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Federal Appellate Court Holds that Requiring an Employee to Undergo Psychological Counseling May Constitute Requiring a Medical Examination Under the ADA

By Peter Petesch and Michael Chichester, Jr.

While numerous cases have dealt with whether a particular medical examination required by an employer was "job related" and consistent with "business necessity," a new case from the U.S. Court of Appeals for the Sixth Circuit addresses the issue of what constitutes a "medical examination" under the Americans with Disabilities Act (ADA). In *Kroll v. White Lake Ambulance Auth.*, No. 10-2348 (6th Cir. Aug. 22, 2012), the court looked to the 2000 *EEOC Enforcement Guidance: Disability Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA)* ("Guidance") and adopted the EEOC's seven-prong test. Relying principally on three factors of that test, the court concluded that a jury must decide whether the employer's requirement that the plaintiff obtain psychological counseling amounted to requiring the plaintiff to undergo a "medical examination." The decision serves as an important reminder for employers to carefully consider any directives that an employee obtain counseling, therapy, or other treatment.

Background

The plaintiff began working for the White Lake Ambulance Authority in 2003 as an emergency medical technician. While employed, she began a romantic relationship with one of her coworkers. The plaintiff's coworkers thereafter expressed concerns to the employer about the plaintiff's well-being. According to the plaintiff, the employer's office manager subsequently requested that she obtain psychological counseling. The plaintiff declined her employer's request.

A few days later, the employer's director held a meeting with the plaintiff in connection with a dispute involving the plaintiff and a coworker. At that meeting, the director informed the plaintiff of a complaint against her that she was screaming at a male acquaintance on the phone while driving a patient in an ambulance with emergency lights and sirens engaged. As a result, the director advised the plaintiff that her continued employment was conditioned upon her obtaining counseling. The plaintiff responded that she would not attend counseling, left the meeting, and never returned to work.

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The plaintiff filed suit, alleging in part that her employer violated her rights under the ADA (42 U.S.C. section 12112(d)(4)) by requiring her to submit to a "medical examination" in the form of counseling.

The Sixth Circuit's Decision

The Sixth Circuit reversed the trial court's determination that counseling was not a "medical examination" under the ADA. First, the court decided that the plaintiff had standing to sue under the ADA's provisions restricting employee medical examinations, noting that the plaintiff lost her job after refusing counseling. Then, the court explored whether directing the plaintiff to obtain psychological counseling amounted to directing her to submit to a medical examination. The court found that a "medical examination" is "a procedure or test that seeks information about an individual's physical or mental impairments or health," relying on the EEOC Guidance's seven-factor test to reach that conclusion:

1. whether the test is administered by a health care professional;
2. whether the test is interpreted by a health care professional;
3. whether the test is designed to reveal an impairment or physical or mental health;
4. whether the test is invasive;
5. whether the test measures an employee's performance of a task or measure of his or her psychological responses to performing the task;
6. whether the test normally is given in a medical setting; and
7. whether medical equipment is used.

The court noted that not all psychological tests will be "medical examinations" under the ADA. Once again, looking to the *Guidance*, the court explained that "psychological tests that measure personality traits such as honesty, preferences, and habits," are not "medical examinations," while "psychological tests that are designed to identify a mental disorder or impairment" are "medical examinations." Thus, the court explained that whether a particular test "is likely to elicit information about a disability, providing a basis for discriminatory treatment" is key to the inquiry. The court further explained that the employer's intent in requiring the examination, test, or procedure is not dispositive.

In discussing the boundaries of what constitutes a "medical examination," the court looked to a Seventh Circuit decision holding that administration of the Minnesota Multiphasic Personality Inventory (MMPI) was a "medical examination" under the ADA. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831(7th Cir. 2005). Reasoning that the MMPI was designed, in part, to reveal mental illness, the Seventh Circuit concluded that the test was "best categorized as a medical examination" restricted under the ADA. The Seventh Circuit reached this conclusion despite the fact that the test was not scored by a psychologist, the employer only used "a vocational scoring protocol" rather than "a clinical protocol," and the employer claimed that it was only using the MMPI to measure personality traits.

Turning to the facts of the *Kroll* case, the court acknowledged that the employer's directive that the employee obtain "counseling" or even "psychological counseling" was ambiguous. The court nevertheless determined that factors one and two of the EEOC test weighed in favor of a conclusion that the recommended "counseling" was a medical exam—largely in reliance on the plaintiff's testimony that the employer directed her to obtain counseling from a psychologist. The court also found that because psychological counseling may disclose a mental health impairment, the EEOC's third factor, whether the test is designed to reveal an impairment or physical or mental health, additionally supported its conclusion that the required counseling was a "medical examination." Relying on these three factors, the Sixth Circuit held that "a reasonable jury could conclude that the psychological counseling [the plaintiff] was instructed to attend was the type designed to uncover a mental-health defect." The court went on to explain:

> [The] facts are sufficient for a reasonable jury to conclude that [the employer] intended for [the plaintiff] to attend counseling to explore her possible affliction with depression, or a similar mental-health impairment, so that she could receive the appropriate corresponding treatment. This uncovering of mental-health defects at an employer's direction is the precise harm that § 12112(d)(4)(A) is designed to prevent absent a demonstrated job-related business necessity.

Although the court directly decided the "medical examination" question, it did not address whether the "medical examination" of the plaintiff was "job related" and consistent with "business necessity." Accordingly, the case was remanded to the district court to decide those questions.

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Recommendations for Employers

Kroll demonstrates how broadly the term "medical examination" can be defined under the ADA. Requiring an employee to obtain counseling from a health care professional may potentially be deemed a "medical examination." It is imperative that employers carefully evaluate such directives to assess whether their request (even a recommendation for anger management counseling) meets the ADA tests for "job relatedness" and "business necessity." There is significant risk that generally requiring an employee to obtain "counseling" would not meet these tests because – as noted by the court in *Kroll* – counseling could potentially uncover mental impairments wholly unrelated to issues the employee may be exhibiting at work.

Cases like *Kroll* also serve to illustrate the adage that "no good deed goes unpunished." Human nature often spurs managers to question why an employee is behaving a certain way. Disciplined human resources practice, however, maintains focus on managing behavior and conduct, regardless of its root cause. In certain cases, ordering a medical exam or counseling may also increase the potential for an employee to claim that he or she is "regarded as" having a disability. While there may indeed be situations in which an employer's legitimate concern over an employee's behavior – prompting worries over safety or job performance – may warrant (or even compel) a medical examination or counseling requirement, *Kroll* underscores the need for employers to proceed with caution. Employers are encouraged to seek advice from counsel (and, where appropriate, health care professionals) on whether a planned examination or referral to counseling is legally defensible and serves a job-related business necessity.

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