

JUL 23, 1999

This is in response to your June 20, 1996, letter to Chairman Gilbert Casellas asking us to review an application for employment which was designed for your company.

Pursuant to the Americans with Disabilities Act, 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. Finally, in order for a medical examination or inquiry to be made of an employee, it must be job related and consistent with business necessity.

The only question on the application you have submitted which raises a possible ADA concern is 'Are you capable of performing in a reasonable manner, the activities involved in the job or occupation for which you have applied!' Pursuant to the Commission's 'ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations' (enclosed), an employer may ask an applicant whether s/he can perform the job for which s/he is applying (Guidance, at page 4). The qualifying phrase in your question - "in a reasonable manner" - could prove troublesome because its meaning is not clear.

An employer may ask an applicant whether s/he can perform job functions with or without reasonable accommodation. If this is what is intended by the "in a reasonable manner" language, you should use the more specific reference to "with or without reasonable accommodation. If, on the other hand - "in a reasonable manner" refers to something else (i.e., the ability to perform without a reasonable accommodation), the better course would be to drop the phrase and simply ask whether the applicant can perform the job.

The more problematic aspect of the application resides not in the questions but in the "Application Instructions." Specifically, at instruction number four, it is stated, "failure to pass the [Post-offer] physical will cause withdrawal of the job offer."

As our Guidance instructs, "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' (Guidance, at page 2)~ However, as the Guidance cautions:

- If the employer rejects the applicant after a disability-related question or medical examination, investigators will closely scrutinize whether the rejection was based on the results of that question or examination.
- If the question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is "job-related and consistent with business necessity."

Consequently, an employer who adheres to instruction number four and automatically withdraws a job offer with regard to anyone who fails a physical could find itself in violation of the ADA.

If an individual who, failed your physical because of a disability could nevertheless Perform the essential functions of the position with or without a reasonable accommodation, you could not lawfully withdraw this person's job offer. In this regard, EEOC Regulation 29 C.F.R. ~ 1630.10 provides:

- It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

The Commission's Interpretive Guidance to this section explains that the purpose of this Provision "is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job". It further explains that a selection criterion that does not concern an essential function of the job is not consistent with business necessity. If the criterion is consistent with business necessity, the employer must consider whether the individual with a disability can meet the criterion with reasonable accommodation. Merely failing a physical does not demonstrate the inability to perform the essential functions of a particular job with or without reasonable accommodation. Thus, the automatic job withdrawal contemplated by instruction number four could result in a violation of the ADA. The instruction also could discourage disabled individuals capable of performing your jobs from even applying. We therefore suggest this instruction be modified in such a way that it is in compliance

We also note that the "Certification and Release" section of the application poses a problem with respect to testing for alcohol. In the third paragraph, it states that the employee agrees 'to submit to drug testing to detect the use of illegal drugs and alcohol at any time during employment.' Under the ADA, tests to determine the current illegal use of controlled substances are not considered medical examinations; consequently, the ADA does not prohibit an employer from conducting drug tests at any time. However, a test to determine whether an individual is currently under the influence of alcohol constitutes a medical examination. Therefore, a test for alcohol use can be administered to an employee only when shown to be job related and consistent with business necessity.

Finally, two of your questions may have Title VII implications. The first question concerns the applicant's availability to work on holidays. Generally, using inquiries concerning availability to work on Friday evenings, Saturdays, or holidays to reject applicants who observe their Sabbath on these days as part of their religious practices may be unlawful. The EEOC's Religious Discrimination Guidelines, 20 C.F.R. S 1605.3(b)(3), provide that:

- The Commission will infer that the need for accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

Therefore, such inquiries should not be made unless the employer can show that the inquiry did not exclude prospective employees who need accommodation for their employee religious practices, or that it would create an undue hardship to accommodate the

Second, 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. For more information concerning the use of conviction records, see 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; EEOC Policy Guidance No: N915, "Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, February 4, 1987 (enclosed).

I hope you find this discussion helpful. Please note that this letter is an informal discussion of some of the issues raised by the application and is not an official opinion

Sincerely,

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Enclosures

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*A test for the illegal use of drugs is not considered a medical exam under the ADA; thus, it may be given pre-offer.*

*2Please note also that, while an employer can test for the current illegal use of controlled substances and reject those who are engaging in such use, an absolute rejection due to a positive drug test result could run afoul of the ADA. For example, if the 'positive' result is due to the lawful use of a prescription drug which the individual is taking because of a disability, a rejection of the individual because of the 'positive' result could violate the ADA.*