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ADA Revisited: Current Legal Pre-Employment Interviewing and Polygraph Issues and Solutions

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Abstract

The Americans With Disabilities Act of 1990 raises many legal issues with regard to conducting pre-employment polygraph examinations that are neither addressed in the law itself nor any subsequent case law. The author provides guidance and practical solutions to such issues as when to conduct examinations relative to the Conditional Offer of Employment, drug and alcohol abuse as protected disabilities, dealing with unsolicited pre-offer health information and Reasonable Accommodation as it applies to pre-employment interviewing and polygraph examinations.

In the world of federal employment laws, the Americans With Disabilities Act (ADA), which went into effect in 1991 (Americans With Disabilities Act, 1990), is one of the most recent and as a result has generated very little case law. To date, the vast majority of claims filed under this law have dealt with those portions of the law concerning access to public and private buildings (ADA, Title III). Nevertheless, there are many issues that the legislation raises that are directly applicable to pre-employment polygraph examinations and neither adequately explained in the Act nor resolved by case law. The following is an attempt to articulate these issues and suggest practical solutions for examiners conducting pre-employment interviews or polygraph examinations. These suggestions should not be construed as legal advice and all actions contemplated from this discussion reviewed by the reader's own legal consul.

Effectuated Employers

Exempt from the Americans with Disabilities Act are all federal employers, all wholly owned subsidiaries of federal employers, Indian tribes and IRS Code 501(c) tax-exempt organizations such as churches. However, many federal employers have voluntarily chosen to adopt the federal employment laws as internal policies. Since

many courts consider the employer's practices as well as policies, interviewers and polygraph examiners employed by federal agencies are encouraged to review their own internal procedures regarding the ADA before assuming there are no compliance requirements. It should be noted that there is no per se law enforcement exemption to the ADA.

The Conditional Job Offer

The ADA does not outlaw any pre-employment question or test that was legal prior to the implementation of the Act. Questions or tests that were legal before the ADA are still allowed. However, for some employers, the issue of when certain questions may be asked might require some changes to previous pre-employment selection practices. When in turn centers around the Conditional Job Offer [Technical Assistance Manual, 1992, 5.5(a)] which is that point in the selection process that the applicant is offered (promised) a job, conditional upon the successful completion of the remaining steps in the selection process. In the case of police applicants, this clearly should occur before the physical and before the written or oral psychologicals. Even though the polygraph instrument is a medical recording device that records physiological changes in the body which, in turn,

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are generated by psychological factors, most would agree that polygraph examinations are neither a medical nor a psychological test as intended by the law and therefore should be permissible prior to conditional offer. The problem arises when examiners try to comply with the procedures taught at polygraph schools certified by the American Polygraph Association and the APA Standards of Practice, specifically, that examiners ascertain the polygraph subject's suitability for testing prior to the examination (APA By-laws, 1999). The most straight forward method of satisfying these requirements would be to simply ask the subject directly, during the pre-test interview, if he or she was taking medication, was seeing a psychologist or physician, was in any discomfort, etc., at the time of the examination. Unfortunately, the ADA expressly states that no questions may be asked regarding the subject's past or present physical or emotional health prior to conditional job offer (Technical Assistance Manual, 5.5(a)(b)). This legal condition was reaffirmed in an opinion letter to the American Polygraph Association from the legal staff of the Equal Employment Opportunity Commission (APA Newsletter, 1992), the federal agency charged with enforcing the ADA. The EEOC has gone so far as to state in writing that examiners who fulfilled their subject suitability requirements by asking "health" questions prior to conditional job offer - but did not include this information in any type of report - would still be in violation of the ADA. Ironically - and in complete contradiction to this opinion - the Department of Justice, Disability Rights Section, in their "Hiring Police Officers" manual for the ADA allows exactly this option for administrators and vendors of various drug tests (U.S. Department of Justice, Civil Rights Division, 1997). Apparently recognizing the problem of false positives and other testing errors, the EEOC allows pre-offer "health" questions for drug testing but not polygraph even though the basis for such questions is precisely the same. In a classic "Catch-22" scenario, polygraph could take its case to court since it is actually the Federal District Court that interprets the ADA, not the EEOC, but such a challenge would be costly both financially and in terms of the effects on an organization's hiring reputation. Being an EEOC test case

often has a chilling effect particularly on minority recruitment efforts.

As a temporary solution until some employer using the polygraph as part of its selection process steps forward to challenge this EEOC directive, examiners might attempt to evaluate the subject's suitability for testing using indirect verbal questioning and observation of the subject's non-verbal behavior during the pre-test. Does the subject appear coherent and lucid - capable of paying attention and processing information? Are there inordinate delays in responding to questions? Does the subject engage in facial grimaces, labored breathing, wheezing, excessive coughing or other symptoms of physical distress? Does the subject exhibit mannerisms often associated with dementia or psychiatric conditions such as talking to oneself or radical mood swings? Some examiners have opined that asking a generic question such as "Is there anything present now that you think would interfere with your ability to take this polygraph examination or interfere with your polygraph results?" would not be a direct violation of the EEOC's ADA directive though no one has obtained written confirmation from the EEOC that such questions would be permitted prior to conditional job offer. Of course, since most subjects are not knowledgeable as to what the polygraph profession considers to be an acceptable physical or emotion state, responses to these kinds of open questions are probably meaningless with regard to determining subject suitability for testing. In any case, the issue still remains: should the examiner conclude from observations, the subject's response to a generic question or some not uncommon spontaneous utterance that some unusual, possibly error causing physical or emotional health condition is present, can the examiner decline to conduct the examination, on what basis and how should this be done? Assuming the examiner has the authority to determine when to conduct or decline to conduct examinations in post-offer situations where direct health questions are permitted and asked, then examiners should follow the exact same procedure citing the observed behavior or subject's verbal statement as the basis for declining to conduct the test. If the situation is appropriate, as might be the case for a

subject with a bad cold, the examination would simply be rescheduled. Though unlikely and impractical for most examiners, if a "pre-examination" physical or psychological examination can be given in which the physician or psychologist is told what physical or mental conditions are necessary (or which would preclude testing), this costly and time consuming additional step might be employed as, in theory, it could also be used to reduce the organization's liability prior to a pre-offer physical agility test. In all of these examples, however, the hiring agency would only receive an opinion stating that the subject was in a suitable state for polygraph or the physical agility and not a report of physical or psychological health in terms of the subject's ability to perform a job.

In summary therefore, examiners have essentially four options in dealing with the ADA and determinations of the polygraph subject's suitability for testing:

1. Conduct the examination post-offer and directly question the subjects as to their physical and emotional state;
2. Conduct the examination pre-offer and use indirect verbal questions and observation of non-verbal behaviors to evaluate testing suitability;
3. Conduct the examination pre-offer but require pre-polygraph suitability physicals and psychologicals; or
4. Conduct the examination pre-offer and directly question the subjects as to their physical and emotional state but be prepared to be an EEOC test case.

It should be noted that this conflict between the EEOC's directive regarding the ADA and examiners' need to determine subjects suitability for testing only applies to pre-employment examinations and Internal Affairs cases where an employee is the polygraph subject. It is also important to remember that the EEOC is traditionally the advocate of the applicant - not a balanced arbitrating agency - and, according to the American Bar Association, loses 98% of the ADA cases it brings to court (Human Resource News, 2004). As a guiding light, if what you

want to do concurs with the EEOC's opinion as to what you can do, you can be reasonably certain you will not become a test case since it is the EEOC that would have to challenge its own interpretation of the law. If, conversely, you disagree substantively with the EEOC's position and desire to challenge the EEOC's interpretation, you have an excellent chance of prevailing but there will be significant costs.

Conditional Job Offers and Available Jobs

Though not a direct polygraph issue, many employers desire to extend conditional job offers to more candidates than exist job vacancies, the logic being that historically some applicants will fail the remaining conditional steps in the selection process (ADA Enforcement Guidance, 2004, p.18). Since this is again one of the many questions neither addressed in the law nor resolved in case law, the answer lies in one's propensity for litigation. If the employer is risk adverse, make one offer per vacancy. If the organization feels that the time, cost and hardship to the applicants that would result from a drawn out process (waiting to find out the results of each condition for each offer for each applicant before making the next offer), then the employer should make more offers than exist available openings but include an additional condition to the conditional job offer. Specifically, the employer should advise applicants that they will get the job if they are successful in the remaining selection steps and the positions aren't filled by more qualified candidates. If that in fact is the case for those candidates promised a job, these applicants should be placed on a timed eligibility list, i.e., a further promise that they will be offered the opportunity to fill any new vacancies that appear within the next six months, twelve months, etc. and agree to an additional "mini" background covering anything they may have done between the time of the conditional offer and the new vacancy.

Drugs and Alcohol

Under some very peculiar conditions, a recovering alcoholic or recovering drug addict may actually qualify as a Disabled American and therefore have redress under the ADA (Employing and Accommodation Individuals with Histories of Alcohol or Drug Abuse, 2001). As is the case with the Age in

Employment Discrimination Act and other federal employment laws, there are no law enforcement exemptions except those cited at the beginning of this article.

Throughout the law and EEOC Technical Assistance Manual, "current" users and so called experimental/social users are specifically denied accommodation (Technical Assistance Manual, 8.2) so interviewers and examiners should adamantly resist any misguided interpretation of the ADA concluding that the law prohibits pre-offer or post-offer questions about the use of alcohol or illegal drugs. Only those who choose to self-declare themselves as alcoholics and/or drug addicts and also maintain that they are "successfully rehabilitating" may seek protection under the ADA. While nowhere within the law nor the EEOC's Technical Assistance Manual are there any meaningful definitions as to what addict, alcoholic, "current user" or "successfully rehabilitating" are supposed to mean, in the absence of any case law on this point, employers (particularly law enforcement agencies) have a one time only opportunity to define these ambiguous conditions in terms they prefer - at least until some Federal District Judge decides otherwise. The EEOC Technical Assistance Manual fails to clearly indicate if merely passing a urinalysis or blood test precludes someone from being considered "current" (Technical Assistance Manual, 8.9) and most abusers are very much aware just how quickly some commonly abused drugs (cocaine, methamphetamine, etc.) are metabolized. Abusers know that simple abstinence of a few days totally defeats the detection of many substances. Unlike "for cause" situations involving current employees, applicants today can anticipate drug tests which might explain why almost none of them fail the drug detection test but 20% or more make disqualifying admissions in the polygraph pre-test or stand alone interview such as Objective Pre-employment Interviewing (International Personnel Managers Association, 1998).

As a starting point in creating a working definition of successfully rehabilitating, interviewers and examiners conducting pre-offer polygraph examinations should not ask applicants if they are addicts, alcoholics, are now or have ever been in any

kind of drug or alcohol rehab program. The logic here is not so much EEOC compliance though the EEOC prohibits these questions pre-offer (Technical Assistance Manual, 8.8) but to minimize false claims of disability. If employers don't ask applicants and employees if they're addicts or alcoholics and they don't self-declare (most true addicts and alcoholics are in denial), they can't be considered or even viewed as Disabled Americans under the language of the law. In anticipation of the extreme case of an applicant or employee who both self-declares and claims to be successfully rehabilitating, employers should create definitions that will allow them to evaluate these cases objectively and consistently yet still incorporate the organization's philosophy about substance abuse. Since most individuals involved in the selection process are not experts in the area of drug and alcohol rehabilitation, it is useful for each employer (and polygraph examiner) to review some of the published works of those that are and find an expert who's published research recommending periods of sobriety that predict relapse or recidivism rates that conform with the employer's tolerance for risk. These studies are readily available through college libraries but it will be immediately apparent that for any given substance there is no consensus among the experts as to how much abstinence is enough to turn high risk into low risk for relapse. Ironically, this confusion allows each employer to select the expert of his or her choice (at no cost since the studies have already been conducted and published) for a wide range of tolerance. Should the employer desire a very low risk standard, one could cite an expert who calls for a lengthy period of abstinence and consider adding one more condition to the definition of "successfully rehabilitating": that during this period of abstinence the applicant must not only be able to prove he or she complied with all of the rehabilitation program's requirements but can also prove that during the entire time, was substance free, i.e., participated in regular, random substance testing. While linking these two conditions (proof of length of participation and compliance testing) might preclude some unmonitored voluntary programs such as Alcoholics Anonymous, it doesn't preclude all rehab programs and it makes it more difficult for abusers to manipulate the law while

simultaneously reducing risk of harm to others should the applicant relapse. Most importantly, by creating objective standards as to how long and what conditions qualify for "successfully rehabilitating", employers are provided with a mechanism to treat applicants fairly, consistently and without discrimination. In cases where the position being sought is less sensitive or more supervised than most law enforcement positions, a more tolerant standard could be used, e.g., cite an expert who's research supports a shorter period of abstinence but keep the compliance testing requirement.

Eventually, there will be case law on this point at which time employers and polygraph examiners may have to change the standards suggested by this approach. The Exxon Corporation following the "Valdez" tragedy (IPMA News, 2000) paid out several billion dollars in damages then changed its hiring policies to prohibit the employment of any recovering drug addict or alcoholic as Tanker Captains. The EEOC promptly sued Exxon for violating the EEOC's interpretation of the ADA and as appears to be almost always the case, the Federal Court in the Fifth District ruled in favor of Exxon commenting that though the risk be small ("successfully rehabilitating"), the danger to health and safety outweighed even a small risk. Unfortunately, employment law decisions involving private corporations do not transfer directly to public sector situations but it certainly would appear that law enforcement has an even greater case when one considers the effect of drugs and alcohol on decisions involving the use of deadly force, hand/eye coordination, etc. In addition, at least one Federal Appellate Court has ruled that alcoholism per se is not necessarily a disability which in turn raises doubts about the EEOC's directive that interviewers cannot ask applicants in the pre-offer stage if they are or were alcoholics (Baily v. Georgia Pacific Corporation, 2002).

Felony Drug Possession

In many states the mere possession of certain illegal drugs is in itself a felony and since felons can't be certified as peace officers (or licensed to possess a handgun - an essential function of the police job), some Departments recommend setting up standards

that disqualify applicants not for drug use but "felonious criminal activity". While this certainly appears to be a superficially viable method to by-pass the "drug use is a disability" problem, one must remember that the ADA is a federal law and in most cases federal law will trump state law. If in fact a "successfully rehabilitating" alcoholic or addict can actually qualify as a Disabled American (the EEOC's position), most courts would dismiss the "use = felony possession = felons are uncertifiable" argument. Users are presumed possessors so if users can qualify as Disabled Americans, felony possession of the drugs they admit using will also probably be dismissed as a disqualifying activity since creating an exemption for users only to cancel it with the obvious possession associated with use is self-defeating. In addition, there appears to be a lot of variance between various states' definitions of felony possession and federal definitions all of which make the creation of uniform, objective standards difficult particularly when applied to lateral hires or out-of-state applicants. It is therefore recommended that employers and polygraph examiners establish standards based upon admitted usage of illegal drugs rather than possession standards. A more interesting question concerns the purchase, sale, manufacture and/or cultivation of illegal drugs. While not true in every case, a substantial number of addicts support their addiction by dealing. Since dealing per se is not addressed in the ADA, and not every user deals (but every user possesses), employers should track the evolution of case law on this point. One would think that these activities should be absolute and unequivocal disqualifiers for law enforcement jobs but if felony possession is waived for successfully rehabilitating user-addicts, selling during the period of addiction might also be waived since many addicts sell to support their addiction.

Health Answers to Non-health Questions

It is not uncommon, during pre-employment interviews and polygraph pre-tests for applicants to volunteer information regarding their past or present health prior to conditional offer of employment. "Why did you leave that job?" is a standard job history question and should be an acceptable question to ask any applicant pre-offer. The unresolved question is how far can an

interviewer or examiner follow-up when the applicant answers, "You mean when I had that accident at work?" The problem of pre-offer health information or discovering a disability before the ADA indicates employers should know, can occur using methods other than interviewing or polygraph. Credit record checks are not considered a "health" eliciting methodology and therefore allowed prior to conditional job offer. However, it is quite possible an employer could discover something about the applicant's physical or psychological health on the credit report. Likewise, field investigations (interviewing the applicant's life partner, parents, children, etc. at the applicant's home) could lead to the discovery of a "health" problem either by observation (medications, wheelchairs, photographs, etc.) or comments made by those being interviewed. While the EEOC indicates that employers are allowed to note such information (ADA Enforcement Guidance, 2004, p.4), there doesn't appear to be any case law indicating how far, in the pre-offer stage, interviewers can follow-up. Take, for example, the case of the pre-offer polygraph examination of a police applicant where the examiner notices that the applicant is missing digits on the hand he or she favors. Since firing a handgun is an essential function of the job but missing digits might not per se preclude the applicant from firing a handgun, employers should be allowed to take the candidate out to the range and require that he or she demonstrate the ability to perform this essential function and that all of this follow-up from the initial observation to the actual demonstration be allowed prior to conditional job offer. It might follow, therefore, that follow-up questions in the pre-offer phase tightly focused on an applicant's ability to perform essential functions of the job, albeit arising out of an answer or observation of a possible disability, could also be permissible. This, in turn, raises another issue altogether, specifically, can employers require some applicants to take tests or answer questions that all applicants for the same job do not have to undergo? While this "some but not all" subroutine appears to be a clear cut violation of Equal Treatment Under the Law constitutional guarantees (U.S. Constitution), the EEOC in its Technical Assistance Manual provides somewhat contradictory advice on successive pages. On page 5-13 (Technical Assistance Manual), employers are told "The

applicant may be asked to describe or demonstrate how s/he will perform specific job functions, if this is required of everyone applying for a job in this job category, regardless of disability." but on 5-14 states that "If an applicant has a known disability that would appear to interfere with or prevent performance of a job-related function, s/he may be asked to describe or demonstrate how this function would be performed, even if other applicants applying for the same job do not have to do so. [NOTE: Bold type as indicated in Technical Assistance Manual]. It would therefore appear, if you follow the advisement on 5-14, that a certain amount of pre-offer follow-up is permitted regarding information indicating a possible disability associated with an essential job function but it is also clear that whatever you do for one you must do for all others meeting the same precise set of conditions. Finally, while information from pre-offer follow-up tests appear to be permitted, it is still unclear if follow-up questions are permitted and pre-employment polygraph, of course, is basically an interview with a truth verification process attached.

In summary therefore, examiners have essentially three options in dealing with the ADA and following up "health" information obtained prior to conditional offer of employment:

1. Note the "health" information but make no attempt to follow-up or evaluate the information in terms of the applicant's ability to perform essential functions of the job until after job offer;
2. Note the "health" information and require the applicant to undergo a non-medical test, e.g. agility, to demonstrate the ability to perform essential functions of the job; or
3. Follow-up the information during the pre-offer polygraph examination (particularly if the same information would effect the applicant's suitability for testing) but be prepared to be an EEOC test case.

Interviewing, Polygraph and Reasonable Accommodation

Although it has yet to be reported, do not be surprised to learn that some job applicant, because of a speech or hearing disability, requests the substitution of a written questionnaire for an interview. In the same vein, an applicant with a heart or hypersensitive skin condition might insist that a CVSA is a reasonable substitute for a polygraph examination and cite the numerous law enforcement agencies that have found (anecdotally) CVSA to be an "acceptable practice in the field" of law enforcement. Examiners should argue that since non-verbal behavior makes up more than half the meaning of what people say, particularly with regard to the detection of deception, written devices are not a viable substitute for face-to-face interviews, including polygraph pre-tests, where, if nothing else, the examiner has to be certain that the applicant understands the questions. All examiners acknowledge that the basic construction of a pre-employment polygraph examination violates some of the basic tenets of specific issue test construction where reasonable degrees of validity and reliability can be demonstrated, e.g., the use of multiple issues in the same test, general or ambiguous relevant questions that appear to be more like comparison questions, the absence of any outcry, case facts or investigation evidence, etc. Most examiners agree further that certain pre-employment polygraph techniques such as Irrelevant/Relevant have inherent weaknesses corrected for in Comparison Question examinations. Nevertheless, this does not mean that pre-employment polygraph examinations, even those using the I/R Technique, have no or mere chance validity or reliability. Conversely, CVSA has yet to demonstrate any scientific validity or reliability and fares poorly when the two methodologies are objectively compared. Therefore, employers and examiners should argue that CVSA is not a reasonable substitute for polygraph. The argument that should be most effective would be that the disability or impairment prompting the request for accommodation would in and of itself be *prima facie* proof of an inability to perform an essential function of the job being sought. If an applicant, because of a disability, could not hear or speak well enough to be interviewed or

polygraphed, it would be inconceivable that they could adequately perform the required functions of any job requiring hearing or speaking. This argument, of course, would apply to all sworn positions and some civilian support positions, but other civilian positions, e.g. some types of file or records jobs, might actually require accommodation.

Language is not normally considered a Disability so examiners should not have to accommodate any police applicant by providing an interpreter. Even if the inability to speak were in fact caused by a physical disability, if speaking were an essential function, accommodation by providing someone to sign during the pre-test interview would not be necessary.

Third Party Agents and the ADA

Many pre-employment interviewers and polygraph examiners provide their services to public employers while maintaining their independent status, i.e., they are not employees of the Department requesting the examinations. However, since examiners operating under these conditions are paid by the requesting agency, they would still be considered agents of the employer and therefore bound by all the requirements of the ADA just as an independent civilian examiner conducting custodial examinations for a law enforcement agency would be required to satisfy all Miranda requirements. Even if it is not reported to the requesting agency, examiners cannot do anything or ask any questions that would violate the ADA and, in effect, must operate as if they were employees of the requesting agency. Conversely, public employers using outside vendors, are liable for any violations of the ADA incurred by their vendors and should, for liability purposes, conduct periodic quality control reviews of their vendors to ensure compliance. While the polygraph profession seems to have accepted this requirement (many examiners video tape all examinations), most psychologists conducting pre-offer psychological examinations, resist having his or her sessions randomly videotaped and refuse allowing even a qualified professional to sit in during sessions as a silent witness to monitor procedures. In any case, the employer, not just the outside vendor, would incur the liability for ADA violations so compliance and

quality control should not only be mandated for all outside vendors but periodically checked by the employer.

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