14, 1997. You state that you are taking medication, and that some type of problem exists at work. The nature of the problem at work is not identified and it is not clear from your letter whether the problem at work and the taking of medication are related.

We suggest that you contact the Equal Employment Opportunity Commission's Richmond Area Office. Our staff there will be able to advise you once you explain your workplace situation. You may write or call that office. The address and phone number are:

Richmond Area Office  
Equal Employment Opportunity Commission  
3600 West Broad Street  
Room 229  
Richmond, Virginia 23230  
(804) 278-4651

We hope you find this information helpful.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

APR 2 1997

(b) 6 4 (b) 7 C

This is in response to your letter of March 3, 1997, to the Equal Employment Opportunity Commission (EEOC) regarding the Americans with Disabilities Act of 1990 (ADA).

You inquired whether PADI, an organization that certifies individuals for scuba diving, is violating the employment provisions of the ADA by asking for medical information on its application form for such certification.

As you know, the EEOC enforces Title I of the ADA which prohibits employers from discriminating against qualified individuals with disabilities in any aspect of employment, including the application process. Title I of the ADA specifically prohibits "covered entities" from conducting medical examinations or making disability-related inquiries of "a job applicant" prior to making a job offer. 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13, 1630.14. "Covered entities" include employers who have 15 or more employees, employment agencies, and unions. 42 U.S.C. § 12111(2), (4).

Although PADI is not the employer of individuals who apply to it for scuba diving certification, a possible legal theory for finding PADI liable to such individuals for employment discrimination under Title I of the ADA is the "third party interferer" doctrine. As applied under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, this doctrine imposes liability upon an entity otherwise covered under Title VII (those having 15 or more employees) that discriminatorily interferes with an individual's employment opportunities with his/her direct employer.<sup>1</sup> The First Circuit Court of Appeals has recognized that this theory may apply to Title I of the ADA. Carparts v. Automotive Wholesaler's Assn, 37 F.3d 12, 3 AD Cas. (BNA) 1237 (1st Cir. 1994).

It is not clear, however, whether the ADA's prohibitions against pre-offer disability-related inquiries or medical examinations would apply to PADI as a third party interferer. As noted

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<sup>1</sup>See e.g., Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); EEOC Compliance Manual, Vol. II, Section 605, Appendix F, "Control by Third Parties Over the Employment Relationship Between an Individual and His/Her Direct Employer."

above, the pertinent Title I provision prohibits pre-offer disability-related inquiries and medical examinations of "job applicants," presumably those of the employer. In this case, however, the individuals are applying to PADI for certification, not for employment.

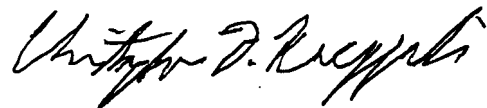
However, a statement on the application suggests that PADI may be engaging in a different type of Title I violation. The form suggests that PADI will not test and/or certify for scuba diving individuals with conditions such as heart trouble, lung disorders, circulatory disorders, epilepsy, asthma, or other severe medical problems. Such individuals may be qualified individuals with disabilities under the ADA, and PADI's policy may interfere with their ability to obtain employment as SCUBA divers. Although PADI or an employer may be able to exclude some individuals with these conditions because they pose a direct threat to self or others that cannot be lowered or eliminated by a reasonable accommodation, blanket exclusions are probably not defensible under the ADA. If you know of an individual who believes that s/he has been discriminated against in violation of Title I of the ADA, you should direct him/her to contact the nearest EEOC office by calling 1-800-669-4000.

In addition, PADI may be violating Title III of the ADA, which prohibits private entities that operate places of public accommodation from discriminating against individuals with disabilities in the full and equal enjoyment of their goods, services, facilities, privileges, advantages, or accommodations. The United States Department of Justice enforces Title III of the ADA. Therefore, we have forwarded your letter to Mr. John L. Wodatch, Chief of the Disability Rights Section of the Civil Rights Division. You may contact him at the following address:

Mr. John L. Wodatch  
Chief, Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035-6738.

We hope that this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the EEOC.

Sincerely,

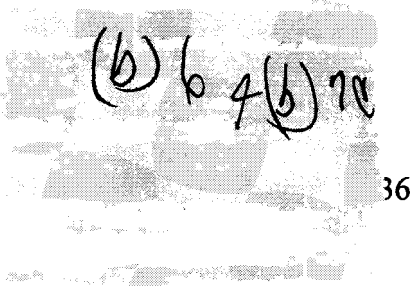


Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

APR 2 1997



This is in response to your letter of February 10, 1997, requesting information on the application of the Americans with Disabilities Act (ADA) to psychiatric disabilities. The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA.

I am enclosing a policy guidance issued by the EEOC on March 25th, that addresses several issues affecting persons with psychiatric disabilities. This guidance includes information on certain types of reasonable accommodations that may be effective for persons with psychiatric disabilities.

If you would like additional general information on the employment provisions of the ADA, you may request a free copy of the EEOC's "ADA Technical Assistance Manual" by calling 1-800-669-3362.

We hope this information is helpful.

Sincerely,

A handwritten signature in cursive script, reading "Christopher J. Kuczynski", is located below the word "Sincerely,".

Christopher J. Kuczynski  
Director, ADA Policy Division  
Office of Legal Counsel

Attachment





U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

April 7, 1997

(b) 6 + (b) 7C

(b) 7C

This responds to your letter to Chairman Casellas of March 26, 1997, which requests information about the status of the Equal Employment Opportunity Commission's enforcement guidance on the application of the Americans with Disabilities Act to employer-provided health insurance plans.

It is my understanding that in a conversation last week with (b) 6 + (b) 7C, the Commission's Legal Counsel, Ellen varygas, indicated that although this subject continues to be important to the Commission, there are no plans to issue final enforcement guidance on it in the near future. We will, of course, inform you as soon as plans for issuing the guidance become more certain and will make every effort at that time to provide you any information about the guidance that you may need.

In the meantime, if you have any further questions, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Claire Gonzales".

Claire Gonzales  
Director of Communications  
and Legislative Affairs



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

APR 10 1997

(b) 6 4 (b) 7 c

This is in response to your March 13, 1997, letter to Chairman Casellas regarding the legality of disability-based distinctions in health insurance plans. You stated that monthly premiums for family health insurance paid by employees of your client, Dallas Central Appraisal District (DCAD), have rapidly escalated over the past several years. As a result, you stated, the percentage of DCAD employees opting to have their dependents covered has plummeted, and the high cost of health insurance has "significantly impaired" DCAD's ability to recruit and retain employees. You believe that insurance costs have risen because of medical treatments associated with a DCAD employee's two hemophiliac dependents. Accordingly, you asked whether it would violate the ADA to: (1) eliminate all medical insurance coverage for this employee's two hemophiliac dependents; (2) eliminate all medical insurance coverage for hemophilia for this employee's two hemophiliac dependents; or, (3) put a cap on the level of annual treatments for hemophilia available to this employee's two hemophiliac dependents.

The Equal Employment Opportunity Commission (EEOC or Commission) enforces Title I of the Americans with Disabilities Act (ADA). 42 U.S.C. § 12111 *et seq.* The Commission also provides technical assistance in response to inquiries by individuals or entities having rights and responsibilities under Title I. However, without a full investigation of the specific facts stated in your letter, the Commission cannot offer an opinion on the legality of your client's proposed changes to its health insurance plan. The purpose of this letter is to give you guidance about the general applicability of Title I of the ADA to employer-provided health insurance plans that you should use in evaluating the three options discussed in your March 13 letter.

Title I prohibits discrimination in employment on the basis of disability.<sup>1</sup> This prohibition includes disability discrimination in the provision or the administration of fringe benefits such as health insurance. 42 U.S.C. § 12201(C); 29 C.F.R. § 1630.4(f). Thus, the ADA requires that individuals with disabilities be accorded equal access to whatever health insurance is provided to individuals without disabilities and generally prohibits discrimination in the terms and administration of any employer-provided insurance plan.

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<sup>1</sup>Title I also prohibits discrimination against a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association. 29 C.F.R. § 1630.8.

Section 501(c) of the ADA, however, specifically permits employers and insurance companies to take actions that are necessary to contain escalating health insurance costs and/or assure the continued viability of the health insurance plan. In this regard, employers and insurers may continue to use legitimate risk assessment and other traditional insurance classification and administration practices even if they have an adverse effect on individuals with disabilities, as long as the practices are uniformly applied to all insured employees and are not used as a "subterfuge" to evade the purposes of the ADA. 42 U.S.C. § 12201(c); 29 C.F.R. § 1630.16(f). "Subterfuge" refers to discriminatory treatment that is not justified by the risks or costs associated with the disability. There are a number of ways an employer may prove that a disability-based distinction in an insurance plan is not a subterfuge.

As you are aware, in an Interim Enforcement Guidance issued on June 8, 1993, the Commission explained how these ADA requirements apply to the terms of employer-provided health insurance plans. The Commission stated that health insurance plan limitations or distinctions that are not based on disability do not violate the ADA, as long as they are applied equally to all insured employees.

A term or provision is "disability-based" if it singles out a particular disability (e.g., deafness, AIDS, schizophrenia, hemophilia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., noncoverage of all conditions that substantially limit a major life activity). Such limitations or distinctions violate the ADA, unless the employer/insurer can show either that they are necessary to preserve the insurance plan's integrity, or that they are justified by increased risks and/or costs associated with the specific disability. If the employer/insurer so demonstrates, it has shown that the disability-based distinction is within the protective scope of section 501(c) of the ADA.

The Commission continues to study the issue of health insurance under the ADA as it prepares a final guidance on the topic. The final guidance will revisit the issues addressed in the interim guidance and will address additional issues concerning the ADA and health insurance that were not discussed in its interim guidance. Prior to issuing the final guidance, the Commission plans to publish a proposed draft in the Federal Register to allow for comment by the public and other interested parties.

We hope this information is helpful to you. Please note that this letter is an informal discussion of the issues raised in your letter and is not an official opinion of the Equal Employment Opportunity Commission. In addition, our failure to address other matters that may have been presented in your letter should not be construed as agreement with those matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Peggy R. Mastroianni".

Peggy R. Mastroianni  
Associate Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

May 2, 1997

(b) 64(b) 7c

I read with concern your editorial discussing the EEOC's recently-issued enforcement guidance on the applicability of the Americans with Disabilities Act to employees with psychiatric disabilities. The editorial, which seriously misrepresents both the law and the guidance, merely contributes to the unfounded beliefs that employers have about their obligations under the ADA.

The editorial's basic premise -- that under the guidance an employer cannot learn whether someone has a psychiatric disability until after the person has begun working -- is simply wrong. The ADA and the guidance clearly state that after making a job offer but before employment has begun, an employer may make disability-related inquiries and conduct medical examinations, so long as it does so for all employees in the same job category.

The editorial also erroneously says that the guidance requires employers to tolerate poor judgment, chronic lateness, and hostility toward co-workers. In fact, the guidance says that traits such as irritability, chronic lateness, and poor judgment are not, in themselves, impairments. Thus people who exhibit these traits are not necessarily people with disabilities who are protected by the ADA.

Even when such traits are linked to a mental impairment, employers do not have an unqualified obligation to excuse them. The guidance says that an employer may discipline an employee with a psychiatric disability for violating conduct standards that are related to the employee's position and necessary for the employer's business, so long as the employer disciplines all employees who violate the rule in the same way. This is true even if the employee claims that a psychiatric disability caused him or her to violate the rule. An employer may also hold an employee with a psychiatric disability to the same performance standards as all other employees.

Consistent with the ADA, the guidance says that an employer does have to make reasonable accommodations that will enable an employee with a psychiatric disability to meet conduct and job performance standards, once the employer knows of the existence of the disability and a request for the accommodation has been made. However, your editorial never mentions the concept of "undue hardship," which limits an employer's obligation to make an accommodation that would be too costly or difficult, and thus creates the impression that an employer's obligation to make accommodations is limitless.

The editorial also misleads employers to believe that the kinds of accommodations they will need to make will always be expensive. In fact, many people with psychiatric disabilities

successfully work without accommodations at all; many others require accommodations that are inexpensive and easy to make. Interestingly, the editorial mentions two such accommodations -- the use of room dividers to eliminate noise or visual distractions and simple adjustments to work schedules.

The editorial's message is that the "conscientious employer" will be so confused by the guidance and so fearful about what the ADA requires it to do that it simply will choose not to hire people with psychiatric disabilities. The Commission believes, however, that employers have nothing to fear from the guidance, which is clear, reasonable, and consistent with the ADA. The truly conscientious employer would be better served by reading the guidance than by reading media accounts about it.

Sincerely,



Gilbert F. Casellas, Chairman  
Equal Employment Opportunity Commission



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAY 12 1997

(5) 6 4(b)(7)C

This is in response to your inquiry dated March 12, 1997, addressed to Congressman (b)(4)(b)(7)C regarding the Americans with Disabilities Act of 1990 (ADA). Congressman Baldacci has asked us to respond directly to you. The Equal Employment Opportunity Commission (EEOC) enforces the Title I employment provisions of the ADA.

In your letter, you ask for information about the ADA rights of injured workers. You state that your company has a "medical bid" procedure that allows injured workers who cannot return to their regular line of work to be assigned to positions in other departments, and a "regular bid" procedure for other workers. You express concern that these procedures may violate the ADA rights of injured workers.

Title I of the ADA prohibits covered entities, which include employers with fifteen or more employees, employment agencies, and unions, from discriminating against qualified individuals with disabilities on the basis of disability. Under the ADA, a covered entity must make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability unless doing so would result in an undue hardship. Reasonable accommodation includes the acquisition or modification of equipment or devices, job restructuring, modified work schedules, and reassignment of an employee to a vacant position. An undue hardship is a significant difficulty or expense.

The ADA covers some, but not all, injured workers. Whether an injured worker is protected by the ADA depends on whether the worker has a "disability" within the meaning of the ADA. The ADA defines "disability" as a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment. Some impairments resulting from occupational injury may not be severe enough to substantially limit a major life activity, or they may be only temporary, non-chronic conditions that have little or no long-term impact.

If an injured worker has a substantially limiting impairment and requests a reasonable accommodation, the employer should first determine whether it can make a modification or an adjustment that would enable the worker to perform the essential functions of his or her current position. If the worker cannot be accommodated in that position, then the employer should determine whether it can reassign the worker to a vacant position for which he or she is

(b) 6 4 (b) 7c

Page Two

qualified. If a proposed reassignment would conflict with a collective bargaining agreement's seniority system, and no other reasonable accommodation is possible, then the employer and union should try to negotiate a variance to the terms of the agreement that would not unduly burden workers without disabilities.

If you believe that your employer or union has discriminated against you on the basis of disability, then you may file a charge of discrimination by contacting the EEOC field office nearest you. You may reach that office by calling 1-800-669-4000.

I have enclosed a copy of the EEOC Enforcement Guidance on Workers' Compensation and the ADA. I hope that you find this information useful.

This is an informal discussion of the issues you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission.

Sincerely,

Claire Gonzales  
Director of Communications  
and Legislative Affairs

Enclosure

cc:

(b) 6 4 (b) 7c



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAY 29 1997

6164(b)7C

Thank you for your letter of May 1, 1997, complimenting the Equal Employment Opportunity Commission's (EEOC) recent guidance on the application of the Americans with Disabilities Act (ADA) to persons with psychiatric disabilities. Enclosed is a copy of that guidance.

Your letter mentions that your son lost his job after requesting that a radio be turned off, or the volume lowered, or that he be allowed to wear earplugs. Under the ADA, a qualified individual with a disability is entitled to "reasonable accommodations," which are adjustments or modifications to a job or the work environment that enable the individual to perform the job. The actions your son requested may be forms of reasonable accommodation if he told his employer he needed these changes because of his disability.

Your son may be able to file an ADA charge (complaint) of discrimination with the EEOC. However, there are deadlines for filing charges, so your son would need to contact the EEOC immediately to determine if he can still file a claim. I cannot give you any opinion as to whether your son may have a successful charge based on your letter; an EEOC investigation would be needed to make such a determination. But, you may advise your son that he can file a charge (assuming that the deadline has not passed) with our Florida office by calling 1-800-669-4000.

This letter is an informal discussion of the issues raised in your letter and is not an official opinion of the EEOC. I hope the information is helpful to you and your son. Thank you again for taking the time to share your son's story with me.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel

Enclosure





**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

**MAY 30 1997**

(b) 6 7 (b) 7C

This is in response to your letter dated April 30, 1997, concerning the confidentiality provisions of the Americans with Disabilities Act (ADA) as they apply to reasonable accommodation and unions.

Any medical information obtained pursuant to the ADA about an applicant or employee must be kept confidential. This means that collected medical information must be maintained on separate forms and in separate medical files and must be treated as confidential medical records. 42 U.S.C. §§12112(c)(3)(B) and (c)(4)(C). The ADA's confidentiality requirements apply to "covered entities," which include both employers and labor organizations. 42 U.S.C. §12111(2).

The statute contains narrow exceptions to the confidentiality requirements. A covered entity may reveal medical information under the following circumstances:

- supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- first aid and safety personnel may be told about an employee's disability if the disability might require emergency treatment;
- government officials investigating compliance with the ADA must be given relevant information upon request;
- employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws; and
- employers may use the information for insurance purposes.

42 U.S.C. §12112(d)(4)(C); 29 C.F.R. §1630.14(c)(1) and Appendix. The "EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities" (March 25, 1997) cautions an employer not to disclose to employees that it is providing a

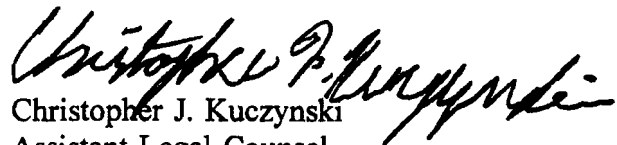
reasonable accommodation, noting that, "a statement that an individual receives a reasonable accommodation discloses that the individual probably has a disability ...." (Enforcement Guidance at page 18). For this reason, the Enforcement Guidance suggests that, in response to co-worker questions about how another worker is being treated, the employer merely state that it is "acting for legitimate business reasons or in compliance with federal law." Id.

At times, however, a necessary accommodation may implicate the terms of a collective bargaining agreement. It is the Commission's position that, "where no other reasonable accommodation exists, the ADA requires an employer and a union, as a collective bargaining representative, to negotiate in good faith a variance to CBA . . . rules to provide an accommodation if the proposed accommodation does not unduly burden non-disabled workers." Brief of the Equal Employment Opportunity Commission as Amicus Curiae, page 7, in Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996). Given the joint obligation of the employer and union to attempt to fashion an accommodation that requires a variance to a collective bargaining agreement, appropriate union officials necessarily would have to be informed of an employee's disability and need for an accommodation.

Consequently, while an employer cannot disclose medical information about an employee to other employees, it can reveal to a union whatever medical information is necessary to enable the employer and union to jointly attempt accommodation for an individual with a disability. Therefore, the first exception to the confidentiality rules should be read to include "union" (in addition to supervisors and managers) whenever the provision of a reasonable accommodation involves the variance or interpretation of a collective bargaining agreement.

We hope this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Divisions



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUN 25 1997

(b) 6467c

This responds to your June 20, 1997, letter regarding the Americans with Disabilities Act of 1990 (ADA). You ask about "the EEOC's position on whether or not the ADA covers employees with HIV who do not have an AIDS diagnosis and do not currently exhibit symptoms."

The Equal Employment Opportunity Commission has taken the position that an individual with HIV infection, including asymptomatic HIV infection, has a "disability" as defined by the ADA. EEOC Compliance Manual § 902, Definition of the Term "Disability," at 902-21, 8 Fair Empl. Prac. Man. (BNA) 405:7265 (1995); see also 29 C.F.R. pt. 1630 app. § 1630.2(j). The Commission recently reiterated this position in a brief filed in the Fourth Circuit. Brief of the Equal Employment Opportunity Commission as Amicus in Support of the Appellant, Runnebaum v. Nationsbank, No. 94-2200 (4th Cir.) (arguing that HIV infection is an impairment that substantially limits the major life activities of procreation and intimate sexual relations).

I have enclosed a copy of the Compliance Manual section and the brief. Both documents cite to legal authority supporting the Commission's position.

This is an informal discussion of the issues you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. I hope that you find this information useful.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel

Enclosures



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUL - 8 1997

(b) 6 4 (b) 7 C  
This is response to your inquiry dated June 23, 1997, on behalf of (b) 6 4 (b) 7 C who raises a number of concerns about a document issued by the Equal Employment Opportunity Commission's (Commission) on March 25, 1997, entitled "EEOC Enforcement Guidance on the Americans with Disabilities Act [ADA] and Psychiatric Disabilities" (Guidance). Enclosed is a copy of the Guidance.

(b) 6 4 (b) 7 C apparently believes that the Guidance mandates protection for any individual who engages in behavior that an employer finds objectionable, such as chronic lateness. Under both the ADA and the Guidance, however, an individual claiming to have a psychiatric disability must be able to demonstrate that he or she has a mental impairment that substantially limits one or more major life activities. The Guidance is careful to distinguish between psychiatric disabilities and ordinary character traits that are not disabilities, such as poor judgment, chronic lateness, and irritability. (Guidance at page 4).

Moreover, nothing in the Guidance can be read as allowing employees to use the existence of a psychiatric disability to avoid discipline for misconduct. The Guidance makes clear that employers generally may hold employees with psychiatric disabilities to the same workplace conduct standards as other employees, as long as the standards are job-related and consistent with business necessity, and are applied uniformly to all employees. Thus, for example, rules against violence, threats of violence, theft, and destruction of property can be applied to all employees, even if such conduct stems from a disability. Similarly, an employer can discipline an employee with a psychiatric disability who makes offensive racial or sexual remarks.

An employer, however, does have an obligation to make a reasonable accommodation to enable an employee with a psychiatric disability to meet conduct standards once the employer has learned of the existence of the disability and the need for an accommodation. Such reasonable accommodation might include adjusting a work schedule (e.g., from 9:00 a.m. to 5:00 p.m. to 10:00 a.m. to 6:00 p.m.) for an employee with a psychiatric disability whose medication causes drowsiness early in the morning. Of course, an employer does not have to make any reasonable accommodation that would result in undue hardship, that is, significant cost or disruption to the employer's business. Thus, if adjusting a work schedule so that a salesperson with a psychiatric disability arrives at 10 a.m., rather than 9 a.m., means that there would be no one available to assist customers from 9 to 10, then the employer could refuse the request to start later.

(b) (6) (c) (7) C  
Page Two

(b) (6) (c) (7) C also expresses dissatisfaction with the portion of the Guidance which states that an employer "may not tell employees whether it is providing a reasonable accommodation for a particular individual." (Guidance at page 18). The ADA requires that information about an employee's disability and about the nature and extent of the disability be kept confidential. A statement that an individual receives a reasonable accommodation discloses that the individual has a disability. The Guidance, therefore, suggests that in response to co-worker questions about how another worker is being treated, the employer should state that it is "acting for legitimate business reasons or in compliance with federal law." Id. An employer may benefit by informing all of its employees about the ADA's reasonable accommodation and confidentiality requirements in the context of a general discussion about federal laws that apply to the workplace. In this way, reasonable accommodation requirements can be addressed before a question arises about a particular employee.

(b) (6) (c) (7) C also believes that the Guidance requires employers to maintain three sets of records: personnel, medical, and "Mentally Ill Records." This is not true. The ADA's rules on confidentiality require that medical information be "collected and maintained on separate forms and in separate medical files . . ." 42 U.S.C. § 12112(c)(3)(B). As long as medical information, regardless of whether it involves physical or mental impairments, is kept separate and apart from the usual personnel files, an employer satisfies this confidentiality requirement of the ADA.

Finally, (b) (6) (c) (7) C objects to that part of the Guidance that prohibits medication monitoring of an employee by an employer (Guidance at page 27), asserting that medication monitoring ensures satisfactory employee performance and conduct. In the event of performance or conduct problems, the ADA requires that an employer treat disabled employees in the same manner in which it treats non-disabled employees. Thus, if an employee is having performance or conduct problems because he or she is not taking prescribed medication, the employer should focus on the problem at hand and counsel the employee regarding the consequences of continued misconduct or poor performance.

We hope this information is helpful. Please note, however, that this letter is an informal discussion of the issues raised by (b) (6) (c) (7) C and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,

Claire Gonzales  
Director of Communications  
and Legislative Affairs

Enclosure



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

**JUL 8 1997**

(5) 64 (b) 70

Thank you for your letter of April 30, 1997, discussing the recent guidance issued by the Equal Employment Opportunity Commission (EEOC) on the application of the Americans with Disabilities Act (ADA) to persons with psychiatric disabilities. Enclosed is a copy of that guidance.

Your letter states that the ADA and the EEOC guidance give individuals with psychiatric disabilities "special treatment," and that such treatment will cost employers substantial amounts of money. As examples of special treatment, you express concern that the ADA permits employees with psychiatric disabilities to engage in "erratic" behavior or hostile acts.

The ADA requires employers to provide "reasonable accommodations" to persons with psychiatric disabilities, just as they must provide reasonable accommodations to persons with physical disabilities. "Reasonable accommodations" refer to modifications or adjustments to a job or work environment that enable a person to perform his or her job. Congress did not believe that reasonable accommodations were "special treatment," but rather a way to ensure that a person with a disability has an equal opportunity to do a good job. A person who uses a wheelchair cannot be expected to climb stairs, and thus it may be a reasonable accommodation for an employer to provide a ramp. Similarly, a person with a psychiatric disability that limits concentration may need a quieter work space, or some additional day-to-day guidance, feedback, or structure from a supervisor to perform effectively. Other types of accommodations that may be effective for employees with psychiatric disabilities include modifying a work schedule (e.g., changing usual work hours from 9 a.m. to 5 p.m. to 10 a.m. to 6 p.m.) for someone whose medication causes drowsiness early in the morning, allowing the use of accrued paid leave or unpaid leave so that an employee can receive treatment, and providing a temporary job coach to assist with training when an employee begins a job. Of course, as your letter points out, not everyone with a psychiatric disability needs a reasonable accommodation.

Certain actions are never required as reasonable accommodations. An employer does not have to tolerate chronic lateness, lower job performance standards, or eliminate essential job functions. Additionally, neither the ADA nor our guidance requires employers to tolerate disruptive behavior or hostile acts engaged in by persons with psychiatric disabilities. To the contrary, the guidance makes clear that employers generally may hold employees with psychiatric disabilities

to the same workplace conduct standards as all other employees, as long as those standards are job related and consistent with business necessity and are applied uniformly to all employees. Thus, the guidance states that rules against violence, threats of violence, theft, and destruction of property can be applied to all employees, even if such conduct stems from a disability.

With respect to your concerns about cost, most studies indicate that reasonable accommodations are relatively inexpensive, especially those needed by persons with psychiatric disabilities. For example, adjusting a work schedule, as discussed above, does not cost an employer any money. Other types of reasonable accommodations, such as partitions, room dividers, or earplugs entail minimal costs.

If a particular accommodation would impose an "undue hardship" on the operation of the business, meaning that it entails significant costs or disruption to the operations of the business, then the employer need not provide it. For example, if adjusting a work schedule so that a salesperson with a psychiatric disability arrives at 10 a.m., rather than 9 a.m., means that there would be no one to assist customers from 9 to 10, then the employer could refuse the request to start later.

This letter is an informal discussion of the issues raised in your letter and is not an official opinion of the EEOC. I hope this information is helpful.

Sincerely,

A handwritten signature in black ink that reads "Peggy R. Mastroianni". The script is cursive and fluid, with the first letters of each word being capitalized and prominent.

Peggy R. Mastroianni  
Associate Legal Counsel

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUL 17 1997

(b) 64 (b) 7C

Thank you for your letter of June 11, 1997, on behalf of (b) 64 (b) 7C who raises concerns about the recent guidance issued by the Equal Employment Opportunity Commission (EEOC) on the application of the Americans with Disabilities Act (ADA) to persons with psychiatric disabilities. Enclosed is a copy of that guidance.

(b) 64 (b) 7C expresses concern that EEOC's guidance goes beyond what Congress intended when it enacted the ADA, will invite abuse, and will burden business with substantial costs. Mr. Taylor's comments appear to be based largely upon an article by Joan Beck in the May 8, 1997 edition of the Chicago Tribune, which he enclosed along with his letter to you.

With respect to (b) 64 (b) 7C concern that the guidance is inconsistent with the requirements of the ADA, please note that the guidance merely clarifies the application of the ADA to persons with psychiatric disabilities. The language of the ADA itself unequivocally indicates that the statute's prohibition of discrimination on the basis of disability in employment, including the obligation to make "reasonable accommodations," applies to people with mental, as well as physical, impairments that substantially limit major life activities. The guidance does not, therefore, extend new rights to persons with psychiatric disabilities.

(b) 64 (b) 7C concerns about potential abuse appear to be rooted in the assumption that many employees will falsely assert that they have psychiatric disabilities in order to avoid discipline for misconduct or to justify poor job performance. The guidance, however, clearly indicates that an individual claiming to have a psychiatric disability must be able to demonstrate that he or she has a mental impairment that substantially limits one or more major life activities. The guidance is careful to distinguish between psychiatric disabilities and ordinary character traits that are not disabilities, such as poor judgment, chronic lateness, and irritability.

Moreover, nothing in the guidance can be read as allowing employees to use the existence of a psychiatric disability to avoid discipline for misconduct or as an excuse for poor performance. To the contrary, the guidance makes clear that employers generally may hold employees with psychiatric disabilities to the same workplace conduct standards as all other employees, as long as those standards are job-related and consistent with business necessity and are applied uniformly to all employees. Thus, the guidance states that rules against violence,



(b) 6 + 0 70  
Page Two

threats of violence, theft, and destruction of property can be applied to all employees, even if such conduct stems from a disability. The guidance also permits employees to require employees with psychiatric disabilities to meet the same performance standards as other employees.

The ADA does require employers to provide "reasonable accommodations" to persons with psychiatric disabilities, but only for the purpose of enabling such employees to perform their jobs. Contrary to (b) 6 + 0 70's assertion that accommodation will be costly, most studies indicate that reasonable accommodations are relatively inexpensive, especially those needed by persons with psychiatric disabilities. For example, adjusting work schedules (e.g., changing work hours from 9:00 a.m. - 5:00 p.m. to 10:00 a.m. - 6:00 p.m.) for an employee whose medication causes drowsiness in the morning does not cost an employer any money. Other types of reasonable accommodations, such as partitions, room dividers, or earplugs for an individual with a psychiatric disability whose concentration is affected by visual and audible distractions, entail minimal costs.

If a particular accommodation would impose an "undue hardship," meaning that it entails significant costs or disruption to the operations of the business, then the employer need not provide it. For example, if adjusting a work schedule so that a salesperson with a psychiatric disability arrives at 10 a.m., rather than 9 a.m., means that there would be no one available to assist customers from 9 to 10, then the employer could refuse the request to start later.

Because the guidance was issued on March 25, 1997, it is too early to determine its effects upon the legal costs to businesses of defending charges of employment discrimination. The Commission believes, however, that by clearly answering many of the most commonly-asked questions about how the ADA applies to employees with psychiatric disabilities, the guidance will enable employers and employees to resolve many issues before they become the subject of an EEOC charge of discrimination or a lawsuit.

We hope this information is helpful to you. This letter is an informal discussion of the issues raised in (b) 6 + 0 70 letter and is not an official opinion of the EEOC.

Sincerely,

Claire Gonzales  
Director of Communications  
and Legislative Affairs

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUL 17 1997

(b) 6 7 (b) 7 C

This is in response to your inquiry dated June 20, 1997, on behalf of (b) 6 7 (b) 7 C who raises concerns about the recent guidance issued by the Equal Employment Opportunity Commission (EEOC) on the application of the Americans with Disabilities Act (ADA) to persons with psychiatric disabilities (enclosed). (b) 6 7 (b) 7 C a small business owner, expresses concern about what he calls the "new rules" and about the "possibility of abuse by employees." (b) 6 7 (b) 7 C concerns appear to be based upon an editorial from an Indiana newspaper, which was enclosed with his letter to you.

The EEOC guidance explains employers' and employees' rights and responsibilities under the law. It does not contain "new rules" but, rather, clarifies Congress's intent in drafting the ADA. In particular, Congress made clear that the ADA covers psychiatric as well as physical disabilities, and that employers are required to provide "reasonable accommodations" to persons with psychiatric disabilities, just as they must do for persons with physical disabilities.

To the extent (b) 6 7 (b) 7 C may be concerned about the cost of providing reasonable accommodations, neither the ADA nor the guidance requires an employer to provide any accommodation that would impose an "undue hardship," meaning that it would entail significant costs or disruption to the operations of the business. In most cases, however, an appropriate reasonable accommodation can be made without difficulty and at little or no extra cost. For example, the guidance suggests that putting up room dividers or partitions to minimize visual or audible distractions or permitting the use of headphones may be effective accommodations for a person whose psychiatric disability makes concentration difficult. Other effective accommodations that impose little or no cost include allowing an employee to use accrued paid leave or unpaid leave to receive treatment, or adjusting an employee's work hours (e.g., from 9:00 a.m. to 5:00 p.m. to 10:00 a.m. to 6:00 p.m.) for an employee with a psychiatric disability whose medication causes drowsiness early in the morning.

To the extent that (b) 6 7 (b) 7 C comments reflect concerns about the possibility that employees will falsely claim to have psychiatric disabilities in order to justify poor job performance or to avoid discipline for violating workplace conduct rules, the guidance clearly responds to these concerns. First, the guidance applies only to individuals who have a disability within the meaning of the ADA. A person claiming to have a psychiatric disability must be able to document that he or she has a mental impairment, such as major depression,

(b)(6) + (b)(7)(c)

Page Two

bipolar disorder, or schizophrenia, that substantially limits one or more "major life activities." Moreover, because the ADA only protects applicants and employees who are qualified, an individual must also be able to show that he or she is able to perform his or her job, with or without reasonable accommodation. Lowering performance standards is not required as a reasonable accommodation. An employer also may discipline an employee for violating a conduct standard that is job-related and consistent with business necessity, even if the violation resulted from a psychiatric disability, so long as the employer applies the same discipline to all employees who violate the standard.

We hope this information is helpful to you. This letter is an informal discussion of the issues raised in your letter and is not an official opinion of the EEOC.

Sincerely,

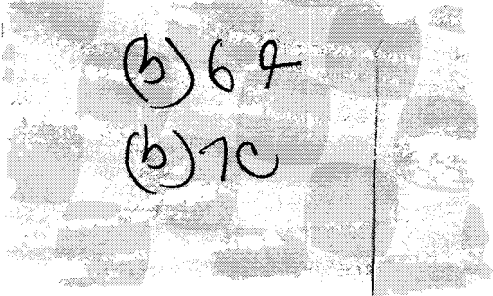
Claire Gonzales  
Director of Communications  
and Legislative Affairs

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUL 17 1997



Thank you for your letter of May 30, 1997, on behalf of (b) 6 f (b) 7c, who raises concerns about the recent guidance issued by the Equal Employment Opportunity Commission (EEOC or Commission) on the application of the Americans with Disabilities Act (ADA) to persons with psychiatric disabilities. Enclosed is a copy of that guidance.

(b) 6 f (b) 7c expresses concern that EEOC's guidance goes beyond what Congress intended when it enacted the ADA, will invite abuse, and will burden business with substantial costs. Mr. Taylor's comments appear to be based largely upon an article by Joan Beck in the May 8, 1997, edition of the Chicago Tribune, which he enclosed along with his letter to you.

With respect to (b) 6 f (b) 7c concern that the guidance is inconsistent with the requirements of the ADA, please note that the guidance merely clarifies the application of the ADA to persons with psychiatric disabilities. The language of the ADA itself unequivocally indicates that the statute's prohibition of discrimination on the basis of disability in employment, including the obligation to make "reasonable accommodations," applies to people with mental, as well as physical, impairments that substantially limit major life activities. The guidance does not, therefore, extend new rights to persons with psychiatric disabilities.

(b) 6 f (b) 7c concerns about potential abuse appear to be rooted in the assumption that many employees will falsely assert that they have psychiatric disabilities in order to avoid discipline for misconduct or to justify poor job performance. The guidance, however, clearly indicates that an individual claiming to have a psychiatric disability must be able to demonstrate that he or she has a mental impairment that substantially limits one or more major life activities. The guidance is careful to distinguish between psychiatric disabilities and ordinary character traits that are not disabilities, such as poor judgment, chronic lateness, and irritability.

Moreover, nothing in the guidance can be read as allowing employees to use the existence of a psychiatric disability to avoid discipline for misconduct or as an excuse for poor performance. To the contrary, the guidance makes clear that employers generally may hold employees with psychiatric disabilities to the same workplace conduct standards as all other employees, as long as those standards are job-related and consistent with business necessity and are applied uniformly to all employees. Thus, the guidance states that rules against violence,



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

DLC/ADA

JUL 17 1997

(b)6 4(b)7c

Thank you for your letter of June 9, 1997, on behalf of (b)6 4(b)7c, who raises concerns about the recent guidance issued by the Equal Employment Opportunity Commission (EEOC) on the application of the Americans with Disabilities Act (ADA) to persons with psychiatric disabilities. Enclosed is a copy of that guidance.

(b)6 4(b)7c expresses concern that EEOC's guidance will burden business with substantial costs and will lead to abuse. Specifically, (b)6 4(b)7c believes that the guidelines are "vague," and that businesses will consequently incur significant costs both to accommodate people with psychiatric disabilities and to defend charges of discrimination. Additionally, (b)6 4(b)7c concerned that the guidance will be used to justify poor job performance.

With respect to (b)6 4(b)7c concern that the EEOC guidance is too vague, please note that the guidance offers detailed clarifications on the application of the ADA to persons with psychiatric disabilities. Using a question-and-answer format and numerous illustrative examples, the guidance provides practical information about the rights and responsibilities of both employers and employees under the ADA. In addition, the guidance explains in understandable terms the process that employers should use to respond to requests for reasonable accommodation from employees with psychiatric disabilities, including the fact that employers can request documentation of the existence of a psychiatric disability and the need for a requested accommodation. The guidance also provides several examples of accommodations that may be effective.

The guidance makes clear that certain actions are never required as reasonable accommodations. For example, employers generally may hold employees with psychiatric disabilities to the same workplace conduct standards as all other employees, as long as those standards are job-related and consistent with business necessity and are applied uniformly to all employees. Thus, the guidance states that rules against violence, threats of violence, theft, and destruction of property can be applied to all employees, even if such conduct stems from a disability.

(b) 6 + (b) 7 C  
Page Two

With respect to (b) 6 + (b) 7 C, concerns about cost, most studies indicate that reasonable accommodations are relatively inexpensive, especially those needed by persons with psychiatric disabilities. For example, adjusting work schedules (e.g., changing work hours from 9:00 a.m. - 5:00 p.m. to 10:00 a.m. - 6:00 p.m.) for an employee whose medication causes drowsiness in the morning does not cost an employer any money. Other types of reasonable accommodations, such as partitions, room dividers, or earplugs for an individual with a psychiatric disability whose concentration is affected by visual and audible distractions entail minimal costs.

Moreover, if a particular accommodation would impose an "undue hardship" on the operation of the business, meaning that it entails significant costs or disruption to the operations of the business, then the employer need not provide it. For example, if adjusting a work schedule so that a salesperson with a psychiatric disability arrives at 10 a.m., rather than 9 a.m., means that there would be no one available to assist customers from 9 to 10, then the employer could refuse the request to start later.

Because the guidance was issued on March 25, 1997, it is too early to determine its effects upon the legal costs to businesses of defending charges of employment discrimination. The Commission believes, however, that by clearly answering many of the most commonly-asked questions about how the ADA applies to employees with psychiatric disabilities, the guidance will enable employers and employees to resolve many issues before they become the subject of an EEOC charge of discrimination or a lawsuit.

We hope this information is helpful to you. This letter is an informal discussion of the issues raised in (b) 6 + (b) 7 C, letter and is not an official opinion of the EEOC.

Sincerely,

Claire Gonzales  
Director of Communications  
and Legislative Affairs

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUL 17 1997

(b) 6 4 (b) 7 C

This is in response to your inquiry dated May 23, 1997, on behalf of (b) 6 4 (b) 7 C who states that she was placed in a lower-paying waitress position when her employer reassigned an individual with a disability to her bartender position, asks whether her demotion is prohibited by any laws the Equal Employment Opportunity Commission (Commission) enforces. You also ask whether any of these statutes dictate the salary level the employer must pay both (b) 6 4 (b) 7 C and the individual with the disability.

Title I of the Americans with Disabilities Act (ADA) requires an employer to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability unless the employer can demonstrate that the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). Reassignment to a vacant position is a form of reasonable accommodation. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.1(o)(2)(ii). As the Commission's Interpretive Appendix to its ADA regulations points out, "reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship." Appendix to 29 C.F.R. § 1630.1(o).

The Interpretive Appendix also provides that, if an employer uses reassignment as a reasonable accommodation, it should, "reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time" (emphasis added). *Id.* Finally, as pointed out in the Commission's ADA Technical Assistance Manual, "an employer is not required to create a new job or to bump another employee from a job in order to provide reassignment as a reasonable accommodation. Nor is an employer required to promote an individual with a disability to make such an accommodation." Technical Assistance Manual, at page III-25 (enclosed).

Though (b) 6 4 (b) 7 C employer was not required by the ADA to demote her in order to accommodate her co-worker by reassigning the individual to the bartender position, nothing in the ADA prohibits the employer from doing so. Moreover, because (b) 6 4 (b) 7 C is not an individual with a disability, she cannot challenge her demotion under the ADA. (b) 6 4 (b) 7 C may have a claim against her employer under state law or under the terms of a collective bargaining agreement (assuming one exists), but the Commission would not have jurisdiction over such

(b) 6 4(b) 7C

Page Two

As to the pay issue, the Commission's Interpretative Appendix states:

An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. An employer, however, is not required to maintain the reassigned individual with a disability at the salary of the higher graded position if it does not so maintain reassigned employees who are not disabled. It should also be noted that an employer is not required to promote an individual with a disability as an accommodation."

Appendix to 29 C.F.R. § 1630.2(o).

While the ADA did not require (b) 6 4(b) 7C employer to promote the employee with a disability as a reasonable accommodation, it also did not prohibit such conduct. Thus, Ms. (b) 6 4(b) 7C employer did not violate the ADA by reassigning the individual with a disability to the bartender position, assuming the reassignment amounted to a promotion. Moreover, because (b) 6 4(b) 7C is not an individual with a disability, she cannot challenge any pay disparity resulting from the reassignment. She may, however, have a claim under state law, or under another federal EEO law, such as Title VII of the Civil Rights Act (which prohibits discrimination on the basis of race, sex, religion, color or national origin), or the Equal Pay Act.

(b) 6 4(b) 7C We hope this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and (b) 6 4(b) 7C ; and is not an official opinion of the EEOC.

Sincerely,

Claire Gonzales  
Director of Communications  
and Legislative Affairs

Enclosure





U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUL 17 1997

(b) 6 4 (b) 7C

This is in response to your inquiry dated May 19, 1997, on behalf of (b) 6 4 (b) 7C who is a small business owner, generally criticizes the Equal Employment Opportunity Commission's (EEOC) recent guidance about Title I of the Americans with Disabilities Act (ADA) and psychiatric disabilities. Her criticism is apparently based on a newspaper column by (b) 6 4 (b) 7C which is enclosed with her letter.

(b) 6 4 (b) 7C's article perpetuates the kinds of myths, fears, and stereotypes about psychiatric disabilities that the ADA and the guidance were intended to combat. The best example of this is the terminology (b) 6 4 (b) 7C uses to describe people who have psychiatric disabilities. He refers to them as "psychos," "crazies," and people "let out of a psycho ward." This choice of language is regrettable, and is analogous to using racial or religious slurs.

(b) 6 4 (b) 7C's column is also unfortunately a prime example of how some critics have misinterpreted the contents of this enforcement guidance. For example, (b) 6 4 (b) 7C writes that an employer may be required to tolerate chronic lateness, poor judgment, or even hostility toward other workers. The Commission's guidance specifically states, however, that traits like chronic lateness, irritability, and poor judgment are not, in themselves, mental impairments. In addition, the guidance explains that an employer may discipline an individual for violating a workplace conduct standard that is related to the job and consistent with business necessity, *even if* the misconduct results from a disability.

In response to (b) 6 4 (b) 7C's concerns that the guidance will negatively affect small businesses, please note that one of the reasons the EEOC publishes enforcement guidance is to help small business owners understand the ADA rather than depend on sources unfamiliar with the statute. The guidance on the ADA and psychiatric disabilities, like other recent

(b) 6 4 (b) 7 C

Page Two

EEOC enforcement guidances, is written in a straightforward question-and-answer format in order to be useful to the general public. A copy of this guidance is enclosed for (b) 6 4 (b) 7 C reference.

We hope this information is helpful to you.

Sincerely,

Claire Gonzales  
Director of Communications  
and Legislative Affairs

Enclosure

FOIA



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUL 31 1997

(b)6 & (b)7c

This responds to your recent letter to the Chicago District Office of the Equal Employment Opportunity Commission (EEOC).

You asked us to review an employment application to ensure that it does not violate "any EEOC regulation or other governmental law regarding" applicants for employment. Our comments are limited to the laws that the EEOC enforces: Title I of the Americans with Disabilities Act of 1990 (ADA), which prohibits employment discrimination based on disability; Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, and national origin; and the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits employment discrimination based on age against persons who are forty years of age or older.

Preemployment Inquiries Under the ADA

Under the ADA, an employer may not ask disability-related questions and may not conduct medical examinations until after it makes a real conditional job offer. 42 U.S.C. §12112(d)(2); 29 C.F.R. §§1630.13(a), 14(a), (b). A job offer is real if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer. EEOC ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (1995) (enclosed) at 18. Once a conditional job offer is made, the employer may ask disability-related questions and require medical examinations as long as this is done for all entering employees in that job category. 42 U.S.C. §12112(d)(3); 29 C.F.R. §1630.14(b)(1), (2). A disability-related question is one that is likely to elicit information about a disability. Enforcement Guidance at 4. A medical examination is a procedure or test that seeks information about an individual's physical or mental impairments or health. *Id.* at 14.

The application that you enclosed does not pose disability-related questions. We note, however, that the "Other" portion of page A-1 of the application may not be used to ask such questions. We also note that the tests referred to in the "Completed Application Check" portion of the last page may not be administered pre-offer if they are medical examinations. Further, an

employer may not ask disability-related questions as part of a pre-offer test even if the test itself is not medical.

Preemployment Inquiries Under Title VII and the ADEA

The application does not pose any questions that indicate discrimination on the basis of race, color, religion, sex, national origin, or age. However, with respect to the "Wonderlic Personnel Test, Preemployment Tests" referred to on the "Completed Application Check" portion of the last page, you should bear in mind that an employer may not use a test that disproportionately screens out persons in a protected class unless the test is job related for the position in question and consistent with business necessity, and there are no alternatives that are substantially as effective but less discriminatory. For additional guidance, see the Uniform Guidance on Employee Selection Procedures, 29 C.F.R. Part 1607.

This letter is an informal discussion of the issues you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. In addition, our silence on other matters that may have been presented in your letter should not be construed as agreement with those matters.

Sincerely,

A handwritten signature in cursive script that reads "Peggy R. Mastroianni".

Peggy R. Mastroianni  
Associate Legal Counsel

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

AUG 15 1997

(b) 6 7 (b) 7c

This letter is in response to your letter dated July 1, 1997, in which you requested information on the rights of an employee with a psychiatric disability. The Equal Employment Opportunity Commission (EEOC) recently published an Enforcement Guidance that sets forth the Commission's position referencing the employment aspects of the Americans with Disabilities Act of 1990 to individuals with psychiatric disabilities. Enclosed you will find a copy of this Guidance.

Also, the EEOC enforces Title VII of the Civil Rights Act of 1964 which prohibits discrimination based on race, color, religion, sex and national origin. However, (b) 6 7c if you feel that your rights have been violated based on your disability, you may contact the nearest EEOC office in your vicinity and file a complaint of discrimination; keeping in mind that there are time limits for filing charges. For your convenience, I have enclosed a list of EEOC offices in the California area.

Sincerely,

A handwritten signature in cursive script, reading "Christopher J. Kuczynski", is written above the typed name.

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUL 31 1997

564-670

This is in response to your letter dated July 11, 1997. Enclosed with your letter was a copy of a pre-employment questionnaire your organization has developed. You ask whether the questionnaire raises any issues of employment discrimination.

The Equal Employment Opportunity Commission (Commission) has issued an enforcement guidance document which is relevant to your inquiry. The document, entitled "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations," explores the types of pre-employment inquiries the Commission believes are permissible under the Americans with Disabilities Act (ADA).

The guidance specifically addresses pre-employment psychological examinations, a category which appears to best describe your questionnaire. The breadth of your questionnaire and our lack of knowledge as to what type of information the questionnaire is designed to elicit or how the answers will be interpreted makes it infeasible for us to assess whether it is violative of the ADA. We believe you will be able to make that determination in light of the enclosed guidance.

We hope this information is helpful to you. Please note that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

OK

AUG 21 1997

(b) 64 (b) 7C

This is in response to your May 1, 1997, letter to President Clinton concerning the guidance issued by the Equal Employment Opportunity Commission (EEOC) on the application of the Americans with Disabilities Act (ADA) to persons with psychiatric disabilities (copy enclosed). The President has asked this agency to respond directly to you.

You suggest that the guidance imposes new requirements on employers. In fact, the guidance creates no new obligations at all. The ADA's provisions prohibiting employment discrimination based on disability have been in effect since 1992. These provisions have always applied to individuals with mental, as well as physical, disabilities. The guidance merely offers employers and individuals with disabilities specific, practical steps for complying with the law.

You also express concern that the guidance extends ADA protection to people with a wide array of "mental problems," including employees who claim that they are chronically late for work due to "mental stress." The guidance is careful to point out, however, that chronic lateness, like other character traits such as poor judgment and irritability, is not a psychiatric disability. Additionally, a statement by an employee that he or she is experiencing "mental stress" is not itself sufficient to establish that the employee has a disability. In order to fall within the ADA's protection, an employee must demonstrate that he or she actually has a mental impairment that substantially limits a major life activity.

Finally, you argue that the guidance will require employers to retain employees who perform poorly. In fact, however, the guidance says that employers may hold employees with psychiatric disabilities to the same performance standards as all other employees. Employers may also hold employees with psychiatric disabilities to the same workplace conduct standards as all other employees, as long as those standards are job-related and consistent with business necessity and are applied uniformly to all employees. The ADA does require employers to provide "reasonable accommodations" to persons with psychiatric disabilities, but only for the purpose of enabling such employees to perform their jobs.

1. (b)64(b)7C  
Page Two

We hope this information is helpful to you. This letter is an informal discussion of the issues raised in your letter and is not an official opinion of the EEOC.

Sincerely,

Claire Gonzales  
Director of Communications  
and Legislative Affairs

Enclosure





U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

ofc

~~SEP 17 1997~~  
SEP 17 1997

(b) 64(b) 7c

This is in response to your inquiry dated August 1, 1997, on behalf of (b) 64(b) 7c who expresses concern and surprise about the Equal Employment Opportunity Commission's (EEOC) recent guidance discussing Title I of the Americans with Disabilities Act (ADA) and Psychiatric Disabilities (guidance). A copy of the guidance is enclosed for (b) 64(b) 7c information.

Contrary to what (b) 64(b) 7c suggests, the EEOC did not extend the ADA to reach psychiatric disabilities in this guidance. The ADA and its legal antecedent, the Rehabilitation Act of 1973, have always prohibited discrimination based on mental or psychiatric disability. The EEOC's goal in this guidance was to provide detailed explanations and concrete examples of how the law applies in this context. For example, the guidance carefully explains the meaning of "psychiatric disability" under the ADA, and provides numerous examples of who would (and who would not) be covered by the law. See Guidance at 2 - 12.

(b) 64(b) 7c also notes that the ADA prevents employers from asking job applicants if they have a history of mental illness. The ADA, however, allows employers to ask any questions related to disability, including whether an individual has a history of mental illness, after offering a person a job but before he or she actually starts work. An employer may condition an offer of employment on the results of its post-offer inquiries, although any decision to withdraw an offer must not itself be discriminatory. Of course, the employer must ask the same questions to everyone in the same job category.

Finally, there are limits on the employer's duty to provide reasonable accommodation. The ADA requires reasonable accommodation only for individuals who are otherwise qualified for their job. Moreover, an employer must provide a reasonable accommodation only if doing so does not pose an "undue hardship," meaning "significant difficulty or expense."

Enclosure

(b) 6 + (b) 7C

Sincerely,

We hope this information is helpful to you.

Page 2

(b) 6 + (b) 7C



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

ch

SEP 2 1997

(b) 6 7 (b) 7c

This is in response to your inquiry, dated August 13, 1997, on behalf of who raises concerns about whether individuals who have applied for social security disability benefits are still protected by the Americans with Disabilities Act (ADA). concerns appear to be based on some court decisions holding that individuals who have stated that they are unable to work in applications for disability insurance payments, workers' compensation, or social security disability benefits are precluded from pursuing an ADA claim on the grounds that they are not "qualified individuals with a disability" within the meaning of the ADA.

In a recent guidance issued by the Equal Employment Opportunity Commission (EEOC or Commission) on the "Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a 'Qualified Individual with a Disability' Under the Americans with Disabilities Act of 1990" (enclosed), the EEOC explained why a person's representations about the ability to work made in the course of applying for disability benefits generally do *not* preclude a finding that he or she is a qualified individual with a disability protected by the ADA. In particular, the guidance explained that because the ADA definitions of the terms "disability" and "qualified individual with a disability" are tailored to the broad remedial purposes of the Act, they differ from the definitions of the same or similar terms used in other laws and benefits programs designed for other purposes. The guidance explained that because of these differences, determinations made by, for example, the Social Security Administration concerning disability are not dispositive findings for claims arising under the ADA. Courts that have considered this issue have reached different conclusions; however, two recent decisions have explicitly endorsed the EEOC's position. *See, e.g., Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997), and *Whitbeck v. Vital Signs Inc.*, 116 F.3d 588 (D.C. Cir. 1997). In addition, the guidance cites several earlier cases that support the Commission's conclusion.

(b) 6 & (b) 7C

Page Two

This letter is an informal discussion of the issues raised in your letter and is not an official opinion of the EEOC. I hope this information is helpful.

Sincerely,

(b) 6 & (b) 7C

Attachment



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

One

SEP 22 1997

(b) 64 (b) 7C

This is in response to your inquiry dated June 20, 1997, on behalf of (b) 64 (b) 7C who raises concerns about the recent guidance issued by the Equal Employment Opportunity Commission (EEOC) on the application of the Americans with Disabilities Act (ADA) to persons with psychiatric disabilities. Enclosed is a copy of that guidance.

(b) 64 (b) 7C believes that, based on EEOC's guidance, employers will be "placed in the untenable position of having to diagnose and accommodate problem employees who may actually be, or become, a threat to fellow employees." (b) 64 (b) 7C is also apparently concerned about the "potential for abuse" by those employees claiming to have psychiatric disabilities.

The EEOC guidance on psychiatric disabilities explains employers' and employees' rights and responsibilities under the law and clarifies Congress's intent in drafting the ADA. In particular, Congress made clear that the ADA covers psychiatric as well as physical disabilities and that employers are required to provide "reasonable accommodations" to persons with psychiatric disabilities, just as they must do for persons with physical disabilities.

To the extent that (b) 64 (b) 7C comments reflect concerns about the possibility that "problem" employees will falsely claim to have psychiatric disabilities in order to justify poor job performance, please note that the guidance applies only to individuals who have psychiatric disabilities within the meaning of the ADA. A person claiming to have a psychiatric disability must be able to document that he or she has a mental impairment, such as major depression, bipolar disorder, or schizophrenia, that substantially limits one or more "major life activities."

Moreover, because the ADA only protects applicants and employees who are qualified, an individual must also be able to perform his or her job, with or without reasonable accommodation. Lowering performance standards is not required as a reasonable accommodation. An employer may also discipline an employee for violating a conduct standard that is job-related and consistent with business necessity, such as a rule prohibiting violence, threats of violence, destruction of property, or theft, even if the violation stemmed from a psychiatric disability, so long as the employer applies the same discipline to all employees who violate the standard.

The guidance further explains that, under the ADA, an employer may lawfully exclude an individual from employment for safety reasons if the employer can show that the employment of

(b) 6 4(b) 7c

Page 2

the individual would pose a "direct threat." The EEOC's ADA regulations explain that "direct threat" means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r).

This letter is an informal discussion of the issues raised in your letter and is not an official opinion of the EEOC. I hope this information is helpful.

Sincerely,

(b) 6 4(b) 7c

ons

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

OPC

SEP 22 1997

(b)64(b)7c

This is in response to your inquiry dated July 29, 1997, on behalf of one of your Iowa constituents who criticized the Equal Employment Opportunity Commission's (Commission) guidance about Title I of the Americans with Disabilities Act (ADA) and psychiatric disabilities (guidance). A copy of the guidance is enclosed for your constituent's information.

Your constituent endorses the views expressed by Suzanne Fields in a column printed in the Des Moines Register on May 6, 1997. This column promulgates some serious inaccuracies about the law. For example, Ms. Fields asserts that the ADA would protect a sexual harasser if he claimed to have "erotomania." This is incorrect. The ADA's statutory definition of the term "disability" expressly states that "the term 'disability' shall not include . . . sexual behavior disorders." 42 U.S.C. 12211(b)(1).

(b)64(b)7c column also misrepresents the guidance (b)64(b)7c argues that "physical and mental disabilities are of a completely different order" and states that the ADA's protection of "mental disabilities" amount to "pathologizing" normal behavior like losing one's temper, or being late, sloppy, or sad. The Commission's guidance specifically states, however, that traits like chronic lateness, irritability, and poor judgment are not, in themselves, mental impairments under the ADA. See Guidance at 4. Moreover, the guidance emphasizes that the ADA only protects individuals if their impairments, be they mental or physical, are severe and long-lasting, so that they "substantially limit" one or more of an individual's major life activities. See Guidance at 2 - 12.

Finally, (b)64(b)7c maintains that the guidance requires employers to tolerate and accommodate all kinds of inappropriate workplace behavior, including belligerence, hostility, and lack of productivity, if an employee asserts that a mental disability caused the behavior. The Commission's guidance explains, however, that the ADA allows an employer to discipline an individual with a disability for violating a workplace conduct standard that is related to the job and consistent with business necessity, even if the misconduct resulted from the disability, so long as the employer applies the same discipline to all employees who violate the standard. See Guidance

(b) 6, 7 (b) 7C  
Page 2

at 29. Thus, an employer is never required to overlook misconduct. *Id.* at 30 - 31. It is also well-established under the ADA that an employer does not have to lower production standards for an individual with a disability. *See* 29 C.F.R. pt. 1630 app. 1630.2(n). *See also* Guidance at 15, n. 39.

We hope this information is helpful to you.

Sincerely,

(b) 6, 7 (b) 7C

ations

Enclosure





U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

SEP 22 1997

(b) 64 (b) 7c

This is in response to your letter dated August 25, 1997, regarding the Americans with Disabilities Act of 1990, as amended (ADA). You specifically inquired whether an employment application form used by the Albany County Sheriff's Office contains questions which violate the ADA.

As you know, the Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA which prohibits discrimination on the basis of disability in all aspects of employment, including the application process. Section 102(d) prohibits an employer from asking applicants disability-related questions or requiring medical examinations before it has made an offer of employment. 42 U.S.C. § 12112(d) (1994); 29 C.F.R. § 1630.13(a) (1996). In its ADA Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations (Guidance), the Commission explains that disability-related questions are "questions that are likely to elicit information about a disability." Guidance, at 4. (A copy of the Guidance has been enclosed.) Thus, an employer may not ask questions about whether an applicant has a particular disability or questions that are closely related to disability. Id. Broad questions about impairments, such as asking an applicant to disclose all of his or her impairments, are disability-related questions and are prohibited prior to an offer of employment. Id. at 9.

A number of questions on the employment application of the Albany County Sheriff's Department are disability-related and prohibited by the ADA, since applicants must answer them before a conditional offer of employment has been made.

1. Item 13 on page two of the enclosed two-page application form asks candidates who wear glasses or contact lenses to provide a certification from an optometrist indicating uncorrected vision. This is likely to elicit information about visual disabilities.
2. The "Authorization for Release of Personal Information" in the front of the application booklet asks applicants to release all records concerning medical or psychiatric treatment

and/or consultation. This seeks information about a person's impairments and is likely to elicit information about a disability.

3. The "Authorization" also requires release of all employment and preemployment records, including background reports. This request is overly broad. It should be rewritten to specify that only non-medical information contained in the records should be released.

4. Items 1 and 2, section IX, ask an applicant to identify all of his or her impairments.

5. The first part of item 3, section IX, asking if a person has ever used illegal drugs is permissible. The second part, however, asks an applicant to explain why and when he or she has used illegal drugs. This question is likely to elicit information about past drug addiction and so is likely to elicit information about a disability.

6. Item 4, section IX, asks an applicant to identify his or her prescription drugs. This is likely to elicit information about a disability.

7. The first part of item 5, section IX, asking whether an applicant drinks alcoholic beverages is permissible. The second part, however, which asks how much a person drinks, is likely to elicit information about whether an applicant has alcoholism, and is thus a prohibited disability-related question.

Employers may ask disability-related questions or require a medical examination after an offer of employment has been made and prior to the commencement of employment duties, if they ask the same questions or requires the same examinations of all employees entering into the same job category. 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.14(b). All medical information obtained by an employer must be collected and maintained on separate forms and kept in separate confidential medical files. The information must be kept confidential with the following limited exceptions:

(1) supervisors and managers may be informed regarding necessary restrictions on the work duties of the employee and necessary accommodations;

(2) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;

(3) government officials investigating compliance with the ADA shall be provided relevant information on request;

(4) employers may submit information to state workers' compensation offices or state second injury funds in accordance with state workers' compensation laws; and

(5) employers may use the information for insurance purposes (pursuant to ADA § 501(c)).

I hope that this information is helpful to you. Please note, however, that this letter does not constitute an official opinion of the EEOC and the fact that we have not commented on other matters contained in the application form does not indicate approval by the Commission.

Sincerely,

(b)6 & (b)7C

Enclosure



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

OCT 10 1997

(b) 6 4 (b) 7C

This is a response to your letter to (b) 6 4 (b) 7C Senior Policy Advisor, U.S. Department of Labor, concerning possible employment discrimination based on disability and/or age. Your letter was forwarded to the Equal Employment Opportunity Commission (EEOC) for a response.

The EEOC enforces the Americans with Disabilities Act of 1990, as amended (ADA), which prohibits employment discrimination based on disability. Under the ADA, an employer is prohibited from discriminating on the basis of disability in any aspect of the employment relationship, including the provision of fringe benefits, such as retirement, long term disability, or health insurance benefits. In addition, the ADA requires that an employer provide an individual with a disability with a reasonable accommodation which enables him or her to perform the essential functions of a position, unless it would impose an undue hardship. The EEOC also enforces the Age Discrimination in Employment Act of 1967, as amended (ADEA), which prohibits employment discrimination based on age for individuals who are forty years of age and older, in any aspect of the employment relationship, including fringe benefits.

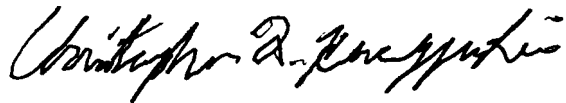
The facts regarding your relationship with your employer are quite complex. It is not clear from your letter whether your employer has violated the ADA and/or the ADEA with respect to your employment. If you believe that your employer has discriminated against you on the basis of disability or age, you should contact the EEOC Cleveland District Office immediately at the following address and telephone number:

EEOC Cleveland District Office  
1660 West Second Street, Suite 850  
Cleveland, Ohio 44113-1454  
(216) 522-2001.

You do not need to have an attorney to file a charge of discrimination with the EEOC and there is no fee for filing a charge.

We hope that this information is helpful to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher J. Kuczynski". The signature is fluid and cursive, with the first name "Christopher" being more prominent.

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

OCT 10 1997

(b)6 & (b)7C

This is in response to your recent letter asking the Equal Employment Opportunity Commission (EEOC or Commission) to review an application for employment and "conditional job offer & medical review" form to ensure compliance with the anti-discrimination laws. Although the Commission does not give "seals of approval" to any of the applications and forms it is asked to review, the purpose of this letter is to provide a few general comments.

Employment Application

The application form you have submitted raises no concerns under the Americans with Disabilities Act (ADA); however, the question about whether an applicant has ever been convicted of a crime may have Title VII implications. Using inquiries concerning conviction records to exclude applicants with conviction records has been found to disproportionately exclude minorities. Therefore, inquiries concerning convictions should be avoided unless the employer can show that the exclusion is job-related and consistent with business necessity.

Conditional Job Offer & Medical Review Form

Pursuant to the ADA, an employer may not ask disability-related questions and may not conduct medical examinations at the applicant stage (*viz.*, before a job offer has been extended). Once a job offer is tendered, an employer may ask disability-related questions and require medical examinations as long as this is done for all entering employees in that job category. If a question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for withdrawing the job offer is job-related and consistent with business necessity. Further, if the individual is rejected for safety reasons, the employer must demonstrate that the individual poses a direct threat. This means that the individual poses a significant risk of substantial harm to him/herself or others that cannot be eliminated or reduced by reasonable accommodation.

The form that you have submitted clearly states that it is only to be completed after an applicant has been given an offer of employment. It also states that the information obtained will be handled confidentially in strict compliance with the ADA. The section entitled "Affirmation and Authorization," however, raises an ADA concern in that you are asking applicants to authorize you to obtain information from prior or other employers.

The ADA requires employers, including prior employers, to keep *any* medical information on applicants or employees confidential, with the following limited exceptions:

- supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;
- first aid and safety personnel may be told, when appropriate, if the disability might require emergency medical treatment;
- government officials investigating compliance with the ADA may be given relevant information on request;
- employers may give information to state workers' compensation offices, state second injury funds, and workers' compensation insurance carriers in accordance with state workers' compensation laws; and
- employers may use the information for insurance purposes.

It is unlikely that an individual can broadly waive the ADA's proscription on the disclosure of confidential information. Therefore, it would violate the ADA for an employer to disclose medical information beyond the ADA's stated confidentiality exceptions.

We hope that this discussion is helpful. Please note that this letter is an informal discussion of some of the issues raised by the employment application and medical form and is not an official opinion of the EEOC.

Sincerely,

A handwritten signature in black ink, reading "Christopher J. Kuczynski". The signature is fluid and cursive, with the first and last names being more prominent.

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

CFC

OCT 10 1997

(b)6 7(b)7c

This is in response to your inquiry dated September 10, 1997, on behalf of (b)6 7(b)7c. (b)6 7(b)7c explains that she has applied for positions with various companies, has been called in for interviews, but is then told that the potential employers' buildings are not accessible. As a consequence, she is prevented from completing the application process.

Title I of the Americans with Disabilities Act (ADA), which is enforced by the Equal Employment Opportunity Commission (Commission), requires that a covered employer provide reasonable accommodations to the known physical or mental limitations of a qualified applicant with a disability, unless it would be an undue hardship to do so. 42 U.S.C. §12112 (b)(5). Reasonable accommodation includes "modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires," and making the employer's facility readily accessible to and usable by individuals with disabilities. 29 C.F.R. §§ 1630.2(o)(1)(I), 1630.2(o)(2)(I).

Accordingly, an employer may be in violation of the ADA if it does not make its building accessible in order to enable a qualified applicant with a disability to enter the building for an interview. Assuming the building cannot be made accessible, the employer may have to provide an alternative interview site, or make other arrangements for an interview to take place, such as over the phone. In short, absent a showing of undue hardship, a covered employer must provide accommodations that will ensure equal opportunity in the application process.

If (b)6 7(b)7c wishes to pursue the matters raised in her letter, she should contact the Commission's Richmond Area Office in order to file a charge of employment discrimination. The address and telephone number are:

U.S. Equal Employment Opportunity Commission  
Richmond Area Office  
3600 West Broad Street  
Room 229  
Richmond, Virginia 23230  
804-278-4651



Additionally, Title III of the ADA, which is enforced by the Department of Justice, may be applicable. In general, Title III requires an entity that owns, leases, leases to, or operates a place of public accommodation to remove architectural barriers where such removal is readily achievable. 42 U.S.C. §12182(b)(2)(A)(iv). An employer that is also a place of public accommodation is subject to both Titles I and III of the ADA. There may be a violation of Title III, as well as Title I, if any of the businesses to which (b) 6 7 (b) 7 C made application is a place of public accommodation and is not accessible. To obtain further information about Title III of the ADA, (b) 6 7 (b) 7 C should contact the Department of Justice at the following address and telephone number:

U.S. Department of Justice  
Disability Rights Section  
P. O. Box 66738  
Washington, D.C. 20035-6738  
202-307-0663

We hope this information is helpful. Please note, however, that this letter is an informal discussion of the issues raised by (b) 6 7 (b) 7 C and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,

(b) 6 7 (b) 7 C



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

12/15/97

(b) 6 4 (b) 7c

This is in response to your inquiry dated November 10, 1997, on behalf of (b) 6 4 (b) 7c. (b) 6 4 (b) 7c expressed concern that the Americans with Disabilities Act (ADA) requires public transportation employers to retain employees who, because of a disability, pose significant risks to the public. His concern is apparently based on a newspaper column by Walter Olson, which is enclosed with his letter.

Congress enacted the ADA to combat the myths, fears, and stereotypes about disabilities that have often prevented qualified individuals from gaining and holding employment. Some of the most pernicious stereotypes concern the alleged safety threat people with various disabilities pose to others. Thus, the ADA is designed to ensure that employers do not exclude individuals based on speculation and unsubstantiated fears, but rather because they have objective information that shows that an individual poses a "direct threat" (i.e., a significant risk of causing substantial harm that cannot be reduced or eliminated through reasonable accommodation). The ADA describes how employers can make such a determination. The EEOC's regulations and ADA materials provide further detailed guidance so that employers can make a rational and supportable determination consistent with the ADA. If an employer shows that a person poses a significant risk of substantial harm to others then the employer is not required to hire or retain the individual in that job. The ADA does not compromise anyone's safety, but it does ensure that people with disabilities are not the subject of discrimination based on speculative claims of possible harm.

Furthermore, and contrary to (b) 6 4 (b) 7c column, the ADA gives employers great leeway to ask individuals for medical information. After making a job offer, an employer may ask individuals any medical question, or subject them to any medical examination, as long as such questions and examinations are given to all individuals offered the same job. Thus, for example, an airline may require all individuals offered a pilot position to take an eye examination. If the answers to any medical questions or the results of any medical examinations show that a person poses a significant risk of substantial harm to others, then the employer may revoke the job offer. Finally, if an employer reasonably believes, based on objective information, that an employee may pose a "direct threat" to others, then the ADA permits the employer to make appropriate inquiries, or require the employee to undergo a medical examination, to ensure that the employee can safely continue performing his/her duties.

Th (S) 6 4 (b) 7 C  
Page 2

(b) 6 4 (b) 7 C wishes to learn more about what the ADA does and does not require, he can get information on the EEOC's home page at <http://www.eeoc.gov>, or he can request our free ADA publications by calling the EEOC's Publication Center at 1-800-669-3362. We hope this information is helpful to you.

Sincerely,

(b) 6 4 (b) 7 C  
ations



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

DEC 15 1997

(b) 6 4 (b) 7 c

1

This is in response to your recent telephone inquiry to the Internal Revenue Service (IRS), which was referred to us. You expressed concern about the potential for liability under the federal equal employment opportunity (EEO) laws if a company uses the IRS form 8850 ("Work Opportunity Credit Pre-Screening Notice and Certification request") to screen applicants for eligibility under the new Work Opportunity Tax Credit (WOTC) program.

The IRS form 8850 will not expose you to liability under the EEO laws. First, the request on the form 8850 for an individual's birthdate does not violate the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq. The ADEA does not expressly prohibit an employer from asking an applicant's age. Additionally, the ADEA regulation includes a specific exemption from "all prohibitions of the Act" for programs "carried out by the public employment services of the several States, designed exclusively . . . to encourage the employment of [various groups including] youth." 29 C.F.R. § 1627.16.

The form 8850 also does not put the employer in the position of asking a pre-employment disability-related inquiry that is prohibited by Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA). The form 8850 is structured so that it does not make a disability-related inquiry. Therefore, employers are free to use this form with job applicants before making an offer of employment, without concern about ADA liability.

In addition, the form 8850 does not put the employer in the position of violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Title VII does not expressly prohibit pre-employment inquiries which disclose an applicant's race, color or national origin. In any event, the form 8850 does not ask whether an individual belongs to a particular Title VII protected group. Moreover, the purpose of the inquiries on the form 8850 is to provide employment, not to deny it.

We hope that this information is helpful.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

OK

DEC 17 1997

(b)6 4 (b)7C

This is in response to your inquiry dated November 3, 1997, on behalf of (b)6 4 (b)7C who states that his child was denied life insurance because of his autism. Mr. (b)6 4 (b)7C questions whether it is legal for an insurance company to deny life insurance coverage to an individual with a disability when life expectancy is not an issue.

The Equal Employment Opportunity Commission (EEOC or Commission) enforces federal laws prohibiting discrimination in employment, including Title I of the Americans with Disabilities Act (ADA), which prohibits employment discrimination on the basis of disability. 42 U.S.C. § 12111 et seq. This prohibition includes discrimination in the provision or administration of fringe benefits, such as employer-provided health or life insurance. 29 C.F.R. § 1630.4(f). It appears from (b)6 4 (b)7C letter, however, that he did not seek coverage for his son under an employer-provided life insurance plan but, rather, applied directly to the insurance company, Northwestern Mutual Life, for such coverage. Thus, the denial of coverage in this instance raises no Title I implications and is therefore outside the Commission's jurisdiction.

Northwestern Mutual Life's denial of life insurance coverage to (b)6 4 (b)7C on may, however, be governed by Title III of the ADA, which prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. 42 U.S.C. § 12182(a). The Department of Justice (DOJ) enforces Title III. If (b)6 4 (b)7C wishes to file a complaint with the DOJ, he may do so by writing to the following address:

Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66738  
Washington, D.C. 20530-6738

The (b) 6 + (b) 7c  
Page 2

This letter is an informal discussion of the issues raised in your letter and is not an official opinion of the EEOC. I hope this information is helpful.

Sincerely,

(b) 6 + (b) 7c



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

DEC 15 1997

(b) 6 4(b) 7C

Georgia Department of Labor  
148 International Blvd. NE, Room 422  
Atlanta, Georgia 30303-1751

(b) 6 4(b) 7C

This is in response to your recent telephone inquiry to the Internal Revenue Service (IRS), which was referred to us. You expressed concern about the potential for liability under the federal equal employment opportunity (EEO) laws if a company uses the IRS form 8850 ("Work Opportunity Credit Pre-Screening Notice and Certification request") to screen applicants for eligibility under the new Work Opportunity Tax Credit (WOTC) program.

The IRS form 8850 will not expose you to liability under the EEO laws. First, the request on the form 8850 for an individual's birthdate does not violate the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq. The ADEA does not expressly prohibit an employer from asking an applicant's age. Additionally, the ADEA regulation includes a specific exemption from "all prohibitions of the Act" for programs "carried out by the public employment services of the several States, designed exclusively . . . to encourage the employment of [various groups including] youth." 29 C.F.R. § 1627.16.

The form 8850 also does not put the employer in the position of asking a pre-employment disability-related inquiry that is prohibited by Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA). The form 8850 is structured so that it does not make a disability-related inquiry. Therefore, employers are free to use this form with job applicants before making an offer of employment, without concern about ADA liability.

In addition, the form 8850 does not put the employer in the position of violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Title VII does not expressly prohibit pre-employment inquiries which disclose an applicant's race, color or national origin. In any event, the form 8850 does not ask whether an individual belongs to a particular Title VII protected group. Moreover, the purpose of the inquiries on the form 8850 is to provide employment, not to deny it.

We hope that this information is helpful.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

DEC 17 1997

(b) 6 & (b) 7C

This is in response to your request for comments on the draft of the statement titled "The Rights and Responsibilities of Test-Takers" prepared by a working group of the Joint Committee on Testing Practices. We specifically reviewed the draft document to see if it raises concerns under the Americans with Disabilities Act (ADA or Act).

The ADA is a comprehensive anti-discrimination statute that prohibits discrimination against individuals with disabilities in private, state, and local government employment, public accommodations, public transportation, state and local government services, and telecommunications. The Equal Employment Opportunity Commission (EEOC) enforces Title I, which prohibits employment discrimination against qualified individuals with disabilities. The Department of Justice (DOJ) enforces Title II of the Act, which applies to public services provided by state and local governments, and Title III, which prohibits discrimination on the basis of disability by public accommodations and requires that examinations or courses related to licensing or certification for professional or trade purposes be accessible to persons with disabilities. Although the draft document raises a few Title I concerns, we believe that it most significantly raises issues that might have Title II and Title III implications. We therefore recommend that you submit the statement to the DOJ for comments, if you have not already done so.

To the extent that the document applies to rights and responsibilities regarding testing as it relates to employment, we have concerns regarding the rights elaborated in subsections 4.i., 6.e., 7.a., and 9 under the section titled "Elaboration of Rights of Test-Takers."

4.i. "If you will be receiving a test administration that is modified in some way to accommodate you, you will have a right to know in advance of the testing if the test results will be identified or flagged as a result of a special administration." Information about the nature of a test modification will often disclose the fact that a test taker has a disability and may indicate the nature and extent of the disability. Title I prohibits employers from making inquiries regarding whether an applicant for employment has a disability the nature and extent of the disability. An employer who receives information from a test administrator concerning test modifications that were made for a job applicant may thereby acquire prohibited disability-related information about the applicant. Flagging a test, therefore, may violate Title I of the ADA.

6.e. "Unless the test you are taking has a time limit, you are entitled to as much time as you



(b)6 + (b)7C |

reasonably need to complete the test.” Title I of the ADA requires an employer to make reasonable accommodations to the known physical or mental limitations of an employee or applicant for employment unless the accommodation would impose an undue hardship. With respect to the job application process, reasonable accommodation means making modifications or adjustments that enable a qualified applicant with a disability to be considered for the position desired. Thus, even if a test has a time limit, a person with a disability may be entitled to more time to take the test as a reasonable accommodation.

7.a. “You should only be tested when you have provided your informed consent to take a test, except when testing without consent has been mandated by law or government regulation, or when consent is implied by an action you have already taken (e.g., such as when you apply for employment and a personnel examination is mandated).” Tests given without consent may raise concerns under Title I if adequate notice is not given that would allow the test-taker with a disability to request a reasonable accommodation. A test-taker with a disability cannot be required to take a test for which notice sufficient to request and receive a reasonable accommodation has not been given. Under these circumstances, the employer and/or test administrator must allow the test-taker with a disability who needs an accommodation to take the test at a later time.

9. The rights stated in this section relate to confidentiality about test results but do not mention the confidentiality requirements under the ADA regarding requests for reasonable accommodations and documentation supporting such requests. If an applicant for employment requests a reasonable accommodation to take a test and the need for the accommodation is not obvious, the ADA allows an employer or test administrator to ask an applicant for documentation about his/her disability. The ADA requires, however, that any medical information obtained at any point in the employment process be kept confidential. This section, therefore, should state that a test taker has a right to have the request for accommodation and the documentation supporting the request kept confidential.

We hope that these comments are helpful. Please note that this letter is an informal discussion of some of the issues raised by the document you asked us to review and is not an official opinion of the EEOC.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

(b) 6 4(b) 7c

DEC 11 1997

This is in response to your letter dated November 20, 1997, addressed to Gilbert Casellas, Chairman of the Equal Employment Opportunity Commission (EEOC). As you know, the Commission is charged with enforcement of, among other laws, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. Title VII contains a number of affirmative defenses, one of which is found in section 703 (g) of the Act. In summary, section 703 (g) provides that it shall not be an unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual where employment in a position carries with it a requirement that the occupant of the position have a security clearance and the individual does not have one. See 42 U.S.C. § 2000e-2 (g).

Your letter references language contained in certain EEOC federal sector appellate decisions stating that the Commission "is not precluded from determining whether the grant, denial or revocation of a security clearance is conducted in a non-discriminatory manner." You appear to be seeking information on the scope of this language.

In response to your request I have attached an EEOC federal sector appellate decision captioned Thierjung v. DOD, DMA, and a policy guidance addressing the national security exception, both issued in 1989. The policy guidance sets forth the Commission's position on all aspects of the section 703 (g) exception including the scope of an investigation into the grant, denial or revocation of a security clearance. The federal sector decision represents an actual case in which the section 703 (g) exception was applied. These documents reflect the Commission's current enforcement position on section 703 (g) of Title VII.

Thank you for your interest in this matter. I hope this information is helpful.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel

Enclosures



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JAN 26 1998

36467

We have received your letter dated January 16, 1998, requesting further information about our enforcement of Title I of the Americans with Disabilities Act of 1990 (ADA), pursuant to the U.S. Commission on Civil Rights' (CCR) study. Because the request is overbroad and in large part irrelevant to the purpose of your study, we cannot comply with it. Despite a woefully inadequate budget and an ever-shrinking staff, the Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the federal employment discrimination laws for the entire nation, in both the public and private sectors. We cannot sacrifice the hundreds of personnel hours it would take to gather the requested information -- much of it from our fifty field offices -- without seriously impairing our ability to fulfill our Congressional mandate to fully and effectively enforce, not only Title I of the ADA, but also Section 501 of the Rehabilitation Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Equal Pay Act. We also find it incomprehensible that you would allot our staff less than three weeks to respond to such a request.

Much of the requested information, such as that pertaining to EEOC's organizational and staffing decisions, bears no relevance to our enforcement of Title I of the ADA and appears to be little more than a fishing expedition. Furthermore, most, if not all, of the specific substantive questions about the ADA are answered in the EEOC's Title I regulations and the accompanying Interpretive Guidance, the EEOC Technical Assistance Manual, and the twelve ADA policy documents which we provided to you in September 1997. Many of the questions in your request suggest to us that the documents we have already supplied have not been reviewed. As you know, in your past study of the EEOC, our staff spent a great deal of effort to provide your agency with over 200 boxes of materials (50 boxes from headquarters alone), but no report was ever issued.

We will be happy to respond to a carefully tailored request for information from CCR that reflects the concerns we have raised. While we are happy to provide you relevant existing documents, we do not have the resources to conduct any surveys or to create any new documents for this purpose, nor do we believe that this is necessary to enable you to effectively conduct your

study. We also decline to create legal analyses or tutorials on Title I of the ADA, since the documents we have already provided -- together with the EEOC's ADA amicus briefs, which we would be happy to provide to you -- are adequate for these purposes. Finally, we remind you that staff deliberation on ADA issues that have not yet been addressed by the Commission, and the draft documents on such issues, are protected from disclosure by the various privileges discussed in our December 15, 1997, letter to you.

Please contact (b) (6) & (b) (7) C if you have any questions regarding this matter.

Sincerely,

*Ellen J. Vargyas*

Ellen J. Vargyas  
Legal Counsel

cc: (b) (6) & (b) (7) C



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

FEB 13 1998

(b) 64 (b) 7c

This responds to your January 9, 1998, letter regarding the Americans with Disabilities Act of 1990 (ADA). In your letter, you ask whether an employer may provide "accident, injury, and occupational illness information obtained from employees" to a "collection company."

As you know, under the ADA, an employer must keep medical information on applicants or employees confidential, with the following limited exceptions:

supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;

first aid and safety personnel may be told if the disability might require emergency treatment;

government officials investigating compliance with the ADA must be given relevant information on request;

employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws; and

employers may use the information for insurance purposes.

These confidentiality requirements apply to any medical information, including information that an employee voluntarily discloses to the employer. EEOC ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 22 (Oct. 10, 1995). Additionally, employers must keep medical information confidential even if an individual is no longer an applicant or employee. Id. At 23.

The information you describe is medical information subject to the ADA's confidentiality requirements. Accordingly, an employer may not disclose it to a "collection company" unless the disclosure meets one of the stated exceptions. You have not shown this to be the case.

In response to your particular point about DSM-IV, the Commission began the Guidance by calling attention to the importance of DSM-IV for identifying a “mental impairment” under the ADA. Guidance at 1-3, Question 1. The Commission did not, however, categorically require submission of a DSM-IV diagnosis by a psychiatrist or other physician in order to establish mental impairment. As explained in the Guidance, not every disorder listed in DSM-IV qualifies as an impairment or disability under the ADA. Moreover, a variety of clinicians and health professionals may provide useful documentation about impairment and substantial limitation, including primary health care professionals, psychiatrists, psychologists, and psychiatric nurses, among others. Guidance at 13-14, Question 14. Requirements should not be adopted that could discourage employees from coming forward with such documentation or from requesting reasonable accommodation in the first place. Similarly, employers should not be prevented from providing an accommodation based on information or documentation they consider sufficient in a particular situation. As to the credibility of an employee’s “treating clinician,” employers are free to assess it on an individual basis. *Cf.* Guidance at 13-14, Question 14 & n.33. In our view, however, employers and their doctors should not categorically dismiss the contribution of treating clinicians, who may know the employee best.

#### Fitness for Duty Evaluations

You express concern that several statements in the Guidance may impose “unworkable limitations” on fitness for duty examinations. AOOOP Memorandum at 2. Under the ADA, all employee medical examinations, including fitness for duty examinations, must be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4). The examination “must not exceed the scope of the specific medical condition and its effect on the employee’s ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.” Guidance at 16, Question 14. The Guidance applies this standard to a fitness for duty examination for an individual returning from a hospitalization for depression, emphasizing that the examination must be limited to the “effect of her depression on her ability, with or without reasonable accommodation, to perform essential job functions.” Guidance at 17, Question 14, Example D. This example does not bar inquiry into any of her prior psychiatric history. Rather, it stands for the proposition that such an inquiry should be pursued to the extent it is expected to yield information concerning her depression and its effect on her ability, with or without accommodation, to perform the essential functions of her current job. Under this standard, a request for her complete medical record, concerning all her medical conditions, would be excessive in most situations. The ADA requires a careful case-by-case assessment of the scope of medical inquiries.

#### Mainstreaming and Stigma

Your comments in this section call attention to perceived negative consequences of reasonable accommodation for individuals with psychiatric disabilities. First, you observe that accommodation can lead to envy, stigma, and consequent exacerbation of emotional distress, especially if co-workers do not know the reason for the accommodation. AOOOP Memorandum

at 3. Although co-workers' envy may be a real concern in some workplaces, the ADA's confidentiality provisions are clear that employers may not disclose medical information in response to such pressure. 42 U.S.C. § 12112(d)(4)(C). Apart from the fact that this disclosure is illegal, it also could backfire if co-workers harass the individual with a disability on the basis of her disability. The Commission encourages employers to address this difficult question by creating a workplace culture in which employees know that the employer will meet their needs, whether under the ADA, the Family and Medical Leave Act, a flexible scheduling or work-at-home arrangement, or another program or law. *See* Guidance at 18, Question 16.

You criticize the Guidance for requiring particular accommodations that may not always be effective. AOOOP Memorandum at 3. The Guidance cites many examples of reasonable accommodations for individuals with psychiatric disabilities, but makes no claim that a particular accommodation is required in any specific circumstance. Guidance at 23-28, Questions 23-29. According to the Guidance, accommodations "must be determined on a case-by-case basis because workplaces and jobs vary, as do people with disabilities." Guidance at 23. Thus, in the example cited in your comments, if a private work space would not enable an individual with depression and associated concentration problems to perform his or her essential job functions, then it would not be an effective accommodation. *See* AOOOP Memorandum at 3. Given the case-by-case nature of accommodation, psychiatrists who are consulted during the accommodation process have an opportunity to make a useful contribution by advising which accommodation(s) may be effective in a particular situation.

#### Potential for Abuse

Your comments argue that the Guidance "pose[s] an enormous potential for abuse" by "individuals with relatively minor emotional problems" in part because it does not include procedural protections like "requirements for accurate independent professional diagnosis." AOOOP Memorandum at 3. As discussed in the Guidance, however, the ADA provides clear opportunities for employers to weed out individuals who may be abusing the law. Employers may request documentation after a request for accommodation (Question 21) and may require the employee to go to a health professional of the employer's choice if the initial documentation is insufficient (Question 22). Thus, an individual must be able to show that he has an impairment that substantially limits a major life activity and also necessitates the requested accommodation. Guidance at 6-12, Questions 5-12. This analytic framework is not undermined simply because employers (and EEOC investigators) may consider, as part of their overall analysis, relevant and credible statements from non-professionals.

#### Clinical Reality

You appear to have concluded that the EEOC is unaware of the "clinical reality" that some psychiatric disabilities may be "readily treatable" and that some individuals may fully recover. AOOOP Memorandum at 4. You argue for a "sunset clause" with regard to how long a given psychiatric disability can justify a reasonable accommodation. We are fully aware that some

psychiatric disorders now are treatable and that individuals may fully recover.<sup>1</sup> However, reasonable accommodation is always a case-by-case determination, and EEOC would not establish a categorical “sunset clause” applicable to accommodations for given psychiatric disabilities. Rather, it is our position that an individual who seeks reasonable accommodation must be prepared to show that he has a covered disability, and that the functional limitations of the disability in fact necessitate a reasonable accommodation to enable him to perform his essential job functions. In your example, an individual who “had a major depression 10 years ago and . . . is no longer on medication” would be entitled to continued reasonable accommodation only if he could make this showing. *Id.*<sup>2</sup>

Your comments also suggest that the Guidance may be a disincentive for offering mental health services, because a supervisor may incur the “risk of perceiving [an] employee as having a disability” by referring him to an Employee Assistance Program (EAP). Referral to an EAP would not mean that the supervisor automatically regarded the employee as having a psychiatric disability within the meaning of the ADA. In order to regard someone as disabled, an employer must treat the individual as having a substantial limitation in a major life activity, for example, learning, thinking, or working. Thus, the employer would only trigger this prong of the definition of disability if, in the process of making an EAP referral, it made broad statements about the individual’s significant problems in major life activities like learning, thinking, or pursuing a whole line of work. An EAP referral, made routinely and with a focus on unacceptable workplace conduct, would not in itself entail such exposure. *See* Guidance at 29-32, Questions 30-32 (Conduct).

### Personality Disorders

You argue that the reality of personality disorders makes them inappropriate for coverage under the ADA. AOOP Memorandum at 4. However, Congress did not exclude personality disorders from the ADA’s definition of “disability,” although it did expressly exclude other psychiatric conditions. *See* 42 U.S.C. § 12211(b) (stating that the term “disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance

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<sup>1</sup> EEOC’s position under the ADA is that the effects of medication should not be considered in evaluating disability. Guidance at 6, Question 6. This does not mean that EEOC is encouraging employers or courts to ignore the fact that someone may have recovered from a psychiatric disability, in part due to medication. It does mean, however, that an individual’s current and underlying disability should not be discounted for ADA purposes just because its effects are now masked by medication. Legislative history to the ADA makes clear that this was Congress’ intent. *Id.* at 7, & n.21.

<sup>2</sup> The individual described in your example also might be covered by the second prong of the definition of “disability,” as having a record of a substantially limiting impairment. 42 U.S.C. § 12102(2)(B).



use disorders resulting from the current illegal use of drugs). Accordingly, personality disorders are subject to the same ADA analysis as other mental conditions.

An employer would have ample opportunity to determine if an individual alleging a personality disorder in fact has a disability within the meaning of the ADA, including requesting documentation and an independent examination in appropriate circumstances. *See* Guidance at 22-23, Questions 21 & 22. Although finding an effective accommodation may be difficult, this is another opportunity for psychiatrists to provide useful input about what may (or may not) be effective for a particular individual. Finally, an employer is free to enforce conduct standards prohibiting, for example, violence, threats, theft, and destruction of property. *See* Guidance at 29-32, Questions 30-32 (discussing conduct standards).

Please note that this letter is an informal discussion of the issues you raised and is not an official opinion of the EEOC. In addition, our silence about matters that may have been presented should not be construed as agreement with statements or analysis related to those matters.

We hope these responses are useful in advancing dialogue about the ADA.

Sincerely,

A handwritten signature in black ink that reads "Ellen J. Vargyas". The signature is written in a cursive, flowing style.

Ellen J. Vargyas  
Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

FEB 09 1998

(b) 6 4 (b) 7C

This is in response to your letter to the Equal Employment Opportunity Commission (EEOC or Commission), which was forwarded by our Chicago District Office to the Office of Legal Counsel on January 5, 1998. Your letter concerns an employee assistance program (EAP or program) which your client is developing. You enclosed a memorandum summarizing the program, titled "Behavioral Intervention System," with the letter (BIS Memorandum). In your letter, you express concerns about whether certain portions of the program may violate provisions of Title I of the Americans with Disabilities Act (ADA).

Your client's proposed "Behavioral Intervention System" appears to be directed to employees who need "a structured program of intervention" to "perform at an acceptable level" or to contribute to "the Company's ability to provide service." See BIS Memorandum at 1. After an employee is assigned to the program, he is involved in, or the subject of, various meetings with supervisors and personnel officials, and must work under a plan "to correct the problematic behavior or performance issue." *Id.* at 2. The employee also is the subject of twice-monthly supervisory reports to personnel officials about his progress under the plan. *Id.*

Prescription Medication

Your first question is whether "it would be appropriate to place an employee in this program solely on the basis that the employee may be taking a prescription medication for any medical condition the employee suffers . . . (i.e., epilepsy, diabetes, depression, hypertension)." Letter from Vincent J. Krocka to EEOC (Dec. 23, 1997). Although every person who "may be taking a prescription medication" is not an individual with a disability under the ADA, your client's policy could expose it to an ADA challenge from employees who take prescription medications based on any one of several theories. First, an individual with a disability could argue that he was treated differently on the basis of disability, because colleagues without disabilities who did not have performance or conduct problems were not placed in the program. Second, an individual with a disability could argue that this policy has a disproportionate adverse impact on him or on a class of individuals with disabilities. Under the ADA, an employer may not use an employment practice or policy that screens out or tends to screen out an individual with a disability, or class of individuals with disabilities, on the basis of disability unless the practice or policy is shown to be job-related and consistent with business necessity, and accommodation is

not possible. 29 C.F.R. §§ 1630.10, 1630.15(c). Your client would probably have difficulty showing that its prescription medications policy is job-related and consistent with business necessity as to employees who do not have performance or conduct problems. Finally, an individual who does not currently have a disability but is referred to the EAP because she takes prescription medications could, in some instances, argue that the employer “regards” her as disabled under the ADA. 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630(g)(3). Although referral to an EAP is not, in itself, sufficient to establish that an employer regards an individual as disabled, the combination of EAP referral, knowledge of prescription medication use, and perhaps other factors, may be sufficient to establish that the employer regards a particular individual as disabled under the ADA.

### Preemployment Inquiries

You also asked whether “psychological symptomology may be inquired about on [the client’s] employment application and medical history addendum.” Letter from Vincent J. Krocka to EEOC (Dec. 23, 1997). The ADA prohibits an employer from asking a job applicant whether he “is an individual with a disability or [about] the nature or severity of such disability.” 42 U.S.C. § 12112(d)(2); 29 C.F.R. § 1630.13(a). The Commission has explained that this prohibition encompasses questions that are “likely to elicit information about a disability,” because they directly inquire about disability or are “closely related” to disability. *See* EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, at 4, 8 FEP Manual (BNA) 405:7191 (1995). The Commission has stated that an employer may not ask questions on a job application about “history of treatment of mental illness, hospitalization, or the existence of mental or emotional illness or psychiatric disability.” *See* EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at 13, 8 FEP Manual (BNA) 405:7461 (1997). Thus, the question for your client is whether inquiries about “psychological symptomology” are “likely to elicit information about a disability,” or concern “the existence of mental or emotional illness or psychiatric disability.”

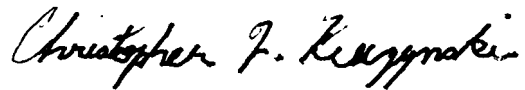
Although the meaning of the term “psychological symptomology” is not entirely clear, there is a strong argument that such an inquiry would be “likely to elicit information” about mental or emotional illness or psychiatric disability. Use of the term “symptomology” indicates that your client’s focus is on identifying symptoms of psychological conditions. Once your client has identified which symptoms a particular individual experiences, it would not be difficult to conclude that the individual has a particular mental disorder, especially if a Company-contracted or -employed psychologist were involved in the evaluation. *See* BIS Memorandum at 3. Mental disorders are defined by their unique profile of symptoms. *See* Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association, 4th ed. 1994). Accordingly, your client should not ask about “psychological symptomology” on its job application and medical

addendum.<sup>1</sup>

Please note that this letter is an informal discussion of the issues raised in your letter and is not an official opinion of the EEOC. In addition, our silence about matters that may have been presented in your letter and the attached memorandum should not be construed as agreement with statements or analysis related to those matters.

For your information, we are enclosing copies of the two EEOC guidances referenced in our discussion. We hope they will be informative.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division

Enclosures

cc:

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<sup>1</sup> Indeed, your client should not make any other disability-related inquiries on its job application and medical addendum. Such questions should be reserved until after a conditional offer of employment is made, provided that the employer is asking the same question of all individuals in the same job category. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b).



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

FEB 06 1998

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This responds to your January 7, 1998, letter asking us to review several employment forms for compliance with the Americans with Disabilities Act of 1990 (ADA).

**1. General Standards Governing Disability-Related Questions and Medical Examinations**

As you know, under the ADA, an employer may not ask disability-related questions or require medical examinations before an applicant has been given a conditional job offer. A disability-related question is one that is likely to elicit information about a disability. A medical examination is a procedure or test that seeks information about an individual's physical or mental impairments or health. After a conditional job offer is made, an employer may ask disability-related questions and administer medical examinations if it does so for all entering employees in the same job category. If the question or examination screens out an individual because of a disability, then the employer must demonstrate that the reason for the rejection is job related and consistent with business necessity. If the individual is screened out for safety reasons, the employer must demonstrate that the individual poses a "direct threat." This means that the individual poses a significant risk of substantial harm to him/herself or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation. (See enclosed Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations.)

Once an employee enters on duty, all disability-related questions and medical examinations must be job related and consistent with business necessity. This means that the employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition or (2) an employee will pose a direct threat due to a medical condition. In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.

An employer must keep any medical information on applicants or employees confidential, with the following limited exceptions:

supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations;

first aid and safety personnel may be told if the disability might require emergency treatment;

government officials investigating compliance with the ADA must be given relevant information on request;

employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws; and

employers may use the information for insurance purposes.

Medical information must be collected and maintained on separate forms and in separate medical files, apart from the usual personnel files.

## **2. The "Health History" Form**

The "Health History" form contains numerous disability-related questions and may not be used at the pre-offer stage of the employment process. It may be used at the post-offer stage if it is given to all entering employees in the same job category. It is unlikely that an employer would have a reason that is job-related and consistent with business necessity for requiring an employee to complete the entire form. Specific disability-related questions, however, may be asked of employees when the questions are job related and consistent with business necessity.

## **3. The "Physical Assessment" Form**

The "Physical Assessment" form appears to be part of a medical examination. The medical examination may not be administered at the pre-offer stage but may be administered at the post-offer stage if it is given to all entering employees in the same job category. As noted previously, any medical examination given to an employee must be job related and consistent with business necessity. It is unlikely that a broad examination of the type described on the form would meet this standard.

#### **4. The “Preplacement and Transfer Medical Examination” Report**

The “Preplacement and Transfer Medical Evaluation Report” asks an examining nurse or physician to provide information about an applicant’s need for reasonable accommodation and about medical conditions that pose a direct threat. This disability-related information may be obtained from an applicant only at the post-offer stage and is subject to the ADA’s confidentiality requirements.

#### **5. The “Consent for Testing and Medical Evaluation” Form**

The “Consent for Testing and Medical Evaluation” form is not a medical examination and does not pose any disability-related questions. We note, however, that the form states that an employee may be required to submit to a physical evaluation “should there be a need to determine . . . fitness for duty.” Fitness-for-duty examinations of employees are permissible only if they are job related and consistent with business necessity.

We also note that the form refers to a physical evaluation that includes “drug or alcohol screening.” A test to determine the current illegal use of drugs is not a medical examination and so may be administered at any time. Alcohol screening and physical evaluation are medical examinations. Thus, they may not be administered at the pre-offer stage, but may be administered at the post-offer stage if given to all entering employees in the same job category, and may be administered to employees only when they are job related and consistent with business necessity.

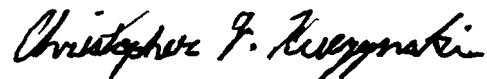
In addition, the form seeks authorization to release the results of a medical evaluation to management officials “in the position to need to know the results,” company physicians, and “health insurers and health care evaluating groups.” This appears to go beyond the ADA’s stated confidentiality exceptions. It is not clear whether an individual can waive the ADA’s proscription on the disclosure of confidential information. Therefore, it could violate the ADA for an employer to disclose medical information beyond the ADA’s stated confidentiality exceptions even if the individual signed the form.

Finally, the form states that the individual “release[s] the Company and its agent from any and all claims or causes of action resulting from this examination and any decisions resulting therefrom.” It is very unlikely that this language would be interpreted as a knowing and voluntary waiver of an individual’s right to be free from employment discrimination. Thus, for example, it is very unlikely that this language could be used to block a lawsuit by an individual alleging that the employer did not hire him or her because of disability-based discrimination.

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Page Four

This letter is an informal discussion of the issues you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. In addition, our silence on other statements or analyses that may have been presented in your letter should not be construed as agreement with those matters.

Sincerely,

A handwritten signature in black ink, reading "Christopher J. Kuczynski". The script is cursive and fluid, with the first name "Christopher" and last name "Kuczynski" clearly legible.

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division

Enclosure





U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

FEB 06 1998

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This responds to your December 17, 1997, letter regarding the Americans with Disabilities Act of 1990 (ADA).

You ask about the appropriateness of personality tests in the hiring process. In particular, you question whether a prospective employer may administer a personality test to an applicant with a developmental disability for a dog groomer position. You state that the applicant cannot read or understand all of the questions on the test.

Whether a particular employer may administer and rely on the results of a particular personality test must be determined on a case-by-case basis. Thus, we cannot state broadly whether an employer may, or may not, administer a personality test and rely on it when hiring dog groomers. We can, however, provide you with some general guidance in this area.

Under the ADA, an employer may not ask disability-related questions or require medical examinations before an applicant has been given a conditional job offer. A disability-related question is one that is likely to elicit information about a disability. A medical examination is a procedure or test that seeks information about an individual's physical or mental impairments or health. Whether a particular test is medical depends on a variety of factors. Psychological examinations are medical if they provide evidence that would lead to identifying a mental disorder or impairment. On the other hand, if a test is designed and used to measure only things such as honesty, tastes, and habits, it is not medical. After a conditional job offer is made, an employer may ask disability-related questions and administer medical examinations if it does so for all entering employees in the same job category. If the question or examination screens out an individual because of a disability, then the employer must demonstrate that the reason for the rejection is job related and consistent with business necessity. (See enclosed Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations.)

An employer may administer a personality test at the pre-offer stage of the application process only if it is not a medical examination and does not ask disability-related questions. If the particular test is medical or asks disability-related questions, then the employer may administer it at the post-offer stage if it does so for all entering employees in the same job category.

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The ADA requires an employer to make reasonable accommodations for an applicant with a disability who requests them in order to take a pre-employment test, unless doing so would result in an undue hardship to the employer (i.e., significant difficulty or expense). This means that tests must be administered to people with disabilities in a format and manner that does not require use of their impaired sensory, speaking, or manual skills, unless the test is designed to measure that skill. Moreover, even if a test is designed to measure a particular skill that is impaired due to a test-taker's disability, the test results could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship. The purpose of these requirements is to assure that tests are not used to exclude people with disabilities from jobs that they actually can do because a disability prevents them from taking a test or negatively influences a test result.

Whether an employer must provide a reasonable accommodation to an individual whose disability interferes with the ability to take a personality test depends on the skills that the test is designed to measure. For example, if a written test was not designed to measure an individual's reading ability, then the employer would have to provide a reasonable accommodation to a person whose disability prevented the person from reading unless doing so would be an undue hardship. On the other hand, an employer would not have to provide a reasonable accommodation that enabled the person to understand test questions if the test was designed to measure the individual's comprehension skills.

If an employer used the results of a personality test to exclude a person because of disability, then the employer would have to show that the test was job related and consistent with business necessity and that the selection criterion could not be satisfied through reasonable accommodation. Essentially, the employer would have to show that the individual could not perform the essential functions of the position at issue even with reasonable accommodation.

If you believe that the individual you mentioned has been subjected to disability-based employment discrimination, then he, or someone acting on his behalf, may file a charge of discrimination with his local Equal Employment Opportunity Commission (EEOC) office. Generally, a charge should be filed within 180 days of the alleged discrimination. The EEOC's Minneapolis Area Office may be reached at the following address and telephone number:

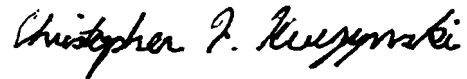
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Page Three

Equal Employment Opportunity Commission  
Minneapolis Area Office  
330 South Second Avenue  
Suite 430  
Minneapolis, Minnesota 55401-2224  
(612) 335-4040 (voice)  
(612) 335-4045 (TTY).

This letter is an informal discussion of the issues you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. In addition, our silence on other matters that may have been presented in your letter should not be construed as agreement with those matters.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAR - 4 1998

(b) 6 7 (b) 7C

This is a response to your letter to the Equal Employment Opportunity Commission (EEOC) dated January 20, 1998, regarding the Americans with Disabilities Act of 1990 (ADA).

You expressed disappointment at the EEOC's withdrawal of the "Guidelines on the Application of the ADA to Employer Provided Health Insurance" because you believe that the guidelines would have clarified that the ADA requires health insurance providers to cover implantation of a device known as the "Cochlear Implant" for individuals with hearing impairments and would have made clear that an individual may file a charge of discrimination against an insurance company without involving his or her employer.

As an initial matter, the EEOC notice in the Federal Register, dated April 25, 1997, to which you refer, did not set forth any proposed guidelines, but simply stated EEOC's intention to *develop* guidelines regarding health insurance issues under Title I of the ADA. (A copy of the referenced EEOC's "Semiannual Regulatory Agenda" is enclosed.) The EEOC, therefore, has not withdrawn any proposed ADA guidelines. We have simply indicated that the Commission will not issue guidance on this subject at the present time. Of course, we are continuing to look at issues regarding employer provided health insurance programs.

In the meantime, however, the EEOC has provided guidance on health insurance under Title I of the ADA sufficient to apprise covered entities, such as employers, insurance carriers, plan administrators, and health maintenance organizations (HMOs), of their ADA obligations regarding the use of disability-based distinctions in employer-provided health insurance plans. See Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance (June 8, 1993) (Interim Guidance) (enclosed). In addition, the EEOC continues to explore and develop these issues through litigation, the filing of *amicus curiae* (friend of the court) briefs, and further development of guidance. For example, the EEOC is suing the Hertz Corporation because the health insurance plan it provides for its employees imposes a \$150 limit on benefits provided for hearing aids. See EEOC v. Hertz Corp. and Hertz Claim Management Corp., No. CV 97-3140 DT (RNBx) (C.D. Cal. 1997). (Insurance companies often treat cochlear implants like hearing aids.)

## Title I ADA Principles Regarding Disability-Based Distinctions in Employer-Provided Health Insurance Plans

The EEOC enforces Title I of the ADA, which prohibits discrimination in *employment* on the basis of disability. 42 U.S.C. § 12112. This prohibition includes discrimination in the provision and administration of fringe benefits available by virtue of employment, including health insurance plans. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.4(f). The ADA also states, however, that employers and insurance companies may continue to administer health insurance plans based on risk assessment and other traditional insurance practices that are applied uniformly and are not being used as a “subterfuge” to evade the purposes of the ADA. 42 U.S.C. § 12201(c); 29 C.F.R. § 1630.16(f). Title I covers employers’ self-insured health plans, as well as employers’ health insurance plans provided through insurance carriers or other entities, such as HMOs. Id.

Based on these statutory and regulatory provisions, the Commission has set forth the analytic framework for determining whether a specific health-related insurance distinction discriminates on the basis of disability in violation of Title I of the ADA. See Interim Guidance at 3-5. Under this analysis, a distinction must be (1) disability-based, (2) part of a bona fide insurance plan, and (3) used as a subterfuge to evade the purposes of the ADA, in order to violate the ADA. Id. at 5. Not *all* health-related insurance distinctions are disability-based. A disability-based distinction is one that singles out a particular group of disabilities (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., all conditions that substantially limit a major life activity). Id. at 7. Broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Id. at 6. For example, universal limits on, or exclusions from, coverage of all “experimental procedures,” or all “elective surgery,” are not disability-based, although they must be uniformly applied. Id. At 7. A self-insured plan is “bona fide” if it exists and pays benefits, and its terms have been accurately communicated to eligible employees. Id. at 10-11. An insured health insurance plan is “bona fide” if it meets the same criteria, and it is not inconsistent with applicable state law. Id. at 10. “Subterfuge” means different treatment based on disability that is not justified by the particular risks or costs associated with the disability. Id. at 11.

Whether a particular provision of a health insurance plan offered in connection with employment, such as one applying to cochlear implants, violates Title I of the ADA must be determined on a case-by-case basis. If your son believes that he has been subjected to discrimination on the basis of disability in violation of Title I of the ADA because of a health insurance provision and would like to file a charge, he should contact the EEOC’s Phoenix District Office at the following address and telephone number as soon as possible:

Equal Employment Opportunity Commission  
Phoenix District Office  
3300 N. Central Avenue, Suite 690  
Phoenix, Arizona 85012-2504  
Telephone: 602/640-5000 (voice) or 602/640-5072 (TDD).

Your son should be aware that a claim may be untimely if it is not filed with the EEOC within the statutory deadline of either 180 or 300 days of the alleged discriminatory action. The Phoenix District Office can inform you of the applicable deadline. You should also be aware that, under Title I of the ADA, your son may be entitled to reasonable accommodations in the workplace that would assist him to overcome the barriers related to his hearing impairment, such as a TDD, a sign language interpreter, or communication in writing. The availability or provision of such accommodations, however, have no effect on the obligation of an employer and/or a health insurance provider to ensure that its health insurance plan does not violate the ADA.

#### Coverage of Health Insurance Companies

As we noted above, Title I of the ADA specifically applies to *employment* discrimination. Therefore, the EEOC generally finds *both* insurance providers *and* employers liable under Title I of the ADA for discrimination in employer-provided health insurance plans. Title I of the ADA makes clear that employers are responsible for discriminatory provisions in the health insurance plans they offer to employees. For example, section 102 of Title I of the ADA prohibits an employer from participating in a contractual relationship that has the effect of subjecting its qualified applicant or employee with a disability to discrimination prohibited by Title I. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.6. An employer cannot divest itself of responsibility to comply with the provisions of Title I of the ADA regarding fringe benefits through contracts with a third party. The EEOC has many times succeeded in obtaining necessary changes in discriminatory insurance plans by employers and insurance providers during settlement of ADA cases.

Health insurance companies or other entities that administer health insurance benefits may be covered by Title I of the ADA because they are (1) the “employer,” since they exist solely for the purpose of enabling employers to delegate their responsibility for providing health insurance benefits; (2) the “agent of the employer,” where the employer controls the manner in which the benefits are administered; or (3) “third party interferers” in the relationship between the employer who established the plan and its employees who are covered by the plan. See, e.g., Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Assn. of New England, 37 F.3d 12, 3 AD Cas. (BNA) 1237 (1st Cir. 1994).

The U.S. Department of Justice (DOJ) enforces Title III of the ADA, which prohibits discrimination on the basis of disability by private entities in places of public accommodation. DOJ interprets Title III of the ADA to apply to the terms and conditions of a health insurance

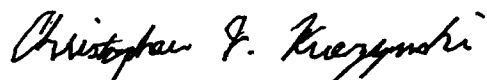
plan offered by a health insurance company, including individual policies. Therefore, if an individual with a disability does not want to file a charge against his or her employer under Title I of the ADA to redress an alleged discriminatory term or condition in an employer-provided health insurance plan, or if an individual has a health insurance policy that is not provided by an employer, he or she may sue the insurance company under Title III of the ADA.

DOJ also enforces Title II of the ADA, which prohibits discrimination on the basis of disability in the services, programs, or activities of state and local governments, and section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability under any program or activity of the federal government. For further information regarding your son's rights under Titles II or III of the ADA, or under section 504 of the Rehabilitation Act, you should contact:

Mr. John L. Wodatch  
Chief, Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035  
202/514-0301 (voice) or 202/514-0383 (TDD).

We hope this information is helpful to you. Please note, however, that this letter does not constitute an official opinion of the Commission.

Sincerely,



Christopher J. Kuczynski  
Associate Legal Counsel  
ADA Division

Enclosures (2)



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

(b) 67677c

MAR 26 1998

This is in response to your inquiry dated November 21, 1997, requesting that we review your employment application to ensure its compliance with the laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC). We apologize for the delay in our response.

The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA), prohibits employers from asking disability-related questions prior to making a job offer. Disability-related questions are those that are likely to elicit information about a disability. This prohibition helps ensure that an applicant's possible hidden disability is not considered before the employer evaluates an applicant's non-medical qualifications. Inquiries about the need for reasonable accommodation are considered disability-related questions, and as such are generally illegal if asked during the pre-offer stage, because they require individuals to reveal whether they have a disability that necessitates some form of accommodation. See ADA Enforcement Guidance: "Preemployment Disability-Related Questions and Medical Examinations" (October 10, 1995) at pages 4 and 5.

The third page of your application, headlined "Special Questions," asks an applicant to indicate whether s/he can perform a specific job function with or without an accommodation. This question is permissible because it focuses on the ability to perform the job function and not on the need for a reasonable accommodation. The next question, however, is illegal because it asks only applicants who need an accommodation to explain how they would perform the function and with what accommodation. Thus, this question is disability-related because it specifically seeks information about the need for an accommodation.

The next question on this page also violates the ADA by asking applicants to indicate whether they have ever been seriously injured, and, if so, to provide details. This question is likely to elicit information about whether an applicant has, or has ever had, a disability, and thus it cannot be asked prior to making a job offer.

Although both questions must be removed from your application form, they can be asked once a job offer has been made, as long as they are asked of all individuals in the same job category. If, however, an employer uses the information learned as the result of asking these questions to withdraw a job offer on the basis of disability, then the employer must demonstrate that its reasons for withdrawing the offer were job-related and consistent with business necessity.



(S) 6467C  
Page Two

The enclosed ADA Enforcement Guidance, on pages 2-3 and 18-20, provides further information concerning these requirements.

The Commission also enforces Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* (Title VII), and the Age Discrimination in Employment Act, *as amended*, 29 U.S.C. § 621 *et seq.* (ADEA). In general, preemployment inquiries that directly or indirectly disclose an applicant's race, color, sex, religion, national origin, or age do not constitute a *per se* violation of Title VII or the ADEA, as long as the inquiries are made of all applicants. However, such inquiries may need to be justified if a hiring decision is challenged, since it is reasonable to assume that hiring decisions are made on the basis of the answers to questions asked in a preemployment interview or on an application. In such circumstances, an employer would need to show that the information was not in fact used in the selection process or that the inquiry concerned a valid criterion for employment.

Your application does not request information on an applicant's race, color, sex, religion, national origin, or age. Nonetheless, you should be aware that your inquiries concerning conviction records and Armed Forces service may raise issues under Title VII if they are used as selection criteria and disqualify disproportionate numbers of minorities or women. If preferences or bonus points are given on the basis of Armed Forces service, for example, the result may be to adversely affect the employment prospects of women, who have not been as well represented as men in the armed services. While such preferences are permissible if they are authorized by statute, they will need to be justified under Title VII if they are voluntarily adopted by an employer and have an adverse effect on women. In addition, courts have recognized that disqualifying applicants on the basis of conviction records may disproportionately affect minorities. *See, e.g., Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975), *appeal after remand*, 549 F.2d 1158 (8th Cir. 1977).

Where an employer's policies adversely affect members of a protected group, the employer must demonstrate that the policies are job-related and consistent with business necessity in order to justify their continued use. For your information in evaluating the use of service records or conviction records as selection criteria, we have attached EEOC Policy Guidance No: N-915, "Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964" (February 4, 1987); EEOC Policy Guidance No: N-915, "Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment" (July 29, 1987); and EEOC Policy Guidance No: N-915-056, "Veterans' Preference under Title VII" (August 10, 1990).

(b) 6 2(b) 7C  
Page Three

I hope this information is helpful to you. Please note that this letter does not represent an official opinion of the EEOC. If you have any further questions relating to the ADA, please call the ADEA, you may call (b) 6 2(b) 7C. For further information on issues under Title VII or

Sincerely,

Peggy R. Mastroianni/JS

Peggy R. Mastroianni  
Associate Legal Counsel

Enclosures



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

(b) 62 (b) 7C

MAR 3 0 1998

This is in response to your letter dated January 26, 1998, requesting that we review the Ohio Civil Service Application to determine whether it raised problems pursuant to the laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC).

The "Applicant Survey" portion of the application requests information on the applicant's race, sex, birth date, disability, and veteran status. The Survey states that responses are voluntary and will not affect the processing of the application or consideration for employment. The Survey also states that the information is requested to assist the state's "equal employment opportunity efforts" and will be used for "statistical purposes only."

The EEOC enforces the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117, 12201-12213 (ADA), which prohibits employers from asking disability-related questions prior to making a job offer. Disability-related questions are those that are likely to elicit information about a disability. Notwithstanding this prohibition, employers are permitted to ask applicants if they wish to self-identify as a person with a disability for purposes of being considered under an employer's affirmative action program. In order for an employer to ask for such self-identification, it must meet the following requirements:

- (1) the employer is undertaking affirmative action because of a federal, state, or local law that requires affirmative action for individuals with disabilities, or the employer is voluntarily using the information to benefit individuals with disabilities;
- (2) the employer must state clearly on any written questionnaire that the information requested is used solely in connection with its affirmative action obligations or efforts;
- (3) the employer must state clearly that the information is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA.

Information collected for affirmative action purposes must be on a form that is kept separate from the application in order to ensure that confidentiality will be maintained.

(S) 64(4) 7C

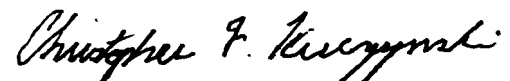
Page Two

The EEOC also enforces Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* (Title VII), and the Age Discrimination in Employment Act, *as amended*, 29 U.S.C. § 621 *et seq.* (ADEA). It is permissible under the federal antidiscrimination laws to request information on race, gender, and age for affirmative employment purposes and/or to track applicant flow. Generally, however, using such information in hiring decisions is not permissible, and the information should be kept separate from the application. There are several methods that the State of Ohio may use to acquire the information necessary for applicant flow and affirmative employment purposes and simultaneously avoid inappropriate use of the data by selecting officials. For instance, data necessary for applicant flow can be obtained by the use of "tear-off sheets" where the tear-off sheet is separated from the application and is not used in the selection process. *Robinson v. Adams*, 847 F.2d 1315 (9th Cir. 1987) (Title VII is not violated where the screener is unaware of plaintiff's race, which was noted only on separate sheet from the application), *cert. denied*, 490 U.S. 1105 (1989).

The survey is attached to the application form and appears to be designed so that the selecting official will not have access to this information during the selection process. The application states the survey will be separated from the application and that "agency personnel will process this survey separately and use the information for statistical purposes only." However, you are concerned that the information provided on the survey can be used in the selection process, since the applicant is requested to provide his/her name. Whether a selecting official actually has access to this information during the selection process can only be determined during an investigation, after a charge has been filed.

If you believe that this form is violating your rights under any of these laws, you may contact the local EEOC office to file a charge. You can reach the nearest EEOC office by calling 1-800-669-4000. I hope this information is helpful to you. This letter does not represent an official opinion of the EEOC.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

(b) 64 (b) 7C

MAR 31 1998

This is a response to your letter, dated January 23, 1998, to the Equal Employment Opportunity Commission, regarding Title I of the Americans with Disabilities Act of 1990 (ADA).

You asked the following questions regarding an employer's proposed "wellness program":

- (1) whether the program is voluntary within the meaning of section 102(d)(4)(B) of the ADA;
- (2) whether the method used for calculating an employee's share of the insurance premium is lawful under the ADA and the EEOC's Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance (Interim Guidance), including part III; and (3) whether the program and the method used for calculating an employee's share of the insurance premium violates any other provision of the ADA.

According to your letter, the wellness program is voluntary because no employee is required to participate. Employees who do not participate in the program pay 100 percent of the employee share of the health insurance premium. Employees who do participate have their share of the health insurance premium reduced by 20 percent for each of five criteria they meet, including not using tobacco products, exercising for a specific amount of time each week, and maintaining a certain weight, blood pressure, and cholesterol level.

**Whether the Proposed Wellness Program is Voluntary Within the Meaning of Section 102(d)(4)(B) of the ADA**

**Title I ADA Principles Regarding Medical Examinations and Disability-Related Questions**

Title I of the ADA prohibits discrimination based on disability in all aspects of the employment relationship. 42 U.S.C. § 12112. Title I prohibits employers from requiring medical examinations or making disability-related inquiries of employees, unless they are job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c). Section 102(d)(4)(B) of the ADA, however, allows employers to conduct *voluntary* medical examinations, including voluntary medical histories, that are part of an employee health program available to employees at the work site, without having to show that they are job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d).

Neither the ADA, nor the EEOC ADA Regulations, define the terms “medical examination” or “disability-related inquiry.” However, the EEOC defined these terms in its Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Guidance on Questions and Examinations) at 4, 14-15 (enclosed). A medical examination is a procedure or test that seeks information about an individual’s physical or mental impairments or health. *Id.* at 14. The EEOC listed a number of factors to consider in determining whether a particular test or procedure is medical. *See id.* at 14. A disability-related question is one that is likely to elicit information about a disability. *Id.* at 4. This includes directly asking whether an individual has a particular disability, or asking questions that are closely related to disability, such as broad questions about an individual’s impairments. *Id.* at 4, 9. On the other hand, if there are many possible answers to a question and only some of those answers would contain disability-related information, that question is not disability-related. *Id.* at 4.

#### Application of ADA Principals Regarding Medical Examinations and Disability-Related Questions of Employees

First, we address the question whether your client’s proposed wellness program includes any medical examinations or disability-related questions (generally part of a medical history) of employees. If the program does not require an individual to answer questions that are disability-related, and involves no tests or procedures that constitute medical examinations under the ADA, then the voluntariness of the wellness program is irrelevant, since the prohibitions of section 102(d) of Title I of the ADA would not apply.<sup>1</sup>

If the proposed wellness program includes any disability-related questions or medical examinations, then it is necessary to determine whether the program is “voluntary” within the meaning of section 102(d)(4)(B) of the ADA. Neither the ADA, nor the EEOC’s ADA regulations, define the term “voluntary,” and the Commission has not issued guidance on employee health programs falling within section 102(d)(4)(B) of the ADA. When Congress has not defined a statutory term, it normally should be construed according to its ordinary or natural meaning.<sup>2</sup> The definition of the word “voluntary” includes the following meanings relevant to this context: (1) an act of choice, not constrained, impelled, or influenced by another; and (2) an act of one’s own free will without valuable consideration or legal obligation.<sup>3</sup> The first suggests

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<sup>1</sup>Nothing in your letter suggests that your client seeks to justify the wellness program or any component of it as job-related and consistent with business necessity. For further information on whether a medical examination or disability-related question of an employee is job-related and consistent with business necessity, see the EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, 15 (1997) (enclosed).

<sup>2</sup>Smith v. United States, 508 U.S. 223, 228, 113 S. Ct. 2050, 2054 (1993).

<sup>3</sup>Websters’ Third International Dictionary 2564 (1976).

simply an absence of penalty or coercion. The second suggests, in addition, that no monetary benefit influences a person's decision.

You suggest that the wellness program is voluntary because, by its terms, no one is required to participate. We assume that this means that an individual who chooses not to participate in the program is not subject to any type of penalty, with respect to eligibility requirements for health insurance coverage, insurance benefits provided, or any other term or condition of employment, by either the employer or its health insurance provider. It could be argued that this satisfies the voluntary requirement of section 102(d)(4)(B).

On the other hand, it could be argued that providing a monetary incentive to successfully fulfill the requirements of a wellness program renders the program involuntary within the meaning of the ADA. The size of the financial benefit is significant in this respect. Also, where an employer decreases its share of the premium and increases the employee's share, resulting in a significantly higher health insurance premium for employees who do not participate or are unable to meet the criteria of the wellness program, the program may arguably not be voluntary under section 102(d)(4)(B).

### **Whether the Method Used for Calculating an Employee's Share of the Insurance Premium is Lawful Under the ADA and the EEOC's Interim Enforcement Guidance**

#### **Title I ADA Principles Regarding Employee Benefit Plans**

Title I of the ADA prohibits discrimination in the provision and administration of fringe benefits available by virtue of employment, including health insurance plans. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.4(f). Section 501(c) also states, however, that employers and other covered entities may continue to establish and administer bona fide benefit plans based on underwriting risks, classifying risks, or administering such risks, that are applied uniformly and are not being used as a "subterfuge" to evade the purposes of the ADA. 42 U.S.C. § 12201(c); 29 C.F.R. § 1630.16(f).

The term "benefit plan" is not defined in the statute. In the employment context, the term generally refers to a plan that provides benefits to employees other than base salary or hourly wages, such as pensions, health insurance, life insurance, and profit sharing. Section 501(c) makes clear that it covers employers' self-insured health insurance plans, as well as insured plans. *Id.* The EEOC's ADA regulation on section 501(c) and its Interpretive Guidance to the regulation refer to "health insurance, life insurance, and other benefit plans," (29 C.F.R. § 1630.16(f); 29 C.F.R. part 1630 app. § 1630.16(f)). The EEOC enforcement guidance on this section addresses only disability-based insurance distinctions contained in employers' health insurance plans. See Interim Guidance. Because the proposed wellness plan is a type of plan providing benefits in connection with employment, and because it is related to a health insurance plan, it will likely qualify as a "benefit plan" under section 501(c).

Although the Interim Guidance does not address the specific questions you raised, its analysis may be helpful in determining whether the proposed wellness program comes within the protective ambit of section 501(c). Under the Commission's analysis, if a health-related distinction in a health insurance plan is found to be disability-based, an employer must show that it is (1) part of a bona fide insurance plan, and (2) not used as a subterfuge to evade the purposes of the ADA. Id. at 5. The employer bears the burden of proof on both issues. Id. at 9.

Not *all* health-related insurance distinctions are disability-based. Id. at 5. A disability-based distinction is one that singles out a particular group of disabilities (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., all conditions that substantially limit a major life activity). Id. at 7. Broad distinctions that apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Id. at 6. For example, universal limits on, or exclusions from, coverage of all "experimental procedures," or all "elective surgery," are not disability-based, although they must be uniformly applied. Id. at 7.

A self-insured health insurance plan is "bona fide" if it exists and pays benefits, and its terms have been accurately communicated to eligible employees. Id. at 10-11. An insured health insurance plan is "bona fide" if it meets both of these criteria, and it is not inconsistent with applicable state law. Id. at 10. "Subterfuge" means different treatment based on disability that is not justified by the particular risks or costs associated with the disability. Id. at 11.

#### Applying Title I ADA Principles Regarding Employee Benefit Plans

The first step in analyzing your client's proposed wellness program is to determine whether any of its five criterion contains or utilizes a disability-based distinction. So, for example, the first criteria of the wellness plan makes a distinction based on an individual's use of tobacco. This is a distinction that could be related to a multitude of dissimilar conditions, such as lung diseases, heart diseases, and blood disorders. It also constrains individuals both with and without disabilities (i.e., not all people who have used tobacco products in the last six months have an ADA disability). You may apply this analysis to the other four criteria of the wellness program to determine whether any of them are disability-based. If any of the criteria contains or utilizes a disability-based distinction, then the second step is to show that the wellness plan is a "bona fide benefit plan" as defined above.

Finally, an employer must demonstrate that the proposed wellness plan is not a subterfuge to evade the purposes of the ADA. Thus, if any of the five criteria of the wellness plan contain or utilize any disability-based distinctions, your client must show that they are justified by the particular risks or costs associated with the disability, and that conditions with comparable actuarial data and/or experience are treated in the same fashion. See id. at 10-11.

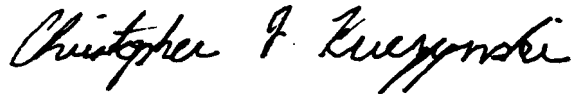


**Whether the Program and the Method Used for Calculating an Employee's Share of the Insurance Premium Violates Any Other Provision of the ADA**

Section 102(b)(3) of Title I prohibits an employer or other covered entity from utilizing standards, criteria, or methods of administration that have the effect of discriminating on the basis of disability. 42 U.S.C. § 12112(b)(3); 29 C.F.R. § 1630.7. An individual with a disability may argue that one or more of the criteria contained in the wellness program has the effect of discriminating against her on the basis of disability if, because of her disability, she is unable to successfully fulfill the criteria, and therefore cannot receive the financial benefit of the program. However, it could be argued that Alexander v. Choate, 469 U.S. 287 (1985), made the adverse impact theory of discrimination under the Rehabilitation Act of 1973 and the ADA inapplicable to benefit plans. So far, the Commission has only stated that the adverse impact theory is unavailable in the specific context of a challenge to a disability-based distinction in a bona fide health insurance plan. Interim Guidance at 5 and n.7.

We hope that this information is helpful to you. Please note, however, that this letter does not constitute an official opinion of the Commission.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Division

Enclosures (2)



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

(b) 64 (b) 7C

APR 24 1998

This is in response to your letter of March 2, 1998, inquiring whether an employer must assign employees to work in locations near their homes as a reasonable accommodation if they find it difficult to handle a long commute because of a disability.<sup>1</sup>

The Commission has not taken a position on this issue, and we therefore regret that we cannot answer your question. The May 4, 1995 letter from (b) 64 (b) 7C referenced in your correspondence simply states that an employer does not have to provide transportation or assistance with transportation (specifically assistance in transferring from a vehicle to a wheelchair upon arrival at the workplace), if the employer does not do so for other employees. According to (b) 64 (b) 7C letter, this is because the obligation to make reasonable accommodations requires an employer to remove only workplace barriers (b) 64 (b) 7C letter, however, does not consider the question of whether the location of a job is a workplace barrier; therefore, nothing in the letter can be read as resolving the question whether reassignment of an employee who, due to a disability, has difficulty with a long commute, is a reasonable accommodation.

There are two possible approaches that could be used in resolving the issue you have raised. An argument could be made that the employer must provide reassignment (absent undue hardship) because the location of work is determined by the employer. As your letter explains, the District Attorney's offices are located throughout the County, and your office determines where each individual will work. While it may be true that the nature of your mission dictates the location of various offices, nonetheless it is still your decision as to where to assign each

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<sup>1</sup> Of course, if an employer has a policy of permitting non-disabled employees to transfer among offices, then the employer must allow employees with disabilities to do likewise. Assuming, however, that no such policy exists, then the issue is whether an employer must provide a reassignment as a reasonable accommodation to an employee who, because of a disability, cannot tolerate a lengthy commute.

(b) 6 26 7C  
Page two

individual. Thus, it could be argued that if an employee, because of a disability, experiences significant difficulty in commuting, the District Attorney would need to reassign the individual to an existing, vacant position for which s/he was qualified. Under this approach, problems with the length of the commute are viewed as similar to problems created when an individual must rely on accessible public transportation to get to work. Just as an employer may, absent undue hardship, have to adjust an employee's working hours because of the schedule of public transportation, so too might an employer have to reassign an individual who has difficulty with the length of the commute. However, an employer would not need to create a position or bump an employee out of a position in order to make a reassignment.

A contrary argument could be made that reassignment is not required due to the length of the commute because problems with a lengthy commute arise only partly based on the location of the employer. The length of a commute also depends on where people choose to live. Thus, if a commuting problem is not a "workplace barrier," then an employer would not have to provide any reasonable accommodation in order to eliminate it. This argument would view problems with the length of a commute as similar to problems an individual has with lack of transportation to get to the employer. Just as an employer does not have to provide transportation to an individual with a disability (if it is not provided to other employees), so it could be argued that an employer does not have to reassign such an individual if s/he has difficulty with the length of the commute.

Sincerely,

  
Ellen J. Vargyas  
Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAR 5 1998

(b)6 & (b)7C

This is a response to your letter to the Equal Employment Opportunity Commission (EEOC) dated January 14, 1998, regarding the Americans with Disabilities Act of 1990 (ADA).

You expressed disappointment at the EEOC's withdrawal of the "Guidelines on the Application of the ADA to Employer Provided Health Insurance" because you believe that the guidelines would have clarified that the ADA requires health insurance providers to cover implantation of a device known as the "Cochlear Implant" for individuals with hearing impairments and would have made clear that an individual may file a charge of discrimination against an insurance company without involving his or her employer.

As an initial matter, the EEOC notice in the Federal Register, dated April 25, 1997, to which you refer, did not set forth any proposed guidelines, but simply stated EEOC's intention to *develop* guidelines regarding health insurance issues under Title I of the ADA. (A copy of the referenced EEOC's "Semiannual Regulatory Agenda" is enclosed.) The EEOC, therefore, has not withdrawn any proposed ADA guidelines. We have simply indicated that the Commission will not issue guidance on this subject at the present time. Of course, we are continuing to look at issues regarding employer provided health insurance programs.

In the meantime, however, the EEOC has provided guidance on health insurance under Title I of the ADA sufficient to apprise covered entities, such as employers, insurance carriers, plan administrators, and health maintenance organizations (HMOs), of their ADA obligations regarding the use of disability-based distinctions in employer-provided health insurance plans. See Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance (June 8, 1993) (Interim Guidance) (enclosed). In addition, the EEOC continues to explore and develop these issues through litigation, the filing of *amicus curiae* (friend of the court) briefs, and further development of guidance. For example, the EEOC is suing the Hertz Corporation because the health insurance plan it provides for its employees imposes a \$150 limit on benefits provided for hearing aids. See EEOC v. Hertz Corp. and Hertz Claim Management Corp., No. CV 97-3140 DT (RNBx) (C.D. Cal. 1997). (Insurance companies often treat cochlear implants like hearing aids.)

## Title I ADA Principles Regarding Disability-Based Distinctions in Employer-Provided Health Insurance Plans

The EEOC enforces Title I of the ADA, which prohibits discrimination in *employment* on the basis of disability. 42 U.S.C. § 12112. This prohibition includes discrimination in the provision and administration of fringe benefits available by virtue of employment, including health insurance plans. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.4(f). The ADA also states, however, that employers and insurance companies may continue to administer health insurance plans based on risk assessment and other traditional insurance practices that are applied uniformly and are not being used as a “subterfuge” to evade the purposes of the ADA. 42 U.S.C. § 12201(c); 29 C.F.R. § 1630.16(f). Title I covers employers’ self-insured health plans, as well as employers’ health insurance plans provided through insurance carriers or other entities, such as HMOs. Id.

Based on these statutory and regulatory provisions, the Commission has set forth the analytic framework for determining whether a specific health-related insurance distinction discriminates on the basis of disability in violation of Title I of the ADA. See id. at 3-5. Under this analysis, a distinction must be (1) disability-based, (2) part of a bona fide insurance plan, and (3) used as a subterfuge to evade the purposes of the ADA, in order to violate the ADA. Id. at 5. Not *all* health-related insurance distinctions are disability-based. A disability-based distinction is one that singles out a particular group of disabilities (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., all conditions that substantially limit a major life activity). Id. at 7. Broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Id. at 6. For example, universal limits on, or exclusions from, coverage of all “experimental procedures,” or all “elective surgery,” are not disability-based, although they must be uniformly applied. Id. at 7. A self-insured plan is “bona fide” if it exists and pays benefits, and its terms have been accurately communicated to eligible employees. Id. at 10-11. An insured health insurance plan is “bona fide” if it meets the same criteria, and it is not inconsistent with applicable state law. Id. at 10. “Subterfuge” means different treatment based on disability that is not justified by the particular risks or costs associated with the disability. Id. at 11.

Whether a particular provision of a health insurance plan offered in connection with employment, such as one applying to cochlear implants, violates Title I of the ADA must be determined on a case-by-case basis. If you believe that you have been subjected to discrimination on the basis of disability in violation of Title I of the ADA because of a health insurance provision and would like to file a charge, you should contact the EEOC’s New York District Office at the following address and telephone number as soon as possible:

Equal Employment Opportunity Commission  
New York District Office  
7 World Trade Center, 18th Floor  
New York, New York 10048-1102  
Telephone: 212/748-8500 (voice) or 212/748-8399 (TDD).

You should be aware that a claim may be untimely if it is not filed with the EEOC within the statutory deadline of either 180 or 300 days of the alleged discriminatory action. The New York District Office can inform you of the applicable deadline. You should also be aware that under Title I of the ADA you may be entitled to reasonable accommodations in the workplace that would assist you to overcome the barriers related to your hearing impairment, such as a TDD, a sign language interpreter, or communication in writing. The availability or provision of such accommodations, however, has no effect on the obligation of an employer and/or a health insurance provider to ensure that its health insurance plan does not violate the ADA.

#### Coverage of Health Insurance Companies

As we noted above, Title I of the ADA specifically applies to *employment* discrimination. Therefore, the EEOC generally finds *both* insurance providers *and* employers liable under Title I of the ADA for discrimination in employer-provided health insurance plans. Title I of the ADA makes clear that employers are responsible for discriminatory provisions in the health insurance plans they offer to employees. For example, section 102 of Title I of the ADA prohibits an employer from participating in a contractual relationship that has the effect of subjecting its qualified applicant or employee with a disability to discrimination prohibited by Title I. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.6. An employer cannot divest itself of responsibility to comply with the provisions of Title I of the ADA regarding fringe benefits through contracts with a third party. The EEOC has many times succeeded in obtaining necessary changes in discriminatory insurance plans by employers and insurance providers during settlement of ADA cases.

Health insurance companies or other entities that administer health insurance benefits may be covered by Title I of the ADA because they are (1) the “employer,” since they exist solely for the purpose of enabling employers to delegate their responsibility for providing health insurance benefits; (2) the “agent of the employer,” where the employer controls the manner in which the benefits are administered; or (3) “third party interferers” in the relationship between the employer who established the plan and its employees who are covered by the plan. See, e.g., Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Assn. of New England, 37 F.3d 12, 3 AD Cas. (BNA) 1237 (1st Cir. 1994).

The U.S. Department of Justice (DOJ) enforces Title III of the ADA, which prohibits discrimination on the basis of disability by private entities in places of public accommodation. DOJ interprets Title III of the ADA to apply to the terms and conditions of a health insurance plan offered by a health insurance company, including individual policies. Therefore, if an

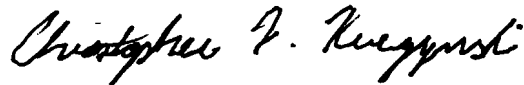
individual with a disability does not want to file a charge against his or her employer under Title I of the ADA to redress an alleged discriminatory term or condition in an employer-provided health insurance plan, or if an individual has a health insurance policy that is not provided by an employer, he or she may sue the insurance company under Title III of the ADA.

DOJ also enforces Title II of the ADA, which prohibits discrimination on the basis of disability in the services, programs, or activities of state and local governments, and section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability under any program or activity of the federal government. For further information regarding your rights under Titles II or III of the ADA, or under section 504 of the Rehabilitation Act, you should contact:

Mr. John L. Wodatch  
Chief, Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035  
202/514-0301 (voice) or 202/514-0383 (TDD).

We hope this information is helpful to you. Please note, however, that this letter does not constitute an official opinion of the Commission.

Sincerely,



Christopher J. Kuczynski  
Associate Legal Counsel  
ADA Division

Enclosures (2)



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAR 5 1998

662670

This is a response to your letter to the Equal Employment Opportunity Commission (EEOC) dated January 14, 1998, regarding the Americans with Disabilities Act of 1990 (ADA).

You expressed disappointment at the EEOC's withdrawal of the "Guidelines on the Application of the ADA to Employer Provided Health Insurance" because you believe that the guidelines would have clarified that the ADA requires health insurance providers to cover implantation of a device known as the "Cochlear Implant" for individuals with hearing impairments and would have made clear that an individual may file a charge of discrimination against an insurance company without involving his or her employer.

As an initial matter, the EEOC notice in the Federal Register, dated April 25, 1997, to which you refer, did not set forth any proposed guidelines, but simply stated EEOC's intention to *develop* guidelines regarding health insurance issues under Title I of the ADA. (A copy of the referenced EEOC's "Semiannual Regulatory Agenda" is enclosed.) The EEOC, therefore, has not withdrawn any proposed ADA guidelines. We have simply indicated that the Commission will not issue guidance on this subject at the present time. Of course, we are continuing to look at issues regarding employer provided health insurance programs.

In the meantime, however, the EEOC has provided guidance on health insurance under Title I of the ADA sufficient to apprise covered entities, such as employers, insurance carriers, plan administrators, and health maintenance organizations (HMOs), of their ADA obligations regarding the use of disability-based distinctions in employer-provided health insurance plans. See Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance (June 8, 1993) (Interim Guidance) (enclosed). In addition, the EEOC continues to explore and develop these issues through litigation, the filing of *amicus curiae* (friend of the court) briefs, and further development of guidance. For example, the EEOC is suing the Hertz Corporation because the health insurance plan it provides for its employees imposes a \$150 limit on benefits provided for hearing aids. See EEOC v. Hertz Corp. and Hertz Claim Management Corp., No. CV 97-3140 DT (RNBx) (C.D. Cal. 1997). (Insurance companies often treat cochlear implants like hearing aids.)



## Title I ADA Principles Regarding Disability-Based Distinctions in Employer-Provided Health Insurance Plans

The EEOC enforces Title I of the ADA, which prohibits discrimination in *employment* on the basis of disability. 42 U.S.C. § 12112. This prohibition includes discrimination in the provision and administration of fringe benefits available by virtue of employment, including health insurance plans. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.4(f). The ADA also states, however, that employers and insurance companies may continue to administer health insurance plans based on risk assessment and other traditional insurance practices that are applied uniformly and are not being used as a “subterfuge” to evade the purposes of the ADA. 42 U.S.C. § 12201(c); 29 C.F.R. § 1630.16(f). Title I covers employers’ self-insured health plans, as well as employers’ health insurance plans provided through insurance carriers or other entities, such as HMOs. Id.

Based on these statutory and regulatory provisions, the Commission has set forth the analytic framework for determining whether a specific health-related insurance distinction discriminates on the basis of disability in violation of Title I of the ADA. See Interim Guidance, at 3-5. Under this analysis, a distinction must be (1) disability-based, (2) part of a bona fide insurance plan, and (3) used as a subterfuge to evade the purposes of the ADA, in order to violate the ADA. Id. at 5. Not *all* health-related insurance distinctions are disability-based. A disability-based distinction is one that singles out a particular group of disabilities (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., all conditions that substantially limit a major life activity). Id. at 7. Broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Id. at 6. For example, universal limits on, or exclusions from, coverage of all “experimental procedures,” or all “elective surgery,” are not disability-based, although they must be uniformly applied. Id. at 7. A self-insured plan is “bona fide” if it exists and pays benefits, and its terms have been accurately communicated to eligible employees. Id. at 10-11. An insured health insurance plan is “bona fide” if it meets the same criteria, and it is not inconsistent with applicable state law. Id. at 10. “Subterfuge” means different treatment based on disability that is not justified by the particular risks or costs associated with the disability. Id. at 11.

Whether a particular provision of a health insurance plan offered in connection with employment, such as one applying to cochlear implants, violates Title I of the ADA must be determined on a case-by-case basis. If you believe that you have been subjected to discrimination on the basis of disability in violation of Title I of the ADA because of a health insurance provision and would like to file a charge, you should contact the EEOC’s Denver District Office at the following address and telephone number as soon as possible:

Equal Employment Opportunity Commission  
Denver District Office  
303 East 17th Avenue, Suite 510  
Denver, Colorado 80203  
Telephone: 303/866-1300 (voice) or 303/666-1950 (TDD).

You should be aware that a claim may be untimely if it is not filed with the EEOC within the statutory deadline of either 180 or 300 days of the alleged discriminatory action. The Denver District Office can inform you of the applicable deadline. You should also be aware that under Title I of the ADA you may be entitled to reasonable accommodations in the workplace that would assist you to overcome the barriers related to your hearing impairment, such as a TDD, a sign language interpreter, or communication in writing. The availability or provision of such accommodations, however, has no effect on the obligation of an employer and/or a health insurance provider to ensure that its health insurance plan does not violate the ADA.

#### Coverage of Health Insurance Companies

As we noted above, Title I of the ADA specifically applies to *employment* discrimination. Therefore, the EEOC generally finds *both* insurance providers *and* employers liable under Title I of the ADA for discrimination in employer-provided health insurance plans. Title I of the ADA makes clear that employers are responsible for discriminatory provisions in the health insurance plans they offer to employees. For example, section 102 of Title I of the ADA prohibits an employer from participating in a contractual relationship that has the effect of subjecting its qualified applicant or employee with a disability to discrimination prohibited by Title I. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.6. An employer cannot divest itself of responsibility to comply with the provisions of Title I of the ADA regarding fringe benefits through contracts with a third party. The EEOC has many times succeeded in obtaining necessary changes in discriminatory insurance plans by employers and insurance providers during settlement of ADA cases.

Health insurance companies or other entities that administer health insurance benefits may be covered by Title I of the ADA because they are (1) the “employer,” since they exist solely for the purpose of enabling employers to delegate their responsibility for providing health insurance benefits; (2) the “agent of the employer,” where the employer controls the manner in which the benefits are administered; or (3) “third party interferers” in the relationship between the employer who established the plan and its employees who are covered by the plan. See, e.g., Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Assn. of New England, 37 F.3d 12, 3 AD Cas. (BNA) 1237 (1st Cir. 1994).

The U.S. Department of Justice (DOJ) enforces Title III of the ADA, which prohibits discrimination on the basis of disability by private entities in places of public accommodation. DOJ interprets Title III of the ADA to apply to the terms and conditions of a health insurance plan offered by a health insurance company, including individual policies. Therefore, if an

individual with a disability does not want to file a charge against his or her employer under Title I of the ADA to redress an alleged discriminatory term or condition in an employer-provided health insurance plan, or if an individual has a health insurance policy that is not provided by an employer, he or she may sue the insurance company under Title III of the ADA.

DOJ also enforces Title II of the ADA, which prohibits discrimination on the basis of disability in the services, programs, or activities of state and local governments, and section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability under any program or activity of the federal government. For further information regarding your rights under Titles II or III of the ADA, or under section 504 of the Rehabilitation Act, you should contact:

Mr. John L. Wodatch  
Chief, Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035  
202/514-0301 (voice) or 202/514-0383 (TDD).

We hope this information is helpful to you. Please note, however, that this letter does not constitute an official opinion of the Commission.

Sincerely,



Christopher J. Kuczynski  
Associate Legal Counsel  
ADA Division

Enclosures (2)



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAR 5 1998

B6 2(6)7c

This is a response to your letter to the Equal Employment Opportunity Commission (EEOC) dated January 15, 1998, regarding the Americans with Disabilities Act of 1990 (ADA).

You expressed disappointment at the EEOC's withdrawal of the "Guidelines on the Application of the ADA to Employer Provided Health Insurance" because you believe that the guidelines would have clarified that the ADA requires health insurance providers to cover implantation of a device known as the "Cochlear Implant" for individuals with hearing impairments and would have made clear that an individual may file a charge of discrimination against an insurance company without involving his or her employer.

As an initial matter, the EEOC notice in the Federal Register, dated April 25, 1997, to which you refer, did not set forth any proposed guidelines, but simply stated EEOC's intention to *develop* guidelines regarding health insurance issues under Title I of the ADA. (A copy of the referenced EEOC's "Semiannual Regulatory Agenda" is enclosed.) The EEOC, therefore, has not withdrawn any proposed ADA guidelines. We have simply indicated that the Commission will not issue guidance on this subject at the present time. Of course, we are continuing to look at issues regarding employer provided health insurance programs.

In the meantime, however, the EEOC has provided guidance on health insurance under Title I of the ADA sufficient to apprise covered entities, such as employers, insurance carriers, plan administrators, and health maintenance organizations (HMOs), of their ADA obligations regarding the use of disability-based distinctions in employer-provided health insurance plans. See Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance (June 8, 1993) (Interim Guidance) (enclosed). In addition, the EEOC continues to explore and develop these issues through litigation, the filing of *amicus curiae* (friend of the court) briefs, and further development of guidance. For example, the EEOC is suing the Hertz Corporation because the health insurance plan it provides for its employees imposes a \$150 limit on benefits provided for hearing aids. See EEOC v. Hertz Corp. and Hertz Claim Management Corp., No. CV 97-3140 DT (RNBx) (C.D. Cal. 1997). (Insurance companies often treat cochlear implants like hearing aids.)

## Title I ADA Principles Regarding Disability-Based Distinctions in Employer-Provided Health Insurance Plans

The EEOC enforces Title I of the ADA, which prohibits discrimination in *employment* on the basis of disability. 42 U.S.C. § 12112. This prohibition includes discrimination in the provision and administration of fringe benefits available by virtue of employment, including health insurance plans. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.4(f). The ADA also states, however, that employers and insurance companies may continue to administer health insurance plans based on risk assessment and other traditional insurance practices that are applied uniformly and are not being used as a “subterfuge” to evade the purposes of the ADA. 42 U.S.C. § 12201(c); 29 C.F.R. § 1630.16(f). Title I covers employers’ self-insured health plans, as well as employers’ health insurance plans provided through insurance carriers or other entities, such as HMOs. Id.

Based on these statutory and regulatory provisions, the Commission has set forth the analytic framework for determining whether a specific health-related insurance distinction discriminates on the basis of disability in violation of Title I of the ADA. See Interim Guidance at 3-5. Under this analysis, a distinction must be (1) disability-based, (2) part of a bona fide insurance plan, and (3) used as a subterfuge to evade the purposes of the ADA, in order to violate the ADA. Id. at 5. Not *all* health-related insurance distinctions are disability-based. A disability-based distinction is one that singles out a particular group of disabilities (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., all conditions that substantially limit a major life activity). Id. at 7. Broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Id. at 6. For example, universal limits on, or exclusions from, coverage of all “experimental procedures,” or all “elective surgery,” are not disability-based, although they must be uniformly applied. Id. at 7. A self-insured plan is “bona fide” if it exists and pays benefits, and its terms have been accurately communicated to eligible employees. Id. at 10-11. An insured health insurance plan is “bona fide” if it meets the same criteria, and it is not inconsistent with applicable state law. Id. at 10. “Subterfuge” means different treatment based on disability that is not justified by the particular risks or costs associated with the disability. Id. at 11.

Whether a particular provision of a health insurance plan offered in connection with employment, such as one applying to cochlear implants, violates Title I of the ADA must be determined on a case-by-case basis. If you believe that you have been subjected to discrimination on the basis of disability in violation of Title I of the ADA because of a health insurance provision and would like to file a charge, you should contact the EEOC’s New York District Office at the following address and telephone number as soon as possible:

Equal Employment Opportunity Commission  
New York District Office  
7 World Trade Center, 18th Floor  
New York, New York 10048-1102  
Telephone: 212/748-8500 (voice) or 212/748-8399 (TDD).

You should be aware that a claim may be untimely if it is not filed with the EEOC within the statutory deadline of either 180 or 300 days of the alleged discriminatory action. The New York District Office can inform you of the applicable deadline. You should also be aware that under Title I of the ADA you may be entitled to reasonable accommodations in the workplace that would assist you to overcome the barriers related to your hearing impairment, such as a TDD, a sign language interpreter, or communication in writing. The availability or provision of such accommodations, however, has no effect on the obligation of an employer and/or a health insurance provider to ensure that its health insurance plan does not violate the ADA.

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Health insurance companies or other entities that administer health insurance benefits may be covered by Title I of the ADA because (1) they are the “employer,” since they exist solely for the purpose of enabling employers to delegate their responsibility for providing health insurance benefits; (2) they are the “agent of the employer,” where the employer controls the manner in which the benefits are administered; or (3) they are “third party interferers” in the relationship between the employer who established the plan and its employees who are covered by the plan. See, e.g., Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Assn. of New England, 37 F.3d 12, 3 AD Cas. (BNA) 1237 (1st Cir. 1994).

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individual with a disability does not want to file a charge against his or her employer under Title I of the ADA to redress an alleged discriminatory term or condition in an employer-provided health insurance plan, or if an individual has a health insurance policy that is not provided by an employer, he or she may sue the insurance company under Title III of the ADA.

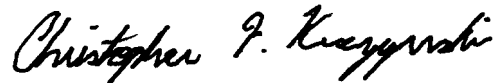
DOJ also enforces Title II of the ADA, which prohibits discrimination on the basis of disability in the services, programs, or activities of state and local governments, and section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability under any program or activity of the federal government. For further information regarding your rights under Titles II or III of the ADA, or under section 504 of the Rehabilitation Act, you should contact:

(b) 6 4 (b) 7 c

Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035  
202/514-0301 (voice) or 202/514-0383 (TDD).

We hope this information is helpful to you. Please note, however, that this letter does not constitute an official opinion of the Commission.

Sincerely,



Christopher J. Kuczynski  
Associate Legal Counsel  
ADA Division

Enclosures (2)



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

MAR 10 1998

b6 7 b7c

This is in response to your recent letter to the Equal Employment Opportunity Commission (EEOC) regarding the Americans with Disabilities Act of 1990 (ADA). You said that you are a member of the uniformed personnel of the United States Air Force (USAF) and asked whether the USAF must comply with the ADA.

The EEOC enforces Title I of the ADA, which prohibits discrimination based on disability in all aspects of the employment relationship. 42 U.S.C. § 12112. Section 102 of the ADA specifically excludes from coverage the United States military, thus excluding all services of the United States military. 42 U.S.C. § 12102. The U.S. Department of Justice enforces Titles II and III of the ADA. Title II prohibits discrimination based on disability in state and local government services and Title III prohibits discrimination based on disability by private entities in places of public accommodation. Therefore, these titles of the ADA, by their terms and because they are governed by the exclusion of section 102, do not apply to the USAF.

Sections 501 and 504 of the Rehabilitation Act of 1973 prohibit discrimination based on disability by the federal government and other non-federal entities. 29 U.S.C. §§ 791, 794. These provisions apply to the civilian employees but not the uniformed personnel of the services of the United States military.

The United States military has its own system for addressing disability-related issues of uniformed personnel. You may want to seek information from the USAF Office of the Judge Advocate General or the USAF Legal Assistance Office on your base regarding any issues that arise because of your Multiple Sclerosis.

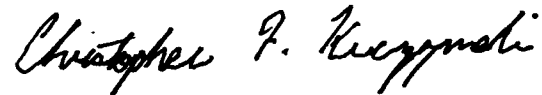


(b)6 + (b)7C

Page Two

I hope that this information is helpful to you. Please note, however, that this letter is not an official opinion of the Commission.

Sincerely,

A handwritten signature in black ink that reads "Christopher J. Kuczynski". The signature is written in a cursive, slightly slanted style.

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

664670

MAR 13 1998

13

This is in response to your letter to the Equal Employment Opportunity Commission (EEOC or Commission), dated February 27, 1998, inquiring about the Commission's progress on the proposed "Guidelines on the Application of the Americans with Disabilities Act of 1990 to Employer-Provided Health Insurance."

On April 25, 1997, the EEOC published a notice in the Federal Register of its intention to develop guidelines regarding health insurance issues under Title I of the ADA. This notice, however, was subsequently withdrawn. See 62 FR 58201 (October 29, 1997). Although the Commission has decided not to issue guidance on this subject at the present time, it continues to examine the issue of the ADA's applicability to employer-provided health insurance plans and other issues identified in the earlier notice, including corporate wellness programs. In addition, the EEOC has provided interim guidance on health insurance that apprises covered entities, such as employers, insurance carriers, plan administrators, and health maintenance organizations, of their ADA obligations. See Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance (June 8, 1993) (enclosed).

We hope that this information is helpful to you.

Sincerely,

*Christopher J. Raczynski*

Christopher J. Raczynski  
Assistant Legal Counsel

Enclosure



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

MAR 19 1998

(b) 6 & (b) 7c

This responds to your inquiry to the Department of Labor, dated January 29, 1998, on behalf of (b) 6 & (b) 7c has raised employment issues that implicate Title I of the Americans with Disabilities Act ("ADA"). Because the Equal Employment Opportunity Commission enforces Title I of the ADA, the Department of Labor forwarded your inquiry to us, and we received it on February 17, 1998.

(b) 6 & (b) 7c states that she is in rehabilitation for alcoholism and received notice of termination from her employer, with no reason given for the termination except the nature of her illness. Set forth below are those provisions of the ADA that may be relevant to Ms. Preston's concerns.

Title I of the ADA prohibits covered employers from discriminating against qualified individuals with disabilities on the basis of disability. Alcoholism may be a disability for purposes of the ADA, and the fact that an individual with alcoholism may be currently drinking does not automatically exclude her from coverage under the Act. Thus, an employer may be prohibited from discharging an employee simply because she has alcoholism, whether or not the employee is currently drinking.

The ADA specifically provides, however, that an employer may prohibit employees from using or being under the influence of alcohol at the workplace. In addition, an employer may hold an employee who is an alcoholic to the same performance and conduct standards as it holds all other employees, even if that employee's poor performance or behavior is related to alcoholism, as long as the alcoholic employee is not being singled out for less favorable treatment. An employee found drinking on the job, even when the drinking is related to alcoholism, may therefore be disciplined to the same extent as all other employees engaging in the same conduct. An employer may also discipline an alcoholic employee for poor job performance related to alcohol use, assuming that comparable action would be taken against similarly-situated non-alcoholic employees.

The ADA does impose a duty on employers to make reasonable accommodations for the known disabilities of applicants and employees. This duty may include allowing an employee to use accrued paid leave or unpaid leave to seek treatment for alcoholism. However, reasonable accommodation is required only to the extent it would not cause the employer "undue hardship,"

The (b) 6 4 (b) 7 c  
Page Two

meaning significant difficulty or expense. Thus, if the amount of leave needed by an employee for treatment of alcoholism would result in an undue hardship, then an employer need not retain the employee in her current position, but should still consider whether the employee could be reassigned to a vacant position for which she is qualified and in which she can take the needed leave without undue hardship to the employer.

We hope this information is helpful to you and your constituent. (b) 6 4 (b) 7 c can obtain copies of informational materials concerning the ADA, free of charge, by calling our publications office toll-free at 1-800-669-EEOC.

Sincerely

(b) 6 4 (b) 7 c



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAR 18 1998

Editor  
The New York Law Journal  
345 Park Avenue South  
New York, New York 10010

To the Editor:

Your "Corporate Counsel" column on February 9, 1998 featured an article entitled "EEOC's Mental Disability Guidance: *Courts Determine It Has No Bite.*" From its title to its final sentence, the article is a mischaracterization of the EEOC's guidance on the Americans with Disabilities Act and Psychiatric Disabilities. It is also bad advice for the employers it is supposedly intended to help.

The article's co-authors, Michael A. Faillace and Edward Butler, characterize the Guidance as "at odds" with established case law and as having little influence on contemporary courts. On this basis, the authors conclude that "the guidance should not be the cause of much concern for employers."

Employers who read the guidance will quickly discover that Faillace and Butler have erroneously characterized it as outside of the legal mainstream. As their first example of how the guidance "departs from established court interpretation," Faillace and Butler incorrectly report that the guidance fails to caution readers that familiar mental impairments, such as major depression and bipolar disorder, are not automatically ADA disabilities. The authors apparently overlook clear language in the guidance's first question emphasizing that a mental impairment "is not automatically a 'disability' [because] an impairment must 'substantially limit' one or more major life activities" to be an ADA disability. Indeed, this point is the premise for an entire section of the guidance about "Substantial Limitation," which gives many examples of familiar mental impairments that qualify as ADA disabilities for some purposes but not for others.

Faillace and Butler similarly criticize the EEOC's position that the effect of mitigating measures (such as medications or prosthetic or assistive devices) should not be considered in assessing whether an impairment constitutes a disability. The authors are forced here to acknowledge, however, that "[t]he courts have split fairly evenly on this issue." Indeed, the EEOC's position, which is based on unambiguous language in the ADA's legislative history, is consistent with the opinions of five circuit courts. See *Arnold v. United Parcel Service, Inc.*, No. 97-1781, 1998 WL 63505 (1st Cir. Feb. 20, 1998); *Matczak v. Frankford Candy and Chocolate Co.*, 133 F.3d 910 (unpublished table decision), No. 97-1057, 1997 WL 786925 (3d Cir. Nov. 18, 1997); *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997); *Harris v. H. & W. Constructing Co.*, 102 F.3d 516 (11th Cir. 1997); *Hollihan v. Lucky Stores*, 87 F.3d 362 (9th Cir. 1996).

Faillace and Butler further misinform their readers about the effect that the guidance has had on emerging ADA case law about psychiatric disabilities. The measure of the guidance's success in the courts is not a simplistic tally of the number of ADA psychiatric disability cases decided against employees during the first few months after its publication. Rather, the body of case law issued in the last year reveals that courts are analyzing these cases with greater precision and greater fairness, which is one of the ultimate goals of the guidance. Cases in which individuals with psychiatric disabilities allege employment discrimination are making it past summary judgment or otherwise are receiving favorable treatment with greater frequency. *See, e.g., Ralph v. Lucent Technologies*, No. 97-1963, 1998 WL 29837 (1st Cir. Feb. 2, 1998) (affirming grant of preliminary injunction requiring employer to provide a part-time schedule for four weeks as a return-to-work accommodation); *Stokes v. E.I. duPont de Nemours*, No. CIV.A. 95-4279, 1997 WL 359995 (E.D. La. June 27, 1997) (denying motion for summary judgment by employer who terminated employee for refusing inpatient treatment for depression but then maintained in court that employee's depression was not substantially limiting); *Krocka v. Bransfield*, 969 F. Supp. 1073 (N.D. Ill. 1997) (denying employer's motions for summary judgment on plaintiff's claims, *inter alia*, that placement in Personnel Concerns Program solely for taking a psychotropic medication violated the ADA, and that blood test for Prozac violated the ADA); *Ferrier v. Raytheon Corp.*, No. CIV. 96-0957, 1997 WL 695552 (E.D. La. Nov. 4, 1997) (sustaining jury finding as to liability in case where employee challenged his termination and alleged he was regarded as disabled after disclosing an anxiety disorder).

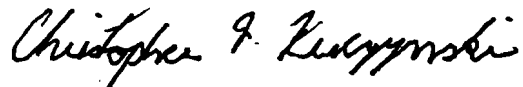
Conversely, cases involving individuals with psychiatric disabilities who engaged in misconduct such as violence, threats, or theft are being properly resolved in favor of employers, often with a careful analysis of the issues that is consistent with principles articulated in the guidance. *See, e.g., Palmer v. Circuit Court, Cook County*, 117 F.3d 351 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 893 (1998) (affirming grant of summary judgment for employer who terminated employee for threatening a supervisor, and also stating that employee had a mental illness even though it was triggered by a personality conflict at work); *Dockery v. City of Chattanooga*, 134 F.3d 370 (6th Cir. 1997) (affirming grant of summary judgment for employer who terminated police officer for stealing from a grocery store where he worked off-duty); *Emberger v. Deluxe Check Printers*, No. CIV.A. 96-7043, 1997 WL 677149 (E.D. Pa. Oct. 30, 1997) (granting motion for summary judgment in favor of employer who terminated employee for disobeying order not to contact female employee who felt harassed).

Finally, the author's underlying message to employers is disturbingly misleading because it implies that the ADA need not be taken too seriously when it comes to employees with psychiatric disabilities. Faillace and Butler essentially invite employers to refuse to make accommodations for employees or job applicants who claim to have psychiatric disabilities, arguing that a court will ultimately find that such individuals are either not disabled or not qualified for the positions they hold or seek. Apart from being legally inaccurate, *see, e.g., Krocka v. Bransfield*, 969 F. Supp. 1073, 1084, nn. 8 & 9 (N.D. Ill. 1997) (rejecting

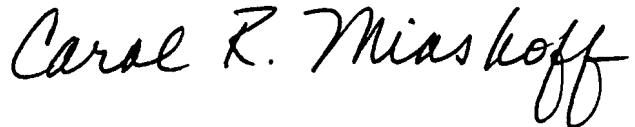
that substantial limitation in "interacting with others" renders employee unqualified), this message is not wise. Employers must give meaningful consideration to an employee's request for a reasonable accommodation due to a psychiatric disability, just as they consider accommodation requests linked to other, less stigmatizing conditions. The employer who fails to do so may find itself the subject of an EEOC investigation or a lawsuit, and may not ultimately be as certain of an easy victory as the authors suggest. In addition, it would appear to make little economic sense for an employer to refuse even to discuss the possibility of making a simple, inexpensive accommodation for a good employee.

Faillace and Butler could have used their efforts more effectively for their employer audience by telling employers how to apply the guidance in their workplaces. Such an approach would have been mutually beneficial to the many people with psychiatric disabilities who are capable, often with very simple types of accommodations, of becoming valuable assets in the workplace, and to employers whose businesses will benefit from the use of talent that has thus far been tremendously underutilized.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel, ADA Policy, EEOC



Carol R. Miaskoff  
Assistant Legal Counsel, Coordination, EEOC



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

(b) to 4(b) x

APR 1 1998

This responds to your letter to the Equal Employment Opportunity Commission (EEOC) dated February 25, 1998, regarding Title I of the Americans with Disabilities Act of 1990 (ADA). In your enclosed February 7, 1998, letter to the Senate Committee on Disability Policy, you expressed concern about the treatment of employees with "emotional or psychiatric impairments" under the ADA. Among other matters, you expressed concern about fitness-for-duty examinations under the ADA.

Under the ADA, all employee medical examinations, including fitness-for-duty examinations, must be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4). This requirement may be met when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. See EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, Question 14 (3/25/97) (Guidance). In addition, periodic medical examinations for public safety positions are permissible if they are narrowly tailored to address specific job-related concerns and are shown to be consistent with business necessity. *Id.* at n. 41.

Let us assure you that we will continue to vigorously enforce the ADA. We are enclosing a copy of the referenced Guidance, which addresses a range of issues related to the ADA and psychiatric disabilities.

Sincerely,

*Christopher J. Kuczynski*

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division

Enclosure





**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

AUG 27 1998

66457c

This responds to your letter dated April 3, 1998, asking for our views on whether proposed state legislation (SB 134/HB 566) on workplace drug testing may violate the ADA. Based on the information in your letter, it appears that the legislation at issue would allow an employer to receive an initial positive drug test result, which then may not be confirmed in follow-up screening. Your letter expresses concern that this may lead an employer to erroneously regard an applicant to be using or abusing illicit drugs, when in fact the test result was falsely positive due to lawful use of prescription medication or ingestion of certain foods. It further appears that the process of validating or confirming initial test results, as contemplated by the proposed legislation, would enable employers to deduce when an initial positive result may have been due to an applicant's lawful prescription drug use. You express concern that this breaches confidentiality and may violate the ADA's provisions on medical inquiries. Below, we set out and apply the relevant legal principles under the ADA.

The ADA neither requires nor prohibits testing applicants and employees for illegal drug use and making employment decisions based on test results. Thus, whether and how an employer tests applicants for illegal drug use is generally outside the bounds of the ADA. As explained below, however, an employer's use of information learned from a drug testing program may have ADA implications where it discriminates on the basis of disability.

Individuals who are/were addicted to drugs but are not currently using drugs illegally may have a covered disability under the ADA. However, the ADA does not protect drug addicts who are currently using, or individuals who only used drugs on an occasional, casual basis. Under the "regarded as" prong of the disability definition, an individual who is erroneously regarded as being a drug addict is protected from discrimination, but an individual who is erroneously regarded to be only a casual user is not.

The ADA prohibits an employer from asking an applicant a disability-related question or from administering a medical exam prior to an offer of employment. A test to screen for the current illegal use of drugs is not considered a medical exam and thus may be given to applicants or employees at any time. Inquiries about an applicant's lawful drug use, on the other hand, are prohibited pre-offer, in most cases, because they are likely to elicit information about a disability. An exception to this latter rule allows an employer to ask about an applicant's lawful drug use

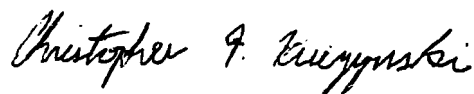
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pre-offer in order to confirm the validity of an initial positive result on a screen for illegal drug use. See EEOC's ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Exams (Oct. 1995).

That the proposed legislation allows the employer to receive an initial positive drug test result which may not be valid, does not by itself implicate the ADA. The ADA does not prohibit an employer from receiving positive drug test results, whether or not these results are due to lawful drug use. However, an adverse employment decision that is based on a false positive drug test result may violate the ADA, under the proposed legislation or any other workplace drug testing program, if an applicant's false positive result is in fact due to lawful drug use associated with an ADA-covered disability, or if the applicant is erroneously regarded by the employer to be a drug addict.

That the proposed legislation may enable the employer to learn of an applicant's lawful drug use following an initial positive test result also does not by itself violate the ADA. As noted above, the ADA permits an employer to ask about an applicant's lawful drug use to confirm a positive test result.

I hope this information is helpful to you. You can obtain copies of informational materials concerning the ADA, including the ADA Enforcement Guidance cited herein, by calling our publications office toll-free at 1-800-669-EEOC. These materials are also available at EEOC's website address: [http\\:www.eeoc.gov](http://www.eeoc.gov).

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel

cc:

6467C

Baltimore District Office



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

AUG 27 1998

(b) 6 7 (b) 7C

This responds to your June 11, 1998, letter to the Equal Employment Opportunity Commission (EEOC).

In your letter, you asked whether there are any federal laws requiring state governments to recruit individuals with disabilities for employment. Specifically, you asked whether a state must inquire about disability on an application form and give "favorable consideration" to people with disabilities.

The EEOC enforces the Title I employment provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-117. Title I prohibits covered employers--including state governments--from discriminating against qualified individuals with disabilities, but it does not require them to engage in affirmative action. As the legislative history to the ADA noted, an "employer has no obligation under [the ADA] to prefer applicants with disabilities over other applicants on the basis of disability." S. Rep. No. 101-116 (1989), at 26-27; H.R. Rep. No. 101-485 pt. 2 (1990), at 56.

The ADA generally prohibits employers from asking about an applicant's disability until after it makes a conditional job offer to the applicant. An employer, however, may ask applicants voluntarily to self-identify as individuals with disabilities if it is undertaking affirmative action because of a law that requires affirmative action for individuals with disabilities or the employer is voluntarily using the information to benefit individuals with disabilities.

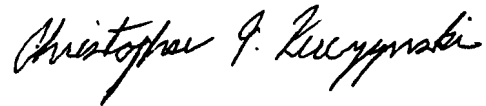
Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, requires federal contractors to take affirmative action to employ and advance individuals with disabilities. For information about section 503, you may wish to contact the Department of Labor's Office of Federal Contract Compliance Programs at the following address:

U.S. Department of Labor  
Office of Federal Contract Compliance Programs  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
(202) 219-9475.

(b) 6 + (b) 7c

This is an informal discussion of the matters you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. I hope that you find this information useful.

Sincerely,

A handwritten signature in cursive script, reading "Christopher J. Kuczynski".

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

**AUG 5 1998**

(b) 6 & (b) 7C

This is in response to your letter to Ellen J. Vargyas, Legal Counsel of the Equal Employment Opportunity Commission (EEOC), dated June 4, 1998, regarding the Americans with Disabilities Act of 1990 (ADA).

You asked whether, under the ADA, it is permissible for you to send to potential employers letters which contain information about the physical limitations, medical diagnoses, and medical history of individuals for whom you are seeking employment. You state that these letters do not include the name or gender of the person you are seeking to place and do not mention any workers' compensation insurer related to the person's South Dakota workers' compensation claim. You further state that you contact the employer two weeks later to find out whether the person has actually applied for work, using the person's name, but without disclosing that it is the person who is the subject of the letter. You state that, if an employer inquires at this point whether the person is the subject of your letter, you inform the employer that, because of the ADA, you cannot disclose that information.

The EEOC enforces Title I of the ADA, as amended, which prohibits employment discrimination against a qualified individual because of a disability. 42 U.S.C. § 12111; 29 C.F.R. § 1630.4. Title I applies to employment agencies, as well as to unions and employers who have 15 or more employees. 42 U.S.C. § 12112; 29 C.F.R. § 1630.2(b). The term "employment agency," as used in Title I of the ADA, has the same meaning as under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12111(7) (citing 42 U.S.C. § 2000e); 29 C.F.R. part 1630, app. § 1630.2(b). Under Title VII, "[t]he term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer . . . ." 42 U.S.C. § 2000e(c).

Title I of the ADA requires that information obtained by covered entities, including employment agencies, regarding the medical condition or history of a job applicant or an

employee be collected and maintained on separate forms and kept in separate confidential medical files. Id. A covered entity must keep the information confidential with the following limited exceptions:

- (1) supervisors and managers may be informed regarding necessary restrictions on the work duties of the employee and necessary accommodations;
- (2) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (3) government officials investigating compliance with the ADA shall be provided relevant information on request.

42. U.S.C. § 12112(d)(3)(B); 29 C.F.R. § 1630.14(b), (c). In addition, employers may submit information to state workers' compensation offices or state second injury funds in accordance with state worker's compensation laws (see 42 U.S.C. § 12201(b); 29 C.F.R. pt. 1630, app. § 1630.14(b)), and employers may use the information for insurance purposes, such as submitting medical information to an employer's health insurance carrier if the information is needed to administer a health insurance plan (see 42 U.S.C. 12201(c); 29 C.F.R. pt. 1630, app. 1630.14(b) and 1630.16(f) (note, however, that this exception does not apply to workers' compensation insurance, which is not covered by section 501(c) of the ADA)).<sup>1</sup> Such information may not be used for a purpose inconsistent with the ADA. 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.14(c).

The ADA's confidentiality provisions do not distinguish between disclosures of medical information about an applicant whose identity is not revealed to the prospective employer and those disclosures that include the name and other identifying information about the applicant. In addition, it appears that your practice of making follow-up calls to prospective employers using the applicant's name within a short time after sending the letter containing confidential medical information could be considered tantamount to disclosing the applicant's identity. Your practice of stating to the employer that, because of the ADA, you cannot answer its question whether the person you are calling about is the person referred to in the letter, might also be construed as a disclosure of a particular applicant's medical information or disability status. We further note that the ADA, as a federal law, would supersede a conflicting state law, such as one that required an employment agency or other covered entity to violate the confidentiality requirements discussed herein.

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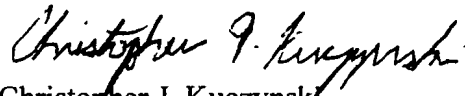
<sup>1</sup>For further information on this topic, see the EEOC Enforcement Guidance: Workers' Compensation and the ADA at 6-7, 8 FEP Manual (BNA) 405:7391, 7394 (1996) and ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 21-23, 8 FEP Manual (BNA) 405:7191, 7201-7202.).

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Page Three

I hope that this information has been helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission. In addition, our failure to address other matters that may have been presented should not be construed as agreement with statements or analysis related to those matters.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

(b) 6 4(b) 7c

9/98

This is in response to your letter, dated August 4, 1998, requesting the Equal Employment Opportunity Commission (EEOC or Commission) to review your post-employment questionnaire. The questionnaire, which will be used for all laborer, carpenter, and rodbuster positions, informs persons who have received conditional job offers that they will be regularly required to lift loads in excess of 70 pounds. The questionnaire also inquires about the receipt of prior workers' compensation benefits, previous injuries/illnesses, and restrictions on lifting. You ask whether your company can withdraw a conditional offer of employment if a person responds that s/he is restricted to lifting 30 pounds or less:

Under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, an employer may not ask disability-related questions (*i.e.*, questions likely to elicit information about a disability), or require medical examinations before an applicant has been given a conditional job offer. Thus, questions about an applicant's medical history, prior worker's compensation claims, or previous illnesses/ injuries are prohibited at the pre-offer stage. After a conditional offer is made, an employer may ask disability-related questions, including questions about an individual's workers' compensation history or illnesses/ injuries, and require medical examinations if it does so for all entering employees in the same job category. (See enclosed Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations.)

Questions about the ability of a job applicant to perform job-related functions are not disability-related questions and, thus, can be asked at any time either before or after a conditional job offer is made. For example, when interviewing for a laborer position, you may explain that the job regularly requires lifting 70 or more pounds and ask the applicant whether s/he can perform that function, with or without reasonable accommodation. It also is permissible for you to ask all applicants for a particular position to demonstrate how they would perform specific job-related functions, as long as all job applicants for that job category are asked the same question.

If an employer refuses to hire an individual with a disability based on the answers to any of the kinds of questions discussed above, the employer must be able to demonstrate that its decision was job-related and consistent with business necessity. In other words, the employer must be able to demonstrate either that the individual could not perform the essential functions of the position, even with a reasonable accommodation, or, if the employer's reason for rejecting the individual was based on safety concerns, that the individual would pose a "direct threat." A "direct threat" is a significant risk of substantial harm that cannot be reduced or eliminated



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Page Two

through reasonable accommodation. Thus, an employer that does not hire an individual who, because of a disability, cannot meet a 70-pound lifting requirement must be able to show that the ability to lift 70 pounds is necessary in order to perform the essential functions of the job, and that there is no reasonable accommodation (such as a device to assist with lifting) that would enable the individual to perform these functions.

I hope that this information is helpful to you. Please note, however, that this letter does not constitute an official opinion of the EEOC.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Division

Enclosure

Chron



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

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SEP 25 1998

This responds to your December 26, 1997, letter to the Disability Rights Section of the United States Department of Justice. The Department of Justice recently asked the Equal Employment Opportunity Commission (EEOC) to respond to your letter.

In your letter, you state that "Medicare clearly recognizes severe obesity as a disability qualifying for life-time payments." You ask whether, in light of this, the Americans with Disabilities Act of 1990 (ADA) prohibits employers from offering health insurance benefits that exclude coverage for severe obesity.

The EEOC enforces the Title I employment provisions of the ADA, which prohibit covered employers from discriminating against qualified individuals with disabilities on the basis of disability. To be protected by the ADA, an individual must meet the ADA definition of "disability."

The ADA defines "disability" as a physical or mental impairment that substantially limits a major life activity (such as walking, breathing, learning, or working), a record of such an impairment, or being regarded as having such an impairment. "Substantially limits" means that an impairment prevents a person from performing a major life activity or significantly restricts the person's ability to perform the activity as compared to the ability of the average person in the general population. The EEOC has stated that morbid obesity is an impairment. Thus, whether a person with morbid obesity has a disability depends on whether that particular person is substantially limited in a major life activity, has a history of being substantially limited, or is regarded as being substantially limited.

The ADA's prohibition against employment discrimination includes discrimination in the provision or administration of fringe benefits, such as employer-provided health or life insurance. Thus, the ADA generally requires that individuals with disabilities be accorded equal access to whatever health insurance is provided to individuals without disabilities.

On the other hand, section 501(c) of the ADA specifically permits employers and insurance companies to continue to use legitimate risk assessment and other traditional insurance classification and administration practices. Employers and insurers may continue to use these practices even if they have an adverse effect on individuals with disabilities, as long as the practices are uniformly applied to all insureds and are not used as a subterfuge to evade the purposes of the ADA.

In an Interim Enforcement Guidance issued on June 8, 1993, the Commission explained how these ADA requirements apply to the terms of employer-provided health insurance plans. Interim Enforcement Guidance on the application of the Americans with Disabilities Act of 1990 to disability-based distinctions in employer provided health insurance (1993) (copy enclosed). The Commission stated that plan limitations or distinctions that are not disability based do not violate the ADA so long as they are applied equally to all insureds. Such limitations are permissible, even if they have a greater effect on some people with disabilities, because they apply to and constrain insureds both with and without disabilities. Guidance at 5-7.

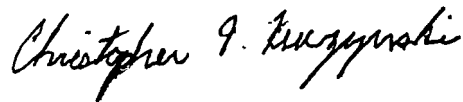
By contrast, health insurance plan limitations or distinctions that are disability based may violate the ADA. A distinction is disability based if it singles out a particular disability (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., all impairments that substantially limit a major life activity). Id. at 7. Such a distinction violates the ADA unless the employer can show that it is part of a bona fide insurance plan and is not used as a subterfuge to evade the purposes of the ADA. Id. "Subterfuge" means that the distinction is not justified by the particular risks or costs associated with a disability. Id. at 11. An employer can defend a disability-based distinction in a plan by showing, for example, that it is necessary to prevent a drastic change in the scope or cost of the plan or that it is justified by actual or reasonably anticipated experience. Id. at 11-13.

A determination of whether a particular provision in an employer-provided health insurance plan violates the ADA requires a fact-specific inquiry into the precise provision and the employer's justification for it. If you believe that you or someone else has been subjected to disability-based discrimination in employer-provided health insurance, then you or the other person may file a charge of discrimination with your local EEOC field office. Charges generally should be filed within 180 days of the alleged discrimination; in some cases, the filing period is 300 days. You may reach the EEOC office nearest you by calling 1-800-669-4000 (voice/TTY).

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Page Three

This letter is an informal discussion of the issues you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. In addition, our silence on other matters that may have been presented in your letter should not be construed as agreement with those matters.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division

Enclosure



U S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

SEP 23 1998

(b) 6 7 (b) 7C

This is in response to your August 29, 1998 letter to the Chairman of the Equal Employment Opportunity Commission (EEOC), regarding the Americans with Disabilities Act of 1990 (ADA).

You asked whether your employer's revised long term disability (LTD) plan violates the ADA. You also asked whether the LTD plan is valid without signatures and without the approval of union members. Your concerns appear to be related to issues you raised in your May 31, 1998 letter to the EEOC about your employer's discontinuing your health insurance, not allowing you to exercise your COBRA rights, and being required to accept Medicare benefits instead, while you are on long term disability. You further indicated that your employer forced you to take long term disability benefits, and that it will not take you back, although your doctor has released you to return to work.

The EEOC enforces Title I of the ADA, which prohibits discrimination against qualified individuals because of disability by employers who have 15 or more employees. The ADA's prohibitions include discrimination in the provision and administration of fringe benefits available by virtue of employment, including LTD plans and health insurance plans. The ADA defines the term "disability" as (1) a physical or mental impairment that substantially limits one or more of an individual's major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment. An individual with a disability is "qualified" for ADA purposes if s/he satisfies a job's skill, experience, and education requirements, and can perform the job's "essential functions" (*i.e.*, its fundamental duties), with or without a reasonable accommodation.

Issues Not Covered by the ADA

Whether an employer's long term disability plan is invalid because it has not been signed is a matter of contract law and not an issue arising under the ADA or any other law enforced by the EEOC. Similarly, whether union members must agree to a change in an employee benefit plan, or whether a change in an employee benefit plan is otherwise valid under ERISA are not ADA issues. Therefore, we express no opinion on these matters. However, there are several other federal agencies which may be able to assist you in this regard. You may contact the

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Page Two

National Labor Relations Board regarding questions about the need for union members to approve changes to employee benefits plans at the following address and telephone number:

National Labor Relations Board  
1099 14th Street, N.W.  
Washington, D.C. 20570  
202-273-1000.

You may contact the U.S. Internal Revenue Service regarding changes in an employee benefit plan under ERISA, at the following address and telephone number:

Internal Revenue Service  
Employee Plans Division  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224  
202-622-8300.

You may contact the Health Care Financing Administration within the U.S. Department of Health and Human Services regarding your rights under COBRA to continue to participate in an employer-provided group health insurance plan upon the termination of your employment, and regarding the coordination of private health insurance and Medicare benefits, at the following address and telephone number:

Health Care Financing Administration  
Baltimore, Maryland 21244  
410-786-3000

#### ADA Issues

It does not appear that any of the terms of the LTD plan discriminate on the basis of disability in violation of the ADA. However, the ADA also prohibits an employer from discriminating on the basis of disability in its application of an otherwise non-discriminatory LTD plan. For example, an employer may not require an employee to apply for, or to accept, long term disability benefits because of his or her disability, if s/he desires to continue working and can perform the essential functions of the position, with or without a reasonable accommodation. An employer also may not refuse to rehire an individual because of his or her disability, if s/he has the requisite qualifications for, and is able to perform the essential functions of, the position for which s/he has applied, with or without a reasonable accommodation.

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Page Three

If you believe that you have been subjected to employment discrimination in violation of Title I of the ADA, you may contact the EEOC's St. Louis District Office at the following address and telephone numbers:

Equal Employment Opportunity Commission  
St. Louis District Office  
1222 Spruce Street, Room 8.1000  
St. Louis, Missouri 63103  
314-539-7800 or 1-800-669-4000.

You should be aware that a claim may be untimely if it is not filed with the EEOC within the statutory deadline of either 180 or 300 days of the alleged discriminatory action. The St. Louis District Office can inform you of the applicable deadline.

We hope that this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,



Peggy R. Mastroianni  
Associate Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

OCT 14 1998

This is in response to your August 31, 1998, letter to Chairman Igasaki of the Equal Employment Opportunity Commission (EEOC or Commission) asking whether the Hawaii Revised Statutes regarding preemployment inquiries conflict with the Americans with Disabilities Act (ADA) and EEOC guidance. The amended Hawaii statutes state that employers may inquire about conviction records only after a prospective employee has received a conditional job offer.<sup>1</sup> You believe that this requirement is inconsistent with EEOC enforcement guidance on the ADA, which states that all non-medical information must be obtained at the pre-offer stage.

As you know, the EEOC enforces Title I of the ADA, 42 U.S.C. § 12101 *et seq.*, which prohibits employers from discriminating against qualified individuals because of disability in all aspects of employment. Section 102 of the ADA specifically prohibits an employer from asking disability-related questions (i.e., questions likely to elicit information about a disability), or requiring medical examinations, before an applicant has been given a conditional job offer. After a conditional job offer is made, an employer may ask disability-related questions and require medical examinations if it does so for all entering employees in the same job category. These restrictions are to ensure that an individual's non-medical qualifications are considered before his/her medical condition is evaluated.

Asking whether a prospective employee has ever been convicted of a crime is not likely to elicit information about a disability and, thus, is not by itself a violation of the ADA.<sup>2</sup> You

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<sup>1</sup>The statutes further state that an offer of employment may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position.

<sup>2</sup>Although questions about an applicant's conviction record do not violate the ADA, they may have Title VII implications. Using inquiries concerning conviction records to exclude applicants with conviction records has been found to disproportionately exclude minorities. Therefore, inquiries concerning convictions should be avoided unless the employer can show that the exclusion is job-related and consistent with business necessity.



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Page Two

seem to be concerned, however, about the timing of this inquiry when an employer *also* intends to ask disability-related questions and/or require medical examinations.

As stated above, an employer may inquire about an individual's medical condition only after it has extended him/her a real job offer. In its "Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990" (October 10, 1995), the Commission explained that a job offer is "real" if the employer has evaluated *all* non-medical information which it reasonably could have obtained and analyzed prior to giving the offer. It is unlikely that an employer could show that it could not reasonably obtain and evaluate information about an applicant's conviction record prior to extending an offer.

An employer that wants to ask about an applicant's conviction record and make disability-related inquiries and/or conduct medical examinations, however, may comply with both the Hawaii statutes and the ADA by taking the following steps: (1) evaluating an applicant's non-medical qualifications; (2) if the applicant is qualified, extending a conditional job offer; (3) asking about conviction records and assessing whether to withdraw the offer; and, (4) asking disability-related questions and/or conducting medical examinations (as long as this is done for all employees in the same job category). Of course, an employer should proceed to the fourth step only if the offer is still valid after an evaluation of a prospective employee's conviction record. Therefore, if an employer withdraws the offer after obtaining medical information, the prospective employee will know that s/he was not rejected because of a conviction record but, rather, because of a medical condition.

I hope this information is helpful to you. Please note, however, that this letter does not constitute an official opinion of the EEOC.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

NOV 24 1998

(b) (6) (4) (b) (7) (c)

This is in response to your letter of October 2, 1998, requesting guidance on whether the Americans with Disabilities Act (ADA) requires an employer to provide an electric wheelchair as a reasonable accommodation to an employee who uses a manual wheelchair and cannot use a ramp at the entrance to the building. Alternatively, you ask whether an employer would have to provide someone to assist the employee in using the ramp.

Reasonable accommodation is required to enable an employee with a disability to gain access to an employer's workplace. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). As Sharon Rennert discussed with you in a telephone conversation, an employer should talk with the employee about the precise nature of the problem with using the ramp to identify effective forms of reasonable accommodation. In addition, the employer should consult with organizations, such as the Job Accommodation Network (1-800-526-7234), that might be able to offer helpful suggestions. Possible reasonable accommodations may include changing the slope of the ramp and providing a lift. There also may be ways to modify the ramp to enable the employee to use it. For example, changes to the handrail might offer a better grip and thus allow the person to use the ramp without assistance. An employer is not required to make any accommodation that would result in undue hardship (i.e., significant difficulty or expense).

The ADA does not require employers to provide an employee with a disability with a "personal use item," such as an electric wheelchair, if such a device is needed to assist the individual throughout his or her daily activities, on and off the job. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997). Thus, a person who is having difficulty generally moving around in a manual wheelchair would not be entitled to an electric wheelchair from the employer.

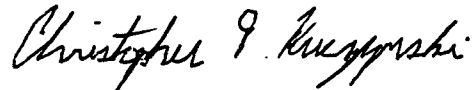
While an electric wheelchair used only to access the ramp at the entrance to the employer's building may not be a personal use item, it would probably not be required as a reasonable accommodation under the circumstances you have described. However, the ADA

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Page Two

would require an employer to provide an individual to assist an employee with a disability in using the ramp, absent undue hardship. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

We hope this information is helpful. If you would like to discuss this matter further, please feel free to call Sharon Rennert at (202) 663-4503. This letter is not an official opinion of the EEOC.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

NOV 4 1998

6069 607C

This is in response to your letter dated September 2, 1998, regarding the Americans with Disabilities Act of 1990 (ADA), as amended. You asked whether an employer's separation pay plan which denies benefits to employees whose employment is terminated for illness or injury violates the ADA.

As you know, the Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA which prohibits discrimination against qualified individuals because of disability in all aspects of the employment relationship, including terms, conditions, and privileges of employment. 42 U.S.C. § 12112; 29 C.F.R. § 1630.4. Separation pay is a term, condition, or privilege of employment subject to the requirements of the ADA. Whether an employer's separation pay plan which denies benefits to employees whose employment is terminated for illness or injury violates the ADA depends whether, under the terms of the plan, qualified employees are denied separation pay benefits because of disability. This can only be determined by examining the overall terms of the plan.

Only a portion of the separation pay plan was enclosed in your letter, so we are unable to determine whether its terms would violate the ADA. If separation pay is provided to employees who lose their jobs because their positions are eliminated by the company, through outsourcing, reorganization, or some similar means, but is not provided to employees who cease to work for the employer for other reasons, such as voluntary resignation, discharge for "cause" (e.g., poor performance or misconduct), or because of illness or injury that prevents job performance, with or without reasonable accommodation, the plan will probably not violate the ADA. This is because qualified individuals would not be denied separation pay because of disability, but because their jobs were not eliminated by the company. On the other hand, if separation pay generally is provided to employees upon termination of employment, but employees who are terminated because of illness or injury are denied the benefit, the plan would likely violate the ADA.

Although you did not inquire about the employer's reasonable accommodation policy under the "Illness or Injury" portion of the plan, its terms appear to be inconsistent with the requirements of the ADA. An employer is required to provide a reasonable accommodation to an otherwise

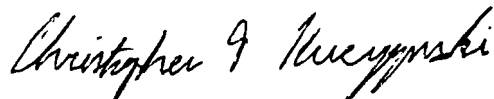
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qualified individual with a disability, unless it can demonstrate that it would impose an undue hardship on the operation of its business. 42 U.S.C. § 12112(5); 29 C.F.R. § 1630.9. Leave is a type of reasonable accommodation required by the ADA. 29 C.F.R. pt. 1630 app. 1630.2(o). Therefore, even if an employee with a disability has exhausted leave available under another statute, such as the Family and Medical Leave Act, or under a sick leave policy, an employer must provide additional unpaid leave (and return to the same position), unless it can demonstrate undue hardship. In addition, if it is not possible to accommodate an employee in his or her current position, the employer must place the employee in an equivalent vacant position, if one exists, and if the employee is otherwise qualified for the position and can perform its essential functions, with or without a reasonable accommodation. Id. An employer may reassign the employee to a lower graded position if there are no equivalent vacant positions for which s/he is qualified, with or without a reasonable accommodation. Id. We have enclosed the EEOC's fact sheet, The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, which provides technical assistance on issues of leaves of absence, among other things, arising under these laws.

I hope this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues you raised and does not constitute an official opinion of the EEOC. In addition, our failure to address other matters that may have been presented should not be construed as agreement with the statements or analysis related to those matters.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

Upton

(b) 6 7 (b) 7c

DEC 14 1998

This is in response to your letter of October 29, 1998, requesting guidance on whether an employer must pay to obtain an assessment of whether an employee has a learning disability.

The EEOC has stated that when an applicant or employee requests reasonable accommodation, and the disability and/or need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations. The employer is entitled to know that the individual has a covered ADA disability for which s/he needs reasonable accommodation. [See the enclosed Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, Question 21.]

The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual initially provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs reasonable accommodation. Documentation is insufficient if it does not specify the existence of an ADA disability and the need for reasonable accommodation. If an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. If the individual fails to provide the missing information, then the employer may require that the individual go to a health care professional of the employer's choosing, and the employer must pay all costs associated with the visit(s). If an employer allows an individual the opportunity to obtain documentation from his/her health professional, the individual bears all costs. [See the Enforcement Guidance, Question 22]

Applying these principles to the situation raised in your letter, George Mason University may require that an applicant or employee who requests reasonable accommodation because of a learning disability provide documentation about the learning disability and the functional limitations that necessitate a reasonable accommodation. The University should allow the individual time to provide documentation that s/he may already have showing the existence of a covered ADA disability and the need for reasonable accommodation, or to obtain documentation, at his/her expense, that show the existence of an ADA disability and the need for reasonable accommodation. If the documentation is insufficient, the University should explain what

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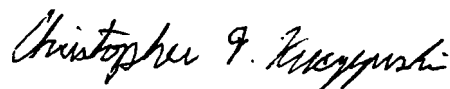
information is missing and allow the individual time to obtain the missing information. If the individual does not do so, the University may require the individual to go to a health care professional of the University's choice, at its expense. However, the University is not obligated to send a person to a health care professional, at its expense, if the individual fails to provide sufficient documentation of an ADA disability.

Sufficient documentation of a learning disability covered under the ADA should include a diagnosis of a specific learning disorder (e.g., as specified in the Diagnostic and Statistical Manual published by the American Psychiatric Association [currently the DSM-4], or the International Classification of Diseases). The documentation should show that the health professional who conducted the tests and made the diagnosis has expertise in learning disabilities, and should give some indication of how the diagnosis was reached (e.g., what tests were administered to determine a diagnosis). Finally, the documentation should include information about the major life activities affected by the learning disorder (e.g., reading, learning, concentrating, thinking).

Your letter expresses concern about the validity of documentation that might be ten years old. The age of the documentation is irrelevant if the disability would not have significantly improved or been eliminated in the intervening years. For example, if the documentation shows that an individual has a chronic, life-long impairment that substantially limits a major life activity, then an employer cannot require an individual to obtain more current documentation. However, if an employer has reason to believe that an individual no longer has the learning disorder, or that it may have improved to the point where it no longer substantially limits a major life activity, then the employer can require more recent documentation.

I hope this information is helpful. This letter does not represent an official opinion of the EEOC.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

(b)6 L(b)7C

DEC 3 1998

This is in response to your letter to the Equal Employment Opportunity Commission (EEOC or Commission), dated June 22, 1998, requesting an opinion as to whether an employer can comply with a state regulation requiring child care facilities to photocopy applicants' drivers' licenses prior to offering employment without violating the Americans with Disabilities Act (ADA). We apologize for the delay in responding.

According to your letter, the State of Florida uses the information listed on the driver's license to determine whether an applicant for a child care worker position has a prior history of child abuse or was convicted of any criminal offenses that would disqualify him/her from employment. Because a driver's license may identify a person as having a disability, you ask whether this requirement constitutes a prohibited preemployment disability-related inquiry under the ADA.

Under the ADA, 42 U.S.C. § 12101 *et seq.*, an employer may not ask disability-related questions or require medical examinations before an applicant has been given a conditional job offer. A disability-related question is one that is likely to elicit information about a disability. The State of Florida indicates whether a licensed driver is subject to any restrictions by placing a letter or number code on the front of the driver's license. An explanation of the codes is on the back of the license (e.g., "A- corrective lenses," "K- hearing aid," "M- hand control or pedal ext.," "U- medical alert bracelet). Although these codes *might* reveal that certain applicants have disabilities (e.g., those restricted to driving with hand controls or prosthetic aids), they will frequently only reveal the existence of impairments that are not disabilities, but merely restrict driving under certain conditions (e.g., with corrective lenses). Further, many applicants will have no codes on their licenses, either because they have hidden disabilities that do not result in driving restrictions, such as diabetes, mental disabilities, or AIDS, or because they have no impairments or disabilities at all. Thus, requiring applicants to present their drivers' licenses is not likely to elicit information about a disability and, therefore, does not constitute an unlawful preemployment disability-related inquiry.<sup>1</sup>

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<sup>1</sup>If an applicant's driver's license reveals that s/he has an impairment, an employer cannot ask any questions about the impairment unless it has a reasonable belief that the person cannot do the job for which s/he is applying, with or without reasonable accommodation. Under these circumstances the employer may ask whether the applicant needs a reasonable accommodation to perform the job, and if so, what type, or may ask the applicant to describe or demonstrate how s/he would perform the job's essential functions with or without a reasonable accommodation.



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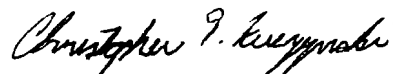
This requirement, however, may raise another ADA concern in that it is a qualification standard which has the effect of screening out applicants who are unable to obtain drivers' licenses because of their disabilities (e.g., those with severe vision impairments or epilepsy). The ADA prohibits the use of qualification standards or other selection criteria that screen out or tend to screen out individuals with disabilities unless they are job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6). This prohibition is designed to ensure that qualification standards do not disqualify individuals with disabilities from jobs they are able to perform. To be job-related and consistent with business necessity, a qualification standard must be directly related to the performance of an essential function of the position in question. Thus, where driving is not an essential function of the child care worker position for which an applicant is applying, an employer would be unable to demonstrate that having a driver's license is job-related and consistent with business necessity. An employer, therefore, could not refuse to hire an applicant whose disability prevented him/her from obtaining a license but, rather, would have to use an alternative means of identification (e.g., another photo I.D. or social security card) to comply with state background screening requirements.

You also should be aware that although requiring applicants to present their drivers' licenses may not violate Title I's prohibition against preemployment disability-related inquiries and medical examinations, it may violate Title II of the ADA, which prohibits discrimination on the basis of disability by state and local government entities. You may contact the Department of Justice (DOJ), which enforces Title II of the ADA, for more information at the following address and telephone number:

Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035-6738

I hope that this information is helpful to you. Please note, however, that this letter does not constitute an official opinion of the EEOC.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

616 4(6)7C

DEC 1 1998

This responds to your letter dated October 6, 1998, requesting our opinion on whether it is lawful to keep a health care provider's note in an employee's personnel file. Your letter states that an employee suspended under the City's Drug and Alcohol Policy has requested that a copy of a letter from a substance abuse professional be placed in his personnel file along with the record of suspension.

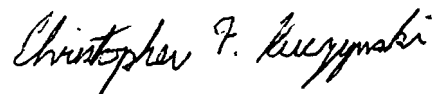
The Americans with Disabilities Act of 1990 (ADA) requires that all medical information be kept confidential in separate medical files and not in personnel files. If, therefore, the letter relates to information about the employee's physical or mental impairments or health, it cannot be kept in the personnel file. There are limited exceptions to the ADA's confidentiality requirements that permit supervisors and managers to know of necessary work restrictions or accommodations. In addition, medical information may be disclosed under certain circumstances to first aid personnel, government officials investigating ADA compliance, and state workers' compensation offices and insurance carriers. See 29 C.F.R. 1630.14 and appendix thereto; EEOC's ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Exams (Oct. 1995) at 21. None of these exceptions would apply to the situation you have described.

Your letter also asks whether it is legal to place with the suspension record in the employee's personnel file a reference to additional medical information that is available on a need-to-know basis. It is our view that this would not comply with the ADA's confidentiality requirements. Placing such a reference with the suspension record is likely to reveal that the employee has a substance abuse impairment and is thus tantamount to disclosing medical information. We also note that disclosure of medical information on a need-to-know basis is broader than the ADA's strict requirement that such information be kept confidential except in limited circumstances, as noted above.

(b)6 4(b)7C  
Page 2

We hope this information is helpful to you. Please note that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission. If you would like to obtain copies of informational ADA materials, including the Enforcement Guidance cited herein, you may do so by calling our publications office toll-free at 1-800-669-EEOC, or by visiting our website at <http://www.eeoc.gov>.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel

cc: (b)6 4(b)7C

Director, Houston District Office



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JAN 6 1999

(b) 6 4 (b) 7 C

This letter is written in response to your letter dated November 2, 1998. In your letter, you thanked us for mailing a copy of the Uniform Guidelines on Employee Selection Procedures (1978) 29 C.F.R. § 1607 (the guidelines), to you. You also expressed concern about preemployment screenings and specifically asked us which physiological criteria (such as heart rate or blood pressure) is acceptable and which criteria will assure that a "prospective employee" is working at a safe level.

Initially, we should mention that the guidelines are not applicable to disability-related matters raised under Title I the Americans with Disabilities Act of 1990 (ADA). The guidelines were designed to determine the legality of testing and other selection procedures under Title VII of the Civil Rights Act of 1964 and Executive Order 11246. The guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

Although the guidelines are not applicable to your concerns about physical tests and physical criterion, the ADA is pertinent here in ways that may not have come to your attention.

First, it may be helpful to review the relevant ADA provisions on disability-related inquiries and medical examinations. Under the ADA, an employer may ask disability-related questions or require medical examinations of an applicant only after the applicant has been given a conditional job offer. Once a conditional job offer is made, the employer may ask such questions or require such examinations as long as this is done for all entering employees in that job category. Employers may single out certain applicants for follow-up medical examinations or questions as long as they are medically related to previously obtained medical information. If the employer, as a result of these questions or examinations, revokes the job offer, it must show that the exclusionary criterion is job-related and consistent with business necessity.

As you may be aware, the Equal Employment Opportunity Commission (EEOC) issued an Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations under the ADA, dated October 10, 1995 (hereafter called "Guidance") (enclosed). On page 14 of this Guidance, EEOC provided a list of factors that are helpful in determining

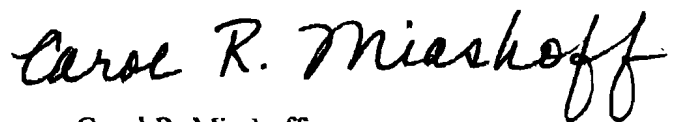
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whether a specific test is "medical" pursuant to the ADA. In many cases, a combination of factors will be relevant in figuring out whether a procedure or test is a medical examination, while in other cases only one factor may be determinative. You should apply these factors to your company's physical capability tests to determine whether they are medical, and thus whether they can be given pre- or post-offer.

Although physical agility tests and physical fitness tests are not medical examinations, these tests are still subject to other parts of the ADA. If an agility test screens out or tends to screen out an individual with a disability or a class of such individuals because of disability, you will need to show that the physical agility test (or physical fitness test) is job-related for the position in question and consistent with business necessity. 29 C. F. R. § 1630.15 (b)(1). This means that you must show that the physical agility test is a legitimate measure for determining whether a specific individual can safely and effectively perform the essential functions of the specific position in question. It is not sufficient that the test measures qualifications for a general class of jobs or a general group of people. Rather, the ADA requires that such qualification standards relate to an individual's ability to perform the essential functions of a specific position.

I hope that this information is helpful to you. Please note that this letter is an informal discussion of some of the issues you raised and is not an official opinion of the EEOC.

Sincerely,

A handwritten signature in black ink that reads "Carol R. Miaskoff". The signature is written in a cursive, flowing style.

Carol R. Miaskoff  
Assistant Legal Counsel  
Coordination Division

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JAN 12 1999

Dear

This letter provides information about Title I of the Americans with Disabilities Act of 1990 (ADA), as it applies to the welfare-to-work program, the

In particular, we address when an "offer of employment" occurs in  
s process in order to determine at what point officials may ask disability-related  
questions or require medical examinations of welfare recipients consistent with the ADA.

ADA Prohibition of Pre-Offer Disability-Related Questions and Medical Examinations

As you know, the Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA which prohibits discrimination against qualified individuals because of disability in all aspects of employment. 42 U.S.C. § 12112; 29 C.F.R. § 1630.4. The ADA prohibits employers from requiring medical examinations or asking questions regarding the existence, nature, or severity of applicants' disabilities before extending a conditional offer of employment. 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13, 1630.14. These prohibitions ensure that an employer considers an individual's non-medical qualifications before it evaluates his or her medical condition. In addition, if an employer withdraws a job offer after an examination or question, the applicant is aware that the reason for the withdrawal relates to his or her medical condition, and not to his or her non-medical qualifications. An employer may require a medical examination or ask disability-related questions after it has made a conditional offer of employment and before the applicant begins his or her work duties, if it does so for all entering employees in the same job category. 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.14.<sup>1</sup>

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<sup>1</sup>Further guidance on this topic, including what questions are "disability-related," what is  
(continued...)

Before determining when an "offer of employment" occurs, one must analyze whether the welfare recipients form an employment relationship that is covered by the ADA, by considering whether the welfare recipients are "employees" within the meaning of the ADA and whether and/or other entities are their "employers" under the ADA. also may be covered by the ADA as an "employment agency."

Whether Welfare Recipients Who Participate in      Are "Employees" Under the ADA

The factors which indicate that an individual is an employee within the meaning of the federal anti-discrimination laws, including the ADA, are set forth on pages 5 and 6 of the EEOC's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Contingent Workers), December 3, 1997 (enclosed). A welfare-to-work program's label for a welfare recipient is not determinative. One must consider all aspects of a welfare recipient's relationship to the entity that conducts a welfare-to-work program (welfare entity), and/or to the entity to which he or she is sent to perform work (receiving entity), in assessing whether he or she is an employee.

At a minimum, a welfare recipient must perform some type of work to be an employee, not simply engage in job search activities, education, or training.<sup>2</sup> If an individual is working, the primary factor indicating that he or she is an employee rather than an independent contractor is that the entity for which he or she works has the right to control when, where, and how the work is done. You stated that      is a program specifically designed to help welfare recipients who are the *least* capable of finding regular employment without assistance because of a lack of education, job skills, and work experience. Under these circumstances, it is likely that      and/or the receiving entities, rather than the individual, has the right to control when, where, and how the work is performed. Also, it is unlikely that a welfare recipient with little prospect for employment is engaged in his or her own distinct occupation or business, or furnishes his or her own tools, materials, and/or equipment, factors which suggest that he or she is an employee rather than an independent contractor. The receiving entities are themselves in business (even if a governmental or non-profit "business"), and it is likely that the work performed by a welfare recipient is part of an entity's regular business, further indications that he or she is an employee.

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<sup>1</sup>(...continued)

a "medical" examination, and what is a "real job offer," is provided in the EEOC's ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, October 10, 1995 (enclosed).

<sup>2</sup>See Contingent Workers, 14-15.

You stated that \_\_\_\_\_ pays the welfare recipients wages, not a predetermined sum, for a work assignment; provides benefits, such as health insurance and workers' compensation; and withholds federal, state, and Social Security taxes, all of which suggest that they are employees.

Although we lack sufficient information about \_\_\_\_\_ program to make a determination on this issue, the information you provided strongly suggests that the participating welfare recipients are "employees" under the ADA.

#### Whether \_\_\_\_\_ or the Receiving Entities Are "Employers" of the Welfare Recipients

If a welfare recipient is an "employee," the second question is *who* is his or her *employer*. and a receiving entity will qualify as the welfare recipient's employers if, under the factors discussed above, one or both organizations have the right to control when, where, and how work is done. All of the circumstances in the welfare recipient's relationship with either or both entities should be assessed to determine if either or both should be deemed his or her employer. If either qualifies as the welfare recipient's employer, and if that entity has the statutory minimum number of employees,<sup>3</sup> then it can be held liable for unlawful discriminatory conduct against him or her. If *both* the welfare entity and the receiving entity have the right to control when, where, and how the welfare recipient performs his or her work, and each has the statutory minimum number of employees, they are covered as "joint employers."

#### Whether \_\_\_\_\_ Is an "Employer" of the Welfare Recipients

A number of factors suggest that \_\_\_\_\_ is an "employer" of the welfare recipients it sends on work assignments: \_\_\_\_\_ typically selects who will participate in the program, decides when and where they should report to work, pays wages and provides benefits, withholds taxes and social security, provides workers' compensation coverage, and has the right to discharge individuals (even if then they are sent to another program). \_\_\_\_\_ pays welfare recipients' wages by the hour or week, rather than by the job. In addition, you stated that \_\_\_\_\_ intends to establish an employer-employee relationship with the welfare recipients, if only on a temporary basis. Therefore, it is very likely that \_\_\_\_\_ is an employer of the welfare recipients.

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<sup>3</sup>The ADA defines the term "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 12111(1)(A); 29 C.F.R. § 1640.2(e).



### Whether Receiving Entities Are "Employers" of the Welfare Recipients

A receiving entity qualifies as an "employer" of a welfare recipient during the time he or she is assigned to it to perform work if it exercises significant supervisory control over the welfare recipient. For example, if it supplies the work space, equipment, and supplies, and if it has the right to control the details of the work to be performed, to make or change assignments, and to terminate the relationship, it would qualify as the welfare recipient's employer. On the other hand, it would not qualify as the employer (but would), if it furnishes the job equipment and has the exclusive right, through on-site managers, to control the details of the work, to make changes in assignments, and to terminate the worker. According to the information you provided, it is very likely that the receiving entities are employers of the welfare recipients during their work assignments.

### Coverage of \_\_\_\_\_ as an Employment Agency

Under the ADA, the term "covered entity" includes "employment agency," which has the same meaning as in Title VII of the Civil Rights Act of 1964 (Title VII): "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer . . ." 42 U.S.C. § 12111(7) (citing 42 U.S.C. § 2000e). If at least one of the employers with whom an employment agency deals on a regular basis is an ADA-covered employer, then the employment agency is covered by the ADA as to all of its activities.<sup>4</sup> You indicated that \_\_\_\_\_ regularly undertakes to procure work opportunities for welfare recipients with non-profit organizations and governmental entities. If the welfare workers are employees of such entities during work assignments, then \_\_\_\_\_ qualifies as an "employment agency," as long as at least one of those entities is covered by the ADA. Employment agencies are subject to the same ADA prohibitions as employers.

### When the "Offer of Employment" Occurs

If a welfare recipient participating in \_\_\_\_\_ is an employee of \_\_\_\_\_ and/or the receiving entity, it means that an "offer of employment" must have been made at some point in \_\_\_\_\_'s process. It is possible to determine *when* the "offer of employment" has been made by analyzing when a welfare recipient is offered the opportunity to become an "employee" of an "employer." There appear to be two possibilities: (1) the "offer" occurs when a welfare recipient is offered the

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<sup>4</sup>This is how the term "employment agency" in Title VII was interpreted by the Commission. See EEOC Compliance Manual, Vol. II, § 605, Appendix N.

opportunity to participate in \_\_\_\_\_'s program; or (2) the "offer" occurs when a welfare recipient is offered a work assignment with a particular receiving entity.

According to the information that you provided, only two indicia of employment are present *after* a welfare recipient accepts \_\_\_\_\_'s offer to participate in its program but *before* he or she is offered a work assignment with a particular receiving entity -- the payment of wages and the withholding of taxes. The most important factor -- the performance of work -- is not yet present. A welfare recipient begins to work only after \_\_\_\_\_ offers him or her a work assignment with a particular receiving entity, and the welfare recipient accepts. Prior to this, the welfare recipient may engage in job search activities, education, or training. The fact that he or she is paid wages for these pre-work activities does not transform them into work but, rather, suggests that the wages are paid at this point *in lieu of* welfare benefits. Accordingly, \_\_\_\_\_'s offer simply to participate in its welfare-to-work program is not in itself an "offer of employment."

After \_\_\_\_\_ offers a welfare recipient a work assignment with a particular receiving entity, and the welfare recipient accepts, he or she begins to receive wages in exchange for performing work. At this point, a second critical factor comes into play -- who controls when, where, and how the welfare recipient performs the work. As discussed above, it is likely that the receiving entity, \_\_\_\_\_, or both exercise control over the welfare recipient's daily work activities, rather than the welfare recipient. Therefore, \_\_\_\_\_'s offer of a work assignment with a particular receiving entity is an "offer of employment" within the ADA.

As a result, \_\_\_\_\_ (acting either as an employer or as an employment agency) and/or a receiving entity (acting as an employer) will violate the ADA if it asks disability-related questions or requires a medical examination of a welfare recipient before \_\_\_\_\_ offers him or her a work assignment with a particular receiving entity.<sup>5</sup>

Of course, \_\_\_\_\_ or a receiving entity may ask disability-related questions or require a medical examination of a welfare recipient following an offer (and acceptance) of a specific work assignment.<sup>6</sup> \_\_\_\_\_ and or the receiving entity may condition the offer of employment on the

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<sup>5</sup>The ADA also prohibits other forms of disability-based employment discrimination. See 42 U.S.C. § 12112(b).

<sup>6</sup>The ADA requires an employer to keep information about the medical condition or history of an applicant or an employee confidential, with a few limited exceptions. 42 U.S.C. § 12112(d)(3), (4); 29 C.F.R. § 1630.14.

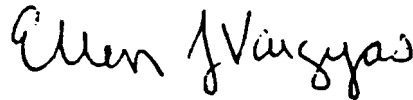
results of such examination or questions, but may withdraw the offer only under limited conditions.<sup>7</sup>

The \_\_\_\_\_ may also be covered by Title II of the ADA, which prohibits disability-based discrimination in state and local government services. You may contact Mr. John Wodatch, Chief, Disability Rights Section, U.S. Department of Justice, for information on Title II of the ADA, at the following address and telephone number:

Mr. John L. Wodatch, Chief  
Disability Rights Section, Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035-6738  
(202) 514-0301.

We hope this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues and is not an official opinion of the Commission. If you would like additional assistance, please contact (b) 6 or (b) 7C of my staff at (202) 663-4503.

Sincerely,



Ellen J. Vargyas  
Legal Counsel

Enclosures (2)

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<sup>7</sup>A conditional job offer may be withdrawn because of a person's disability *only* if the reason is job-related and consistent with business necessity, which means that \_\_\_\_\_ and/or the receiving entity must demonstrate that: (1) the person cannot perform the essential functions of the job, with or without reasonable accommodation (29 C.F.R. § 1630.14(b)); (2) he or she poses a "direct threat" in the position (i.e., a significant risk of substantial harm to self or others that cannot be reduced below the direct threat level through reasonable accommodation) (29 C.F.R. § 1630.2(r)); or (3) another federal law requires the employer to withdraw the job offer because of the person's medical condition (29 C.F.R. § 1630.15(e)).



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

**FEB 4 1999**

(b) 6 & (b) 7(c)

This is in response to your letter sent to me by facsimile on December 2, 1998, regarding the Americans with Disabilities Act of 1990 (ADA). You enclosed a release form which Employers Reference Source of New England (ERSNE) requires Connecticut employers to have executed by a job applicant before it will conduct a background check. ERSNE uses such an executed release to obtain information from various sources, including former employers, credit bureaus, and the Connecticut Workers' Compensation Commission. You asked whether the release violates any provisions of the ADA.

ADA Principles

As you know, the EEOC enforces Title I of the ADA, which prohibits discrimination against a qualified individual because of disability in all aspects of employment. 42 U.S.C. § 12112; 29 C.F.R. § 1630.4. The ADA specifically prohibits employers from requiring medical examinations or asking questions regarding the existence, nature, or severity of applicants' disabilities before extending an offer of employment. 42 U.S.C. § 12112(d)(2)&(3); 29 C.F.R. §§ 1630.13, 1630.14. The offer may be conditioned on the applicant's meeting an employer's legitimate medical criteria. These prohibitions are meant to ensure that an individual's non-medical qualifications are considered before his or her medical condition is evaluated. They also ensure that if a job offer is withdrawn after a medical examination or inquiry, the applicant is aware that the reason for the withdrawal relates to his or her medical condition, and not to his or her non-medical qualifications.

An employer may require a medical examination or ask disability-related questions after it has made a conditional offer of employment and before the applicant begins work duties if it does so for all entering employees in the same job category. 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.14.<sup>1</sup>

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<sup>1</sup>Further guidance on this topic, including whether particular questions are "disability-related," what constitutes a "medical examination," and what constitutes a real job offer, is provided in the EEOC ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, dated October 10, 1995 (enclosed).

(b) 6 4 (b) 7 c

Page Two

The job offer must be a "real" offer. This means that the employer has evaluated all non-medical information it reasonably could have obtained and analyzed before making the offer. EEOC ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, October 10, 1995, at 18 (enclosed).<sup>2</sup>

It is the Commission's position that information about occupational injury or illness and workers' compensation claims is disability-related, so an employer may ask for it only *after* it has made an offer of employment. EEOC Enforcement Guidance: Workers' Compensation and the ADA, September 3, 1996, at 4 (enclosed). An employer also is prohibited from obtaining such information at the pre-offer stage from third parties, such as former employers, workers' compensation offices, and employer information services. *Id.*, 4-5.

#### Application of ADA to the ERSNE Release

The release itself does not contain any unlawful disability-related questions. However, it appears that employers use this form to obtain disability-related information about job applicants. The fourth paragraph specifically includes authorization to obtain workers' compensation information. The second paragraph authorizes the employer to obtain information about an applicant's "work history" and "any other information as deemed necessary," which could include disability-related information.

Although employers are prohibited from obtaining disability-related information prior to an offer of employment, certain language in the release suggests that an applicant is required to execute the document *before* a job offer has been made. While the release says that an applicant acknowledges by his or her signature that an offer of employment has been made, the release is entitled "*Applicant Authorization . . .*," and the first sentence states, "We truly welcome your *application*." (Emphasis added.) The third sentence says "You are *applying* for a position of which *acceptance* will place you . . .," and the fourth sentence says that an employer using this release requires "as a condition of *employment* and/or continued employment that all *applicants* consent to and authorize a *pre-employment* verification of the background information submitted on their *application or resumes*." (Emphasis added.) Finally, the statement, "I have been offered a position contingent upon a satisfactory background investigation," indicates that, except in cases where an employer could demonstrate that the investigation could not reasonably have been completed at the pre-offer stage, the applicant is being required to execute the release *before* a real job offer has been made.

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<sup>2</sup>In some situations, an employer cannot reasonably obtain and evaluate all non-medical information at the pre-offer stage. If an employer can show that this is the case, the offer would still be considered a real offer. *Id.* at 18. If an employer is not able to do so, its offer of employment will not be considered real for ADA purposes. *Id.*

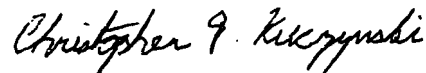
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Page Three

If an employer used an applicant's executed release to obtain disability-related information prior to making an offer of employment, this would violate the ADA. An organization, such as ERSNE, which used the release to obtain information on the employer's behalf prior to an offer of employment also could be found liable as an agent of the employer or as an interferer under either section 503(b) of the ADA, 42 U.S.C. § 12203; 29 C.F.R. § 1630.12, or the third party interference theory.<sup>3</sup>

We hope this information is helpful. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission. In addition, our failure to address other matters that may have been presented should not be construed as agreement with the statements or analysis related to those matters.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel

Enclosures(2)

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<sup>3</sup>The ADA's confidentiality provisions, 42 U.S.C. § 12112(d)(3)(B)&(4)(C); 29 C.F.R. §§1630.13(b)(1), 1630.14(b)(1), would prohibit a former employer from disclosing medical information in its possession to an individual's prospective employer, even at the post-offer stage. To date, the Commission has not taken a position on whether and to what extent an individual can waive confidentiality rights. Therefore, you should be aware that an employer who obtains medical information from an individual's former employer using ERSNE's form, even at the post-offer stage, might violate the ADA, and ERSNE itself may be liable under the Act for providing such information.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

*Chen*

MAR 23 1999

This letter responds to your letter of February 5, 1999, requesting an opinion on whether a particular provision in a job announcement is a violation of the Americans with Disabilities Act (ADA).

As you know, the ADA prohibits covered entities from conducting medical exams or making disability-related inquiries before an applicant is extended a conditional offer of employment. This provision is intended to ensure that applicants with disabilities are not excluded before their ability to perform the job is evaluated. The process established by the ADA isolates an employer's consideration of an applicant's non-medical qualifications from any consideration of the applicant's medical condition.

Employers *may*, however, ask about an applicant's ability to perform specific job functions before a conditional offer of employment is extended. In addition, employers *may* ask about an applicant's non-medical qualifications and skills, such as education, work history, etc. Finally, employers *may* ask applicants to describe or demonstrate how they would perform job tasks. See ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, October 10, 1995 (Guidance).

According to your letter, you applied for the position of Senior Staff Attorney with the Bazelon Center for Mental Health Law. The job announcement seeks applicants who "demonstrate leadership skills, a commitment to the protection of individual rights and a strong background in public-interest law, along with an understanding of the problems people with mental disabilities face...." (emphasis supplied). You contend that requiring applicants to demonstrate "an understanding of the problems people with mental disabilities face" is an inquiry which is not only likely to elicit information about a disability, but which *requires* an applicant to disclose his/her mental disability. While it is true that asking applicants to demonstrate that they meet this requirement may reveal that some individuals have mental disabilities, there are many other ways to meet this requirement as well that would not reveal the existence of a disability. For example, it is possible that an applicant could demonstrate an understanding of the problems unique to persons with mental disabilities by describing prior work experience involving such issues, or an educational background in such issues. Asking applicants to demonstrate that they meet this requirement, therefore, does not constitute a disability-related inquiry. (See Guidance at 4).

(b) 6 4 (b) 7 C

Page Two

Moreover, the Bazelon Center for Mental Health Law is an advocacy organization for individuals with mental disabilities. Thus, it follows that an understanding of the problems persons with mental disabilities face is a requirement of the job, and an employer does not violate the ADA if it asks an applicant if he/she can satisfy this job requirement.

In your letter, you ask for a formal opinion on item #1 of the charge that you filed with the Washington Field Office. Although this letter is not an official opinion of the Commission, we do hope it is helpful to you. Our silence on other matters that may have been presented should not be construed as agreement with those matters.

Sincerely,

A handwritten signature in cursive script that reads "Peggy R. Mastroianni".

Peggy R. Mastroianni  
Associate Legal Counsel





U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

(b) 6 4(b) 7c

APR 1 1999

01

This responds to your letter of March 25, 1999, in which you disagree with the position in our March 23 letter to you that the Bazelon Center's job application does not contain a disability-related inquiry prohibited under the Americans with Disabilities Act (ADA).

Your position is that an inquiry violates the ADA if it would cause an individual with a disability to reveal the existence of the disability, even though there are many other possible answers that are not disability-related. The Commission considered, but rejected, this approach when drafting the guidance on preemployment inquiries, and acknowledged that there will be some situations where an individual response to an inquiry will reveal a disability. This result alone, however, is not a basis for concluding that the question is a disability-related inquiry where there are many responses to the question which would not reveal a disability.<sup>1</sup>

For these reasons, our opinion as set forth in our March 23, 1999 letter remains unchanged. Our opinion, however, does not affect your right to file suit on your own behalf.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel  
Coordination and Guidance Programs

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<sup>1</sup> We also note that your theory might prove disadvantageous to individuals with mental disabilities. For example, assuming the Bazelon Center cannot ask applicants to demonstrate an understanding of the problems faced by individuals with mental disabilities, as you suggest, a non-disabled applicant who *voluntarily* reveals during an interview that he or she has significant work experience or an educational background related to issues affecting persons with mental disabilities might well be offered a job over an individual who chooses not to self-disclose.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

(b)6 + (b)7c

APR 14 1999

This letter is in response to your letter of March 16, 1999, wherein you ask several questions regarding your rights and responsibilities as you search for employment. Your questions involve whether a prospective employer can legally request information concerning: (1) reference checks and background investigations; (2) injuries sustained on-the-job; (3) prior employment terminations; and (4) "personal characteristics."

**I. Questions About "Personal Characteristics"**

The United States Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination laws that prohibit employment discrimination on the basis of race, color, sex, national origin, religion, age, and disability. One of your questions involves pre-employment inquiries about "personal characteristics" prior to a job offer. If "personal characteristics" refers to race, color, sex, national origin, religion, or age, then Title VII or the ADEA would apply. Generally, making pre-employment inquiries which directly or indirectly disclose the applicant's race, color, religion, sex, national origin, or age does not constitute an automatic violation of Title VII or the ADEA, as long as the inquiries are made of all applicants. However, unless justified, such inquiries may be important evidence of discriminatory selection, since it is reasonable to assume that all questions on an application form or in a pre-employment interview are asked for some purpose and that hiring decisions are made on the basis of the answers given. *Gregory v. Litton Systems*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (pre-employment information which is obtained is likely to be used), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972). Therefore, such inquiries are suspect and generally must be justified by the employer by showing that the information was not used for selection purposes or that the inquiry concerned a valid criterion for employment.

On the other hand, Title I of the Americans with Disabilities Act (ADA) prohibits employers from asking disability-related questions, including whether an applicant has a disability, before a conditional offer of employment is made. The reason for this prohibition is to ensure that an employer does not consider an applicant's medical condition before it evaluates his or her non-medical qualifications for the job. Employers *may*, however, ask about an applicant's ability to perform specific job functions before a conditional offer of employment is extended. In addition, employers *may* ask about an applicant's non-medical qualifications and skills, such as education, work history, etc. Finally, employers *may* ask applicants to describe or demonstrate how they would perform job tasks. After a conditional job offer has been made, but

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Page Two

before the applicant begins work, the employer may require a medical exam or ask disability-related questions, only if it does so for all other entering employees in the same job category.<sup>1</sup>

## **II Inquiries Concerning Prior On-the-Job Injuries**

Questions about on-the-job injuries are disability-related inquiries that cannot be made of either an applicant or an applicant's prior employer(s). See EEOC ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (October 10, 1995) at 10, 13 (enclosed). It is unlikely that any attempted waiver of this protection would be knowing and voluntary.

A prospective employer may obtain information about an individual's prior on-the-job injuries once it has extended the individual a conditional offer of employment, provided, of course, the employer asks for the same information from all others in the same job category. However, the prospective employer will probably have to obtain the information from sources other than former employers. This is because information about on-the-job injuries is medical information which, with a few limited exceptions, employers must be kept confidential under Title I of the ADA.<sup>2</sup> This means that a former employer cannot provide information about a former employee's work-related injury to a potential employer, even at the post-offer stage.

To date, the Commission has not taken a position on whether someone can waive confidentiality rights under the ADA, so that a prospective employer could obtain information

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<sup>1</sup> Further information on this topic, including what questions are "disability-related," what is a "medical" examination, and what is a "real job offer," is provided in the enclosed guidance on preemployment inquiries.

<sup>2</sup> The limited exceptions to non-disclosure are as follows:

- (1) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and about necessary accommodations;
- (2) first aid and safety personnel may be informed, if appropriate, if the disability might require medical treatment;
- (3) government officials investigating compliance with the ADA shall be provided relevant information on request;
- (4) employers may give information to state workers' compensation offices, state second injury funds, workers' compensation insurance carriers in accordance with state workers' compensation laws;
- (5) employers may use information for insurance purposes.

about on-the-job injuries from a former employer. However, if such an agreement could be made, it would need to be an agreement between the individual and the former employer, not the prospective employer. The individual and the prospective employer cannot alone release the former employer from liability under the ADA's confidentiality provisions. Moreover, any release which is obtained must be voluntary. Therefore, a waiver would be invalid if a prospective employer required or otherwise coerced a person to enter into it in order to obtain or hold a job, or gain access to any other employment opportunity.

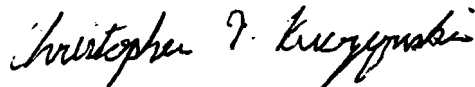
### **III. Reference Checks, Background Investigations, and Information About Job Terminations**

We interpret another of your questions to be whether an employer may legally conduct reference checks or background investigations, and ask for information concerning job terminations from applicants. Such actions, in and of themselves, do not violate federal anti-discrimination laws. Reference checks and information concerning job terminations are usually part of the application process and do not raise a negative inference of discrimination. Employers should, however, refrain from making inquiries that should not be used in the selection process, such as, for example, inquiries concerning race, national origin, or pregnancy. If an applicant is not hired and brings an action under the anti-discrimination laws, the inquiry may be considered evidence that the prohibited factor was a basis for the refusal to hire. Background investigations and reference checks of applicants may not include disability-related questions.

Employers should also be mindful of how they use certain information obtained as the result of background investigations or reference checks. For example, an employer's use of information concerning arrest and conviction records, negative financial information, and less than honorable military discharges, among other inquiries, have been found by some courts to have an adverse impact on minorities. If information obtained and used in the selection process has an adverse impact on a protected group, the employer must show that the requirement is related to the job and consistent with business necessity.

You may obtain published information on all EEOC enforced laws by calling 1-800-669-EEOC. You may also contact the EEOC's website at [www.eeoc.gov](http://www.eeoc.gov) for additional information. We hope that this information is helpful to you. Please note, however, that this letter does not constitute an opinion or interpretation of the Commission within the meaning of § 713(b) of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e-12(b).

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

(b) 6 7 (b) 1c

APR 15 1999

This responds to your letter of February 23, 1999, in which you ask for information concerning an employer's obligation to make reasonable accommodations under Title I of the Americans with Disabilities Act (ADA). Specifically, you ask whether an employer may require an individual who is deaf to learn sign language rather than communicating with the individual through the use of notes.

Title I of the ADA requires employers with fifteen or more employees to provide reasonable accommodations that afford qualified individuals with disabilities an equal opportunity to participate in the application process, perform essential job functions, and enjoy the benefits and privileges of employment. The ADA does not specifically identify communicating with notes as a type of reasonable accommodation; nevertheless, it is clear that the ADA's list of accommodations is not exhaustive. See 42 U.S.C. 12101(9)(B) (stating that in addition to those specific measures listed, reasonable accommodation also includes providing "other similar accommodations for individuals with disabilities"); 29 C.F.R. 1630.2(o)(2)(ii) (same). Writing notes for a person who is deaf as a means of communicating with him or her may be required as a reasonable accommodation, provided it does not result in "undue hardship" (i.e., significant difficulty or expense). Whether a particular accommodation will result in undue hardship must be determined on a case-by-case basis, taking into consideration the nature and cost of the accommodation, the employer's resources, and the extent to which the accommodation would disrupt the operation of the employer's business.

An employer may choose from among possible accommodations, where more than one exists, but the accommodation chosen must be effective, that is, it must remove the workplace barrier at issue. Obviously, a sign language interpreter for an individual who does not know sign language is not an effective accommodation.

Moreover, an employer cannot require an individual to learn sign language. In its recently issued *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (hereafter *Guidance*) (enclosed), the EEOC has said that an employer is not relieved of its obligation to provide a reasonable accommodation simply because an individual fails to take prescribed medication, to obtain treatment for a disability, or to use an assistive device (such as a hearing aid). *Guidance* at 49 (Question 37). Decisions about medication, treatment, and assistive devices are complex and personal ones. *See id.* at 49-50 n.98.

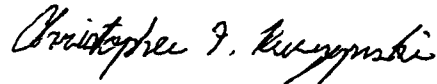
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The same rationale would apply to an individual's decision about whether to learn sign language. An employer could not refuse to provide a reasonable accommodation, such as communicating through the use of notes, for an individual who is deaf simply because the employer believes the individual should have learned sign language. Of course, a deaf person who does not know sign language might be unqualified for a position, if communicating through the use of notes would not be effective or would pose an undue hardship, and if there are no other effective accommodations available. *See id.* at 50 (Question 37) (if an individual cannot perform a job's essential functions or who poses a direct threat without medication, treatment, or use of an assistive device, is unqualified for the position).

We hope that this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,

A handwritten signature in cursive script, reading "Christopher J. Kuczynski".

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



299-043

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAY 19 1999

(b) 6 4 (b) 7C

This responds to your letter of April 27, 1999, to Chairwoman Ida L. Castro. You ask that the Equal Employment Opportunity Commission ("EEOC" or "Commission") support programs that would eliminate work disincentives for people with disabilities. In particular, you ask that we support programs aimed at expanding state Medicaid options and allowing individuals with disabilities who are working, especially those with HIV/AIDS, to continue Medicare coverage under certain circumstances.

The availability of health care for individuals with HIV/AIDS is of great importance to the Commission. While the EEOC cannot effect precisely the kinds of policy changes you are suggesting, we have, as part of our obligation to enforce and implement Title I of the Americans with Disabilities Act of 1990 ("ADA"), challenged provisions in employer-provided health insurance plans that limit or deny coverage to individuals with HIV/AIDS. Additionally, in 1993, the Commission published a document entitled *Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability Based Distinctions in Employer Provided Health Insurance*, in which we clearly stated that such provisions violate the ADA, unless an employer can justify them with cost or actuarial data, or by showing that the plan treats conditions with similar risks and costs associated with them in the same way. The interim guidance may be obtained from the EEOC's web site, at [www.eeoc.gov](http://www.eeoc.gov).

Finally, the EEOC, along with several other federal agencies including the Social Security Administration, is a member of the Presidential Task Force on Employment of Adults with Disabilities. The removal of work disincentives of the type you described is an important

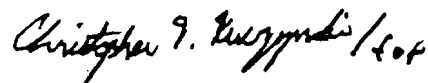
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Page Two

issue for the Task Force. You may want to contact the Task Force directly about these issues at the following address:

Presidential Task Force on Employment  
Of Adults with Disabilities  
200 Constitution Ave., N.W.  
Room S2312  
Washington, DC 20210

Thank you very much for your thoughtful comments on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher P. Mastroianni".

Peggy R. Mastroianni  
Associate Legal Counsel





U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

JUL 21 1999

(b) 6 & (b) 7C

This responds to your June 17, 1999, letter concerning the Americans with Disabilities Act of 1990 (ADA). You ask if the determination of whether a person has an impairment that substantially limits the major life activity of working considers "three different classes of work from which an individual can or must be significantly restricted."

As you know, an individual is substantially limited in working if s/he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Thus, under the Equal Employment Opportunity Commission's Title I regulations, an individual may be substantially limited in working if s/he is significantly restricted in either of two categories: (1) a class of jobs or (2) a broad range of jobs in various classes. The relevant "class of jobs" is determined by looking at the job at issue and other jobs that are similar to it. Id. § 1630.2(j)(3)(ii)(B) (referring to "the number and types of jobs utilizing similar training, knowledge, skills or abilities"). A determination of a "broad range of jobs in various classes" looks at jobs that are dissimilar to the job at issue. Id. § 1630.2(j)(3)(ii)(C) (referring to "the number and types of jobs not utilizing similar training, knowledge, skills or abilities") (emphasis added).

Jobs that involve similar training, knowledge, skills, and abilities, by definition, constitute a "class of jobs." A "broad range of jobs in various classes," by definition, involves a multitude of jobs that involve dissimilar training and abilities. Accordingly, there is no "broad range of jobs in various classes with similar training, skills, and abilities."

As you note, very few people have the training, skills, and abilities required of a broad range of jobs in various classes. An individual who was not trained in a broad range of jobs nonetheless would be substantially limited in working if his/her impairment disqualified the individual from the job at issue and from a wide variety of dissimilar jobs. Although the average person might not have the skills to perform a broad range of jobs, s/he would be able to perform those jobs with the proper training. However, an individual whose impairment disqualified him/her from a broad range of jobs still could not perform those jobs even if s/he received the

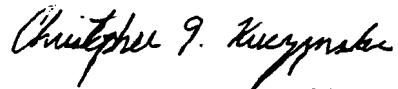
(b) 6 4 (b) 7 C

Page Two

appropriate training and skills. That individual, therefore, has an impairment that substantially limits the major life activity of working.

This has been an informal discussion of the issues you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. Further, our silence on other statements or analyses that may have been presented in your letter should not be construed as agreement with those matters.

Sincerely,

A handwritten signature in cursive script, reading "Christopher J. Kuczynski".

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

**AUG 5 1999**

(S) 4(b) 7c

This is in response to your letter dated July 26, 1999, regarding the Americans with Disabilities Act of 1990 (ADA), as amended.

You indicated that your employer's long term disability (LTD) plan provides only two years of benefits for psychiatric conditions but provides benefits to age 65 for physical conditions. You further indicated that because your condition, bi-polar disorder, is considered to be psychiatric in nature by your employer's insurance carrier, your benefits under the LTD plan terminated after two years. You asked for the Equal Employment Opportunity Commission's (EEOC) assistance in this matter.

As you know, the EEOC enforces Title I of the ADA which prohibits discrimination against qualified individuals because of disability in all aspects of the employment relationship, including terms, conditions, and privileges of employment. 42 U.S.C. § 12112; 29 C.F.R. § 1630.4. An LTD plan is a term, condition, or privilege of employment subject to the requirements of the ADA. In a number of cases the EEOC has taken the position that an LTD plan that provides lesser benefits for individuals with psychiatric disabilities than it provides for individuals with physical disabilities violates the ADA. However, whether a particular LTD plan violates the ADA must be determined on a case-by-case basis.

It is not clear from your letter whether you have filed a charge of disability discrimination with our agency. If you have not, and you believe that your employer and/or the insurance carrier has discriminated against you because of your disability in the provision of LTD benefits, you should file a charge immediately with the EEOC Little Rock Area Office. You may contact that office at the following address and telephone number:

Equal Employment Opportunity Commission  
Little Rock Area Office  
425 West Capitol Avenue  
Little Rock, Arkansas 72201  
1-800-669-4000 or 501-324-5060.

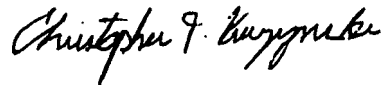
(b) 6 & (b) 7 C

Page Two

You must file a charge within 180 or 300 days of the date of the discriminatory action for your charge to be timely. The Little Rock Area Office can tell you which deadline applies to you. If you fail to file a timely charge, you will be unable to bring suit in state or federal court.

I hope this information is helpful to you.

Sincerely,

A handwritten signature in black ink, reading "Christopher J. Kuczynski". The signature is written in a cursive, flowing style.

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

AUG 13 1999

(b) 6 4 (b) 7C

This responds to your letter of July 9, 1999, and to questions raised in your telephone conversations with me about whether communicating with someone who is deaf through the use of written notes is a form of reasonable accommodation required by Title I of the Americans with Disabilities Act ("ADA"). You have also asked for clarification of statements made in an April 15, 1999 letter on this subject that you received from Assistant Legal Counsel, Christopher Kuczynski.

First, you are correct that, in its ADA Technical Assistance Manual, the Equal Employment Opportunity Commission (EEOC) recognized that communicating through the use of notes is a form of reasonable accommodation. (b) 6 4 (b) 7C : letter should not be read as expressing a contrary view. While it does not reference the Technical Assistance Manual, the letter clearly states that communicating with notes is a type of reasonable accommodation.

Additionally, I agree that communicating through notes is an effective accommodation that would enable people who are deaf to perform many kinds of jobs. Indeed, many employers may prefer this accommodation to a sign language interpreter because it involves little or no expense.

Finally, you ask whether an employer may prefer an applicant who is deaf and uses sign language over a qualified applicant who is deaf but who does not know sign language and instead communicates verbally and through the use of notes. An employer may not deny an employment opportunity to an otherwise qualified applicant or employee with a disability based on the employer's need to make reasonable accommodation for the individual's physical or mental limitations resulting from the disability. See 42 U.S.C. 12112(b)(5)(B); 29 C.F.R. 1630.9(b). An employer may not, therefore, choose an applicant without a disability over an applicant with a disability because the applicant with a disability requires no reasonable accommodation. Similarly, an employer may not discriminate as between two individuals with disabilities who require reasonable accommodations based on the type of accommodations each applicant needs.

Thus, an employer may not prefer an applicant who is deaf and uses sign language over an applicant who is deaf and communicates verbally and through notes simply because the employer would rather provide an interpreter than write notes. Nor may the employer prefer the applicant who uses notes because this accommodation is less costly than providing an interpreter. The employer is, of course, free to choose the more qualified applicant. However, the

(b) 64(b) 7C

Page Two

determination of which applicant is more qualified must be based on factors unrelated to disability and the type of accommodation the applicant uses.

I hope that this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel

70162



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

SEP - 3 1999

(b) 6 7 (b) 7C

This is in response to your letter of May 13, 1999, to the Equal Employment Opportunity Commission (EEOC) about the Americans With Disabilities Act (ADA). You asked whether Kansas' workers' compensation law and regulations conflict with ADA provisions regarding disability-related questions and medical examinations. We apologize for the delay in responding.

ADA Principles

As you know, the EEOC enforces Title I of the ADA, which prohibits discrimination against a qualified individual because of disability in all aspects of employment. 42 U.S.C. § 12112; 29 C.F.R. § 1630.4. The ADA permits employers to ask disability-related questions and to require medical examinations of employees only if they are job-related and consistent with business necessity. 42 U.S.C. § 12112; 29 C.F.R. § 1630.14(c). This means that an employer must have a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) the employee will pose a direct threat due to a medical condition.<sup>1</sup> EEOC Enforcement Guidance: Workers' Compensation and the ADA, dated September 3, 1996, at 4-5 [hereinafter Workers' Compensation].

In the workers' compensation context this standard is met when an occupational injury occurs or when the employee seeks to return to the job following an absence for the injury.

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<sup>1</sup> EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities, dated March 25, 1997, at 15. Although this guidance specifically addresses psychiatric disabilities, the general principles regarding disability-related questions and medical examinations applies to all employees.

Workers Compensation at 5. Disability-related questions or medical examinations must not exceed the scope of the specific occupational injury and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat. Moreover, an employer may not obtain from third parties, such as an employee's physician, information that it is prohibited from obtaining directly from the employee. Id. at 5-6.

### Application of ADA Principles

According to your letter, the Kansas Workers' Compensation Act (KWCA) provides in pertinent part that "there shall be no disqualification or privilege preventing the furnishing of reports by or the testimony of any health care provider who actually makes an examination or treats an injured employee prior to or after an injury." K.S.A. 44-51(d). This provision and an administrative regulation prevent workers' compensation claimants from maintaining a patient privilege with respect to any medical information in the possession of their health care providers. The ADA, on the other hand, prohibits an employer from obtaining an employee's confidential medical information except where job-related and consistent with business necessity. Therefore, if either the KWCA provision or the regulation compels an employee's health care provider to disclose confidential medical information to the employer that the employer could not lawfully obtain from the employee, it conflicts with the ADA. If the KWCA provision or regulation merely *allows* an employer to obtain information from an employee's health care provider, it does not conflict with the ADA. However, even in the latter case, an employer could not rely on the KWCA provision or the regulation as a defense to a claim that it obtained medical information from an employee's health care provider in violation of the ADA.

You further indicate that an employee filing a workers' compensation claim might be required "to authorize disclosure of all medical records which could include any prior medical examination, diagnosis, medical treatment, and hospitalization for both physical or mental purposes . . . ." If this means that this information will be disclosed by the health care provider to the employer or to its agent, it conflicts with the ADA. An employee's complete medical record will almost certainly contain information that exceeds the scope of the specific occupational injury at issue and its effect on the employee's ability to perform essential job functions or to work without posing a direct threat.

Also, requiring an employee who files a workers' compensation claim to disclose the existence of *any* communicable or venereal disease conflicts with the ADA, since an employer cannot ordinarily ask about these conditions or require a medical examination for them. Such questions or examinations would not be job-related and consistent with business necessity in the



context of a workers' compensation claim, unless an employee has made one of these conditions the basis of the claim.

We hope this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission. In addition, our failure to address other matters that may have been presented should not be construed as agreement with the statements or analysis related to those matters.

Sincerely,

A handwritten signature in black ink that reads "Peggy R. Mastroianni". The script is cursive and fluid, with the first name "Peggy" and last name "Mastroianni" clearly legible.

Peggy R. Mastroianni  
Associate Legal Counsel



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

SEP 9 1999

(b) 6 4(b) 7c

This responds to your letter of June 27, 1999, asking that we address questions by (b) 6 4(b) 7c concerning workplace alcohol testing under the Americans with Disabilities Act of 1990 (ADA). Dr. Catlett asks about the use of pre-offer alcohol test results, and random alcohol testing of employees.

Alcohol tests are considered medical examinations under the ADA. See EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 1995) at 17. Accordingly, the ADA's rules on medical exams generally apply.<sup>1</sup> At the pre-offer stage of employment, alcohol tests are prohibited. Post-offer, alcohol tests are permissible if they are administered to all individuals in the same job category. Once employment has begun, an alcohol test is permissible only if it is "job-related and consistent with business necessity," that is, if the employer has a reasonable belief, based on objective evidence, that due to a medical condition the employee's ability to perform essential job functions will be impaired or the employee will pose a direct threat. See 29 C.F.R. 1630.14; EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Mar. 1997) at 15. Alcohol tests of employees are permitted under the ADA if they meet this standard.

Separate from the question of whether an alcohol test is permissible, is whether an employer violates the ADA by disqualifying an applicant or employee based on test results. The ADA prohibits an employer from screening out individuals with disabilities on the basis of test results, or any other selection criteria, unless the test is job related and consistent with business necessity. An employer does *not* violate the ADA by rescinding a job offer based on alcohol test results if the individual does not have a "disability" within the meaning of the act, or if the test results, as used, are job related and consistent with business necessity.

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<sup>1</sup> Employers may require that applicants and employees subject to Department of Transportation regulations comply with DOT regulatory standards regarding alcohol, including those concerning alcohol testing for positions involving safety sensitive duties.

6) 6 4 672

Page 2

Under the ADA, employers may prohibit employees from using or being under the influence of alcohol at the workplace. Thus, if the results of an alcohol test demonstrate that an employee used or was under the influence of alcohol at the workplace, the employer may discipline the employee as it does all others that violate its substance use policies, regardless of whether the employee has alcoholism and is disabled under the ADA.

We hope this information is helpful to you. This letter is an informal discussion of the issues raised by 6) 6 4 672 and is not an official opinion of the U.S. Equal Employment Opportunity Commission. To obtain copies of informational ADA materials, including the Enforcement Guidance referred to above, call our publications office toll-free at 1-800-669-EEOC (voice) or 1-800-800-3302 (TTY), or visit our website at <http://www.eeoc.gov>.

Sincerely,



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

OCT 05 1999

(b) 6 4 (b) 7 C

This is in response to your letter to Ellen Vargyas, Legal Counsel of the Equal Employment Opportunity Commission (EEOC), dated July 27, 1999, about the Americans with Disabilities Act of 1990 (ADA). You asked whether "fertility" is a disability under the ADA and whether "fertility benefits" will be required under self-funded medical plans in the future.

ADA Principles

As you know, the EEOC enforces Title I of the ADA which prohibits discrimination against qualified individuals on the basis of disability in all aspects of employment. 42 U.S.C. § 12112. The ADA defines "disability" as a physical or mental impairment that substantially limits one or more of a person's major life activities, a record of such an impairment, or being regarded as having such an impairment. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g). "Physical impairment" means any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the various body systems, including the reproductive system. 29 C.F.R. § 1630.2(h)(1). "Substantially limits" means unable to perform a major life activity that the average person in the general population can perform, or significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j).

Discrimination is prohibited with respect to all terms, conditions, and privileges of employment. 42 U.S.C. § 12112. This means that it is unlawful to discriminate with regard to "(f)ringe benefits available by virtue of employment, whether or not administered by the [employer]." 29 C.F.R. § 1630.4(f). The ADA, therefore, prohibits employers from discriminating on the basis of disability in the provision of health insurance to their employees.

(b) 6 4 (b) 7C

Page Two

See EEOC Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance, June 8, 1993 (enclosed) [hereinafter Health Insurance Guidance].

Not all health-related plan distinctions discriminate on the basis of disability. A health-related plan distinction is disability-based if it singles out a particular disability (*e.g.*, deafness, AIDS, schizophrenia), a discrete group of disabilities (*e.g.*, cancers, muscular dystrophies), or disability in general (*e.g.*, non-coverage of all conditions that substantially limit a major life activity). Health Insurance Guidance at 7. On the other hand, broad distinctions, which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability and do not violate the ADA as long as they are applied equally to all insured employees. *Id.* at 5.

If a distinction is disability-based, an employer may still defend it by showing that the health insurance plan is "bona fide," and that the disability-based distinction is not being used as a "subterfuge" to evade the purposes of the ADA. See 42 U.S.C. § 12201(c)(3) (1994); Health Insurance Guidance at 5. The Guidance discusses in some detail how an employer might make this showing. See *id.* at 11-13.

#### Is "Infertility" a Disability Under the ADA?

Although your letter asks whether "fertility" is a disability, we assume you mean "infertility." At this time, the Commission has not taken a position on this issue in enforcement guidance or litigation. While the Supreme Court held, in *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998), that reproduction (or procreation) is a major life activity, the determination of whether any particular individual with infertility has a disability will depend upon whether the infertility is the result of an impairment and whether the ability to have children is actually substantially limited as compared to the average person in the general population.

#### Will Infertility Benefits Be Required Under Self-Funded Medical Plans in the Future?

At this time, the Commission has not taken a position in enforcement guidance or in litigation on whether a health insurance plan provision that provides inferior or no benefits for the treatment of infertility is a disability-based distinction. In making this determination, it is important to look carefully at how the terms of a particular policy are written and applied, and whether all or substantially all of the people affected by those terms are individuals with disabilities.

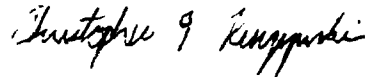
(b) 6 4(b) 7c

Page Three

As noted above, even if a particular health insurance plan provision is found to be disability-based, an employer can defend it by showing that it is not being used as a subterfuge to evade the purposes of the ADA. Again, the Commission has not yet taken a position on how this principle would apply to a health insurance plan that denies or limits coverage for infertility treatment.

We hope this information is helpful to you. Please note, however, that this letter is an informal discussion of the issues raised by you and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher J. Kuczynski".

Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

OCT 15 1999

(b) 64 (b) 7C

I am responding to your letter of August 28, 1999, in which you asked if you are required to divulge to prospective employers that you have a visual impairment.

Under the Americans with Disabilities Act (ADA), an applicant is not required to divulge that s/he has a disability. Moreover, employers are prohibited from asking applicants about medical conditions, and/or requiring medical examinations, before making a job offer. If an applicant's obvious disability gives the employer a reasonable belief that the individual might need a reasonable accommodation to perform a job task, the employer is permitted to ask if an accommodation will be needed and if so, what type of accommodation is needed.

An employer is permitted to ask medical questions and/or require a medical examination after making a job offer but before the individual starts work. The same questions and medical examination must be given to all individuals entering the same job category. Therefore, an employer cannot single out a person with a disability to undergo a medical examination. At this point, applicants must answer such questions or take any medical examination required. But, an employer cannot revoke the job offer based on the medical information it acquires unless it can show that the individual cannot safely and effectively perform the job, with or without reasonable accommodation.

Enclosed is more information on what an employer can and cannot ask during the hiring process. I hope this information is helpful. This letter does not represent an official opinion of the EEOC.

Sincerely,

(b) 64 (b) 7C

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

OCT 21 1999

(b)6 + (b)7c

This letter responds to your letter to Chairwoman, Ida Castro, in which you contend that your client, (b)6 + (b)7c, was denied access to a hearing program conducted by the Equal Employment Opportunity Commission (Commission). Specifically, you state that the Administrative Judge assigned to hear (b)6 + (b)7c EEO complaint erroneously refused to order the respondent agency, the United States Postal Service, to pay for the cost of an interpreter needed by (b)6 + (b)7c consult with you prior to the hearing.

We agree that 29 C.F.R. §1615.160(a)(1) requires the Commission to ensure that individuals with disabilities are not excluded from participation in, denied benefits of, or otherwise subject to discrimination in a program or activity that is conducted by the Commission. A pre-hearing conference and hearing are "program[s] or activity[ies]" conducted by the Commission, and providing an interpreter for these proceedings is required by Commission regulations. You note in your letter that the Administrative Judge did order the Postal Service to provide an interpreter for the pre-hearing and hearing. The Commission believes, however, that a consultation session with an attorney, held apart from the hearing proceedings (e.g., at the attorney's office before the hearing proceedings begin), does not constitute an agency service, program, or activity contemplated by 29 C.F.R. §1615.

The Commission "need not provide...readers for personal use or study, or other devices of a personal nature." See 29 C.F.R. §1615.160(a)(1)(ii). As is apparent from the regulation, the Commission is not obligated to provide a reader to enable an individual to prepare for a hearing, as this would constitute "personal use or study". Similarly, the Commission is not obligated to provide (b)6 + (b)7c with an interpreter during outside consultation with his attorney to prepare for a pre-hearing conference.

Pursuant to Title III of the Americans with Disabilities Act, which prohibits discrimination on the basis of disability by places of public accommodation, an attorney may be



(5) 6 4 (6) 7C

Page Two

obligated to provide an interpreter during consultation with a client who needs one. Although this letter is not an official opinion of the Commission, we do hope it is helpful to you. Our silence on other matters that may have been presented should not be construed as agreement with those matters.

Sincerely,

A handwritten signature in black ink that reads "Peggy Mastroianni". The signature is written in a cursive, flowing style.

Peggy Mastroianni  
Associate Legal Counsel  
Office of Legal Counsel



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

NOV 4 1999

(b) 6 4 (b) 7C

This responds to your inquiry of October 6, 1999, about the Americans with Disabilities Act of 1990 (ADA). You asked whether a health insurance plan provision that excludes coverage for treatments for obesity or weight reduction violates the ADA.

The EEOC enforces the Title I employment provisions of the ADA, which prohibit covered employers from discriminating against qualified individuals with disabilities on the basis of disability. To be protected by the ADA, an individual must meet the ADA definition of "disability."

The ADA defines "disability" as a physical or mental impairment that substantially limits a major life activity (such as walking, breathing, learning, or working), a record of such an impairment, or being regarded as having such an impairment. "Substantially limits" means that an impairment prevents a person from performing a major life activity or significantly restricts the person's ability to perform the activity as compared to the ability of the average person in the general population. The EEOC has stated that morbid obesity is an impairment, but this does not mean that it is a disability. Whether a person with morbid obesity has a disability depends on whether that particular person is substantially limited in a major life activity, has a history of being substantially limited, or is regarded as being substantially limited.

The ADA's prohibition against employment discrimination includes discrimination in the provision or administration of fringe benefits, such as employer-provided health or life insurance. Thus, the ADA generally requires that individuals with disabilities be accorded equal access to whatever health insurance is provided to individuals without disabilities.

On the other hand, section 501(c) of the ADA specifically permits employers and insurance companies to continue to use legitimate risk assessment and other traditional insurance classification and administration practices, as long as the practices are uniformly applied to all insureds and are not used as a subterfuge to evade the purposes of the ADA.

(S) 64 (S) 7C

Page Two

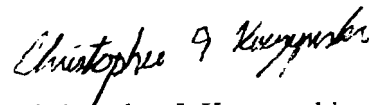
In an Interim Enforcement Guidance issued on June 8, 1993, the Commission explained how these ADA requirements apply to the terms of employer-provided health insurance plans. Interim Enforcement Guidance on the application of the Americans with Disabilities Act of 1990 to disability-based distinctions in employer provided health insurance (1993) (copy enclosed). Plan limitations or distinctions that are not disability based do not violate the ADA so long as they are applied equally to all insureds. Such limitations are permissible, even if they have a greater effect on some people with disabilities, because they apply to and constrain insureds both with and without disabilities. Guidance at 5-7.

By contrast, health insurance plan limitations or distinctions that are disability based may violate the ADA. A distinction is disability based if it singles out a particular disability (e.g., deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophies, kidney diseases), or disability in general (e.g., all impairments that substantially limit a major life activity). Id. at 7. Such a distinction violates the ADA unless the employer can show that it is part of a bona fide insurance plan and is not used as a subterfuge to evade the purposes of the ADA. Id. "Subterfuge" means that the distinction is not justified by the particular risks or costs associated with a disability. Id. at 11. An employer can defend a disability-based distinction in a plan by showing, for example, that it is necessary to prevent a drastic change in the scope or cost of the plan or that it is justified by actual or reasonably anticipated experience. Id. at 11-13.

Thus, a determination of whether a provision in an employer-provided health insurance plan that excludes or limits coverage for the treatment of obesity or for weight reduction violates the ADA requires a fact-specific inquiry into the precise provision and the employer's justification for it.

This letter is an informal discussion of the issues you raised and does not constitute an official opinion of the Equal Employment Opportunity Commission. In addition, our silence on other matters that may have been presented in your letter should not be construed as agreement with those matters.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division

Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

Supy.

NOV 4 1999

(b) 6 4 (b) 7c

This letter responds to your letter of September 13, 1999, in which you ask three questions pertaining to the Americans with Disabilities Act (ADA).

First, you ask whether an employee must have a permanent disability before he/she is entitled to accommodation. As you probably know, the ADA has a specific, legal definition of "disability", and an individual must meet this definition in order to be entitled to the protections of the ADA, including accommodation. A "disability" within the meaning of the ADA is any one of the following: (1) a physical or mental impairment that **substantially limits** one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

How long an impairment lasts is a factor to be considered, but it does not, by itself, determine whether a person is substantially limited in a major life activity. This question is answered by looking at the **severity, impact, and duration** of the impairment on the individual's major life activity. Certainly, if the limiting effects of an impairment are permanent or long-term (and severe), the condition will rise to the level of an ADA disability. However, an impairment does not have to be permanent in order to be considered substantially limiting, if it can be shown that it was either severe enough or had a long term impact, such that the individual was significantly restricted in performing a major life activity, or unable to perform the activity altogether. The EEOC has stated that an impairment must last for more than several months in order to be substantially limiting. See EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002, question 7, p.8 (March 25, 1997).

Your next question is whether an employee who is injured off the job, and who requires medical attention for an indefinite period of time, is covered. Once again, this depends upon whether or not he/she meets the definition of a disability under the ADA. The fact that the individual was injured off the job is not relevant. The fact that the individual requires medical attention for an indefinite period of time may help determine whether or not the impairment is severe enough or of such a duration that it is a substantial limitation of a major life activity. Once again, however, an analysis of the severity, impact, and duration must be individualized.

(b) 6 + (b) 7c

Page Two

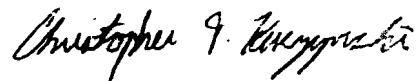
Finally, you ask whether an employer is required to accommodate an employee if the employee submits a request from his/her doctor. The doctor's note that your referenced in your question would be considered a request for reasonable accommodation under the ADA, as long as it informed the employer that the individual needed a change at work for a reason related to a medical condition. The employee does not need to use the words "reasonable accommodation", and the request may come from the employee's representative, including a doctor.

However, an individual will not be entitled to a reasonable accommodation simply because he or she has requested one. After the request is made, it may be necessary for the employer and the employee to engage in an informal, interactive process to clarify what the employee needs, and to identify the appropriate accommodation. An individual must have a disability within the meaning of the ADA in order to be entitled to reasonable accommodation. Thus, as part of this process, the employee may have to provide the employer with documentation demonstrating that he or she has a disability within the meaning of the ADA, and describing the limitations imposed by it, if the disability or the need for reasonable accommodation is not obvious. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002, questions 6-8, pp.12-17 (March 1, 1999) (enclosed).

An employer does not have to provide any accommodation that would result in an undue hardship. Undue hardship means **significant difficulty or expense**, and it must be based upon an individualized assessment of the nature and cost of the accommodation, the employer's and other resources available to provide the accommodation, and the nature of the employer's business. See Enforcement Guidance on Reasonable Accommodation, p. 54.

We hope this information is helpful. Please note, however, that this letter is an informal discussion of the issues raised, and is not an official opinion of the Equal Employment Opportunity Commission.

Sincerely,



Christopher J. Kuczynski  
Assistant Legal Counsel  
ADA Policy Division

Enclosures (1)



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

DEC 16 1999

[REDACTED] (b)(6) (b)(7)(C)

Dear [REDACTED] (b)(6) (b)(7)(C)  
(b)(6) (b)(7)(C)

Your E-mail to [REDACTED] concerning your employer's alleged refusal to provide you with a reassignment as a reasonable accommodation for your disability was forwarded to this agency for a response.

The Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability by employers with fifteen or more employees. An employer is required to provide reasonable accommodations to the known physical and mental limitations of otherwise qualified individuals with disabilities, as long as doing so would not result in undue hardship (*i.e.*, significant difficulty or expense). Reassignment is a form of reasonable accommodation that is available when an employee with a disability can no longer perform his or her current job.

Since it appears that you wish to file a charge of employment discrimination under Title I of the ADA, we will forward your E-mail to our Denver District Office. If you have not already done so, you should contact that office as soon as possible at the following address and telephone number:

U.S. Equal Employment Opportunity Commission  
Denver District Office  
303 East 17<sup>th</sup> Avenue  
Suite 510  
Denver, Colorado 80203  
(303) 866-1300

You may also contact the office by calling (800) 669-4000.

We hope this information is helpful to you.

Sincerely,

*Peggy R. Mastroianni*

Peggy R. Mastroianni  
Associate Legal Counsel