

# Comments

## **PERSONALITY TESTS IN JEOPARDY: AN EVALUATION OF THE SEVENTH CIRCUIT'S DECISION IN *KARRAKER V. RENT-A-CENTER* AND ITS IMPACT ON THE FUTURE USE OF PERSONALITY TESTS IN PRE-EMPLOYMENT SCREENING**

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### I. INTRODUCTION

Besides being a nerve-wracking experience, the job application process can be an extensive one, involving a potential employer's evaluation of a number of factors such as an applicant's resume, references, and interview results. An employer may also be using the results of a personality test in its determination.

While some people may never have heard of a personality test, let alone actually taken one, it is a tool often used by many employers in their determination of whether an applicant has the desired traits for a particular position.<sup>1</sup> This type of exam is used regularly in the hiring of management personnel, particularly when the employee is in a position of trust and the employer wants to make sure that it hires someone who is not dishonest or unreliable.<sup>2</sup>

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1. Adrienne C. Mazura & Leah D. Gidron, *United States: Personality Tests and The ADA: A Risky Business*, MONDAQ BUS. BRIEFING, Jul. 19, 2005, <http://www.mondaq.com/article.asp?articleid=33809&searchresults=1> (last visited Nov. 8, 2006).

2. John D. Finerty, *Seventh Circuit Prohibits Use of Personality Test*, WIS. L. J. (Jun. 22, 2005), available at <http://www.wislawjournal.com/archive/2005/0622/finerty-062205.html>.

The use of personality tests in pre-employment screening has grown in popularity. In 1995, yearly sales of such tests to various businesses were estimated at over \$100 million.<sup>3</sup> Currently, there is no sign of a decline with regards to the use of such tests. In fact, the trend is growing, as illustrated by the 2,500 different types of personality tests that are now on the market. Recent surveys indicate that thirty percent of American companies use such tests to screen applicants for jobs that range “from store clerk to nuclear power plant operator.”<sup>4</sup> The reasons given for the increased use of personality tests in the employment process include increasing fears about security since September 11, 2001, a growing focus on emphasizing teamwork, mounting desires to avoid the large costs associated with bad hires, and developing improvements in testing for conscientiousness and open-mindedness.<sup>5</sup>

Of course, personality tests do have their restrictions, the primary one being the Americans with Disabilities Act (ADA).<sup>6</sup> The ADA was designed to protect individuals with mental and physical disabilities.<sup>7</sup> One type of protection that the ADA provides to the disabled is in the form of restrictions against employment discrimination.<sup>8</sup> Employers “shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”<sup>9</sup> Under the ADA, the use of personality tests by employers prior to employment is prohibited if the test constitutes a medical exam.<sup>10</sup>

Personality tests raise discrimination issues, which in the past have been viewed as insufficiently scrutinized by the courts.<sup>11</sup> Courts generally

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3. Lois Langley, *Getting Personal\Use of Psychological Tests to Screen Job Applicants Can Backfire on Employers*, PITT. POST GAZETTE, Feb. 5, 1995, at D1.

4. H.J. Cummins, *Personality Test or Medical Exam? Law Sorting it Out*, STAR TRIB. (Twin Cities, MN), Jun. 30, 2005, at 1D (citing as the source for such information the Society for Human Resource Management, based in Alexandria, Virginia). See also Kaja Whitehouse, *Employers Face Risks With Use of a Personality Test*, DOW JONES NEWSWIRE, Jul. 18, 2005, <http://www.careerjournal.com/hrcenter/articles/20050718-whitehouse.html> (“Roughly 30% of American companies use personality tests, according to a 2003 survey by job recruitment firm Management Recruiters International Inc. in Cleveland”).

5. Cummins, *supra* note 4.

6. 42 U.S.C. §§ 12101-12213 (2006).

7. *Id.* § 12101(b)(1) (2006).

8. *Id.* § 12101(a)(8) (2006).

9. *Id.* § 12112(d)(2) (2006).

10. See Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. PA. J. LAB. & EMP. L. 279, 287 (2002) (“[T]he ADA restricts an employer’s use of pre-employment medical examinations of job applicants. That means that in order for an employer to be able to use a personality test, the test must not constitute a prohibited pre-offer medical exam.”) (footnote omitted).

11. See *id.* (“Adopting EEOC’s approach, courts reached opposing holdings on whether

have held that when a personality test is administered and interpreted by a non-health care professional and the test is not conducted in a medical setting, then such tests will not be deemed to be medical exams.<sup>12</sup> Conversely, psychological tests administered and interpreted by health care professionals have generally been found to be medical exams administered prior to employment and thus prohibited by the ADA.<sup>13</sup>

This prior general rule is now in question given a recent decision by the Seventh Circuit Court of Appeals. In June 2005, the Seventh Circuit found that a defendant company's use of the Minnesota Multiphasic Personality Inventory (MMPI)<sup>14</sup> test was prohibited because the test was a medical exam that violated the ADA.<sup>15</sup> The defendant's use was only to measure personality traits, not to disclose mental illness, and the exam was not evaluated by a health care professional. However, the court stated that "whether or not [the defendant] used the test to weed out applicants with certain disorders, its use of the MMPI likely had the effect of excluding employees with disorders from promotions"<sup>16</sup> since the test was originally designed to help diagnose mental illness.<sup>17</sup> It is the first time that a court has struck down a screening test since the passing of the ADA.<sup>18</sup>

Personality tests are used nation-wide and this ruling is likely to make employers wary about using them in the future given how it dismantled the distinction between a test that evaluates personality and one that diagnoses mental disorders.<sup>19</sup>

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personality tests constitute prohibited medical exams.").

12. *Id.*

13. *Id.*

14. The Minnesota Multiphasic Inventory is a personality test that consists of 550 questions. *See Work & Family Connection, Inc., Personality Test Violates the ADA*, WORK & FAM. NEWSBRIEF, Aug. 1, 2005, at 8. It is thought by many to be the most popular personality test in the world. Whitehouse, *supra* note 4. The MMPI was originally created in the 1930s to help diagnose psychiatric disorders. HR News Staff, *Reassess Personality Tests After Court Case*, HR MAGAZINE, Sept. 1, 2005, at 30. Despite its past medical use, the test is currently used by employers to evaluate the personality traits of applicants. *Id.* The test questions encompass several areas including "health, psychosomatic symptoms; sexual, religious, political and social attitudes; educational, family, occupational and marital issues; and phobias, delusions and sadistic and masochistic tendencies." *See* Kimberli R. Black, *Personality Screening in Employment*, 32 AM. BUS. L.J. 69, 74 (1994).

15. *Karraker v. Rent-A-Center*, 411 F.3d 831, 832 (7th Cir. 2005).

16. *Id.* at 836-37.

17. *Id.* at 837.

18. HR News Staff, *supra* note 14, at 32.

19. *See, e.g., Jeffrey Harris, Use of Personality Test for Promotion Violates ADA*, HAW. BUS. PUB. CO., Oct. 1, 2005, S13 (noting that even though the *Karraker* case is not binding in Hawaii, the Hawaiian state and federal courts may find the reasoning of the decision persuasive since the ADA does apply to them and the state law is similar). *See also* Cynthia Lane, *Use of Personality Test Violates ADA*, A.B.A. J. E-REPORT, Jun. 24, 2005 (quoting Miami employment lawyer, David M. DeMaio, who claims that employers should be wary about using personality tests given the decision by the Seventh Circuit).

The next Part of this Comment looks at the history of personality tests in the United States as a pre-employment screening tool, discussing its relation to the ADA and the interpretations of prior courts of when a personality test was deemed a medical exam under the ADA. In Part III, the Comment will describe the events leading up to the Seventh Circuit's decision, as well as its holding and arguments. Part IV analyzes the detrimental effect the decision is likely to have on employers' future uses of personality tests during the pre-employment process. It argues that the Court's holding is a warning that employers should begin looking for other screening methods for job applicants to replace the personality test. Finally, it will discuss the possible options and alternatives for employers in Part V, including the Role-Based Assessment, which was established and is implemented by The Gabriel Institute (TGI).<sup>20</sup>

## II. HISTORY OF PERSONALITY TESTS IN THE UNITED STATES

### A. Personality Tests' Formation and Evolution

Psychological testing began in the early 19<sup>th</sup> century with the growing concern for individualism.<sup>21</sup> Swiss psychiatrist Carl Jung believed that behavior was affected by personality, and several decades later, psychologists used that theory to develop personality tests.<sup>22</sup> Psychologists focused on developing a system of personality classification by measuring individual differences.<sup>23</sup> During this period, Hugo Munsterberg created "a test that measured psychological traits that were necessary and desirable in employees."<sup>24</sup> Such tests were used by the American Tobacco Company and the Boston Elevated Company to select their employees.<sup>25</sup>

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20. The Gabriel Institute believes that Role-Based Assessment is a much more effective determinant than personality tests of whether an applicant will fit a particular position, without the same risk of psychological testing. Business Wire, *Experts Available to Discuss Court Ruling that Personality Tests for Job Applicants are Prohibited Under the ADA*, Jul. 5, 2005, [http://www.findarticles.com/p/articles/mi\\_m0EIN/is\\_2005\\_July\\_5/ai\\_n14712763](http://www.findarticles.com/p/articles/mi_m0EIN/is_2005_July_5/ai_n14712763) (last visited Nov. 10, 2006). For more information about The Gabriel Institute and the products and services that they provide, see The Gabriel Institute: Innovative Provider for Workforce Management, Assessment, Training & Strategic Planning, <http://www.thegabrielinstitute.com> (last visited Mar. 8, 2006).

21. Black, *supra* note 14, at 71.

22. Langley, *supra* note 3.

23. Black, *supra* note 14, at 71.

24. *Id.* (footnote omitted).

25. *Id.* See also Sujata S. Menjoge, *Testing the Limits of Anti-discrimination Law: How Employers' Use of Pre-Employment Psychological and Personality Tests can Circumvent Title VII and the ASA*, 82 N.C. L. REV. 326, 329-330 (2003) (noting the use of tests "measuring traits and aptitudes" by the American Tobacco Company and the Boston Elevated Company).

But it was not until World War I that the development of all forms of psychological testing began, the purpose being to evaluate military employees.<sup>26</sup> Studies were done on "soldiers who froze during battle"<sup>27</sup> and testing was then performed to pick out soldiers "for special missions."<sup>28</sup> Also during the war, tests were used to determine what employees had submissive personalities and which of them had radical political views.<sup>29</sup>

During the 1920s projective testing was developed.<sup>30</sup> Projective testing presents ambiguous stimuli to a subject and then asks the subject to explain what they saw or has the subject respond to the stimulus.<sup>31</sup> The subject would project his or her fantasies and emotional associations onto the stimulus.<sup>32</sup> Hermann Rorschach was the first to use this technique in a test that many of us are familiar with, where the subject is shown a series of "inkblots" and asked to describe what he or she sees.<sup>33</sup>

During the 1930s and 1940s, performative and situational tests were developed.<sup>34</sup> These types of tests put the subject in complex lifelike or simulated situations in order to elicit the demonstration of certain characteristics.<sup>35</sup> This type of test is used by many companies to evaluate leadership ability.<sup>36</sup> It was also "administered to school children and measured behavior such as cheating, lying, stealing, cooperativeness and persistence."<sup>37</sup> During this period, factory executives and private companies used personality and psychological tests as a result of the increasing need in the economy for candidates to fill managerial and professional positions.<sup>38</sup> It was determined from extensive follow up that personality tests were not a better predictor of actual performance than random selection, but both the civil and military communities used these types of tests extensively during World War II, both in the military and the civilian community, and such use continued into the present.<sup>39</sup> The tests developed during World War II, measuring social and emotional behavior, enabled the development of rating-scales and standardized questionnaires that are in

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26. Black, *supra* note 14, at 71.

27. *Id.*

28. *Id.* (footnote omitted).

29. Menjoge, *supra* note 25, at 330.

30. Black, *supra* note 14, at 71.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Black, *supra* note 14, at 71-72.

36. *Id.* at 72.

37. *Id.* (footnote omitted)

38. Menjoge, *supra* note 25, at 330.

39. *Id.* (quoting Sharona Hoffman, *Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace*, 49 U. KAN. L. REV. 517, 539 (2001)).

most of the common types of personality tests used today.<sup>40</sup>

Currently, there are over 8,000 psychological and personality tests in use with forty-six percent of employers using such tests to screen applicants for employment.<sup>41</sup> Additionally, most Fortune 1000 companies use psychological and personality tests.<sup>42</sup> Even small and mid-sized companies have been using them as a result of the decrease in tests' costs and the increase in their availability.<sup>43</sup>

### *B. Personality Tests and the ADA*

Personality tests must confront and conform to the rights provided to disabled individuals under the ADA. The Act provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>44</sup> The ADA was enacted in 1990 and provides standing for claims to plaintiffs with qualified disabilities.<sup>45</sup> The Act defines a “qualified individual with a disability” as a person “with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>46</sup> The statute also gives consideration to an employer’s judgment as to what the essential functions of a job are and whether the employer has written down a description of the position prior to advertising or interviewing for the job.<sup>47</sup> Such a description will be viewed as evidence of the essential functions of the job.<sup>48</sup> Discrimination is defined under the act as including the use of:

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 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 . . . .<sup>49</sup>

A test is also considered discriminatory when it fails to measure what it

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40. Black, *supra* note 14, at 72.

41. Menjoge, *supra* note 25, at 330.

42. *Id.* at 328.

43. *Id.*

44. 42 U.S.C. § 12112(a) (2006).

45. Menjoge, *supra* note 25, at 348.

46. 42 U.S.C. § 12111(8) (2006).

47. *Id.*

48. *Id.*

49. 42 U.S.C. § 12112(b)(6) (2006).

claims to measure.<sup>50</sup> Test results that are affected by a person's sensory, manual, and speaking impairments are considered discriminatory.<sup>51</sup>

The ADA does not discuss psychological tests or personality tests, but it does prohibit employers from using medical tests as part of the hiring process.<sup>52</sup> It also does not provide examples of medical tests; rather, guidelines to determine whether a personality test is a medical exam under the ADA were promulgated by the EEOC.<sup>53</sup> The guidelines provide several factors which include: whether a health care professional administers the test and analyzes the results, whether the test is meant to determine impairments or evaluate health, whether the test is invasive, whether it tests physiological characteristics or task performance, whether it takes place in a medical environment, and whether the administration of the test requires the use of medical equipment.<sup>54</sup> The EEOC states that a personality test that is only meant to analyze a person's "honesty, tastes and habits"<sup>55</sup> is not a medical exam, unlike a test that is meant to determine whether an individual has a mental disorder.<sup>56</sup> While this interpretation by the EEOC is not controlling law, it "constitutes a body of experiences and informed judgment to which the courts and litigants may properly resort for guidance."<sup>57</sup>

### C. Courts' Interpretations of the ADA with Regard to Personality Tests

Since its enactment, the ADA has received constant attention from the courts.<sup>58</sup> However, when it came to suits regarding personality tests that were argued to be medical exams under the ADA, many tests that were likely to be considered prohibited under the Act went unchallenged because

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50. Black, *supra* note 14, at 117.

51. *Id.* See also 42 U.S.C. § 12112(b)(7) (2006) (pointing out that test results affected by impairments are discriminatory unless the test intends to measure sensory, manual, and speaking skills).

52. Menjoge, *supra* note 25, at 348 (evaluating the provisions of 42 U.S.C. § 12112(d) (2000)). *But see* Black, *supra* note 14, at 117 (stating that medical exams can be performed after an offer of employment has been made but before the commencement of work if the requirement is extended to all applicants and the results are stored separately as medical files and kept confidential and also explaining that offers can be contingent on the results but any rejection can not be based on a disability unless the rejection is job-related and necessary for business) (citing 42 U.S.C. § 12112).

53. Menjoge, *supra* note 25, at 348-49 (citing Gregory R. Vetter, Comment, *Is a Personality Test a Pre-Job-Offer Medical Examination Under the ADA?*, 93 NW. U. L. REV. 597, 628 (1999)).

54. *Id.* at 349 (citing Vetter, *supra* note 53).

55. *Id.* (quoting Vetter, *supra* note 53).

56. *Id.* (citing Vetter, *supra* note 53).

57. *Id.* (quoting *Barnes v. Cochran*, 944 F. Supp. 897, 904 (S.D. Fla. 1996) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986))).

58. Menjoge, *supra* note 25, at 351.

the applicants did not qualify as disabled under the Act.<sup>59</sup> Even when applicants did have standing to sue and their cases did go to trial, many tests that may have been discriminatory were still found not to be medical exams under the ADA.

One example of this type of outcome can be found in *Thompson v. Borg-Warner Protective Services Corporation*.<sup>60</sup> In this case, the plaintiff, Thompson, filed a class action suit against the defendant, Borg-Warner, claiming, among other things, that the defendant's use of the PASS-III D.A.T.A. Survey as a criterion for hiring security guards violated the ADA.<sup>61</sup> The PASS-III D.A.T.A. Survey is a multiple-choice test involving 100 statements that the applicant must respond to by marking boxes with the labels "yes," "?," and "no."<sup>62</sup> The responses were divided into three sections: alienation, trustworthiness attitudes, and drug attitudes.<sup>63</sup>

The plaintiff pointed to certain statements within the test's administration and evaluation materials to argue that the test was a medical examination. The plaintiff highlighted a description of the use of the test to find the alienated, untrustworthy applicants that are likely to have behavior problems at the job; conclusions that people who have alienated attitudes are more likely to be emotionally unstable; and statements that applicants' who score high for having a lenient attitude toward abusive behavior are more likely to be currently abusing drugs.<sup>64</sup> There was no evidence presented that the survey was designed or used for the purpose of determining if an applicant has a mental impairment.<sup>65</sup> The court felt that a test that merely exposed mental or personality traits that may be disfavored was not a violation of the ADA.<sup>66</sup> The court found that:

[e]vidence that the test is designed to reveal "behavioral problems" and "emotional instability" is insufficient; there is no evidence in the record that "behavioral problems" and "emotional instability", [sic] as those are revealed in the PASS-III survey, are either themselves disabilities or are characteristics that can lead to identifying whether an applicant has an impairment, whether defined by the [Diagnostic and Statistical Manual of Mental Disorders] or by some other parameter.<sup>67</sup>

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59. *Id.*

60. No. C-94-4015MHP, 1996 U.S. Dist. LEXIS 4781 (N.D. Cal. Mar. 11, 1996).

61. *Id.* at \*1-2.

62. *Id.* at \*2.

63. *Id.*

64. *Id.* at \*15-16.

65. *Borg-Warner*, No. C-94-4015MHP, 1996 U.S. Dist. LEXIS 4781. at \*21.

66. *Id.*

67. *Id.* With regard to the issue of substance abuse, the court found that the ADA did not protect current illegal drug use and an employer was allowed to ask an applicant about such use. *Id.* at \*23-24.



In arriving at its decision, the court concluded that the ADA was meant to protect disabilities and was not crafted to prevent employers from excluding applicants who possessed traits that an employer may view as “personal flaw[s] or undesirable aspect[s] of an applicant’s personality.”<sup>68</sup>

Under this decision, employers could use personality tests to hire people that seemed to be the most “physiologically and psychologically” desirable even if such requirements were not necessary for the position.<sup>69</sup> As a result, employers were able to exclude many people with disabilities from employment, whether intentionally or unintentionally, without violating the ADA.<sup>70</sup>

It was indeed very difficult for a plaintiff to win a claim that a pre-employment personality test was actually a medical exam under the ADA. In *Barnes v. Cochran*,<sup>71</sup> the plaintiff was eliminated from consideration for a job after being required by the defendant to take a psychological test under the administration of a psychologist.<sup>72</sup> During this exam, the plaintiff confessed that he had a history of “flashbacks, nightmares, blackouts, and hallucinations,” and that these events would generally occur when he was stressed.<sup>73</sup> After evaluating the exam results and the findings of plaintiff’s physician, the psychologist gave the plaintiff a rating that was below the defendant’s employment standard.<sup>74</sup> The court concluded that the defendant’s pre-employment test was a medical exam that violated the ADA.<sup>75</sup> The decision was based on the nature and the extensiveness of the examination.<sup>76</sup> The psychologist’s report showed that the plaintiff was referred to him for a “clinical evaluation,” and the psychologist’s inquiry was directed towards determining whether the plaintiff had any specific psychological disabilities.<sup>77</sup> The psychologist also reviewed the plaintiff’s medical records, and performed several personality tests and psychological tests.<sup>78</sup> As a result of all these factors, the court explained that even though the ADA allows pre-employment examinations in order to determine if the

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68. *Id.* at \*20.

69. Menjoge, *supra* note 25, at 353.

70. *Id.*

71. 944 F. Supp. 897 (S.D. Fla. 1996).

72. *Id.* at 901.

73. *Id.*

74. *Id.* at 901-02.

75. *Id.* at 904.

76. *Cochran*, 944 F. Supp. at 904.

77. *Id.* (quoting Report from Harley V. Stock to Broward Sheriff’s Office (Mar. 14, 1994)).

78. *Id.* at 905. The psychologist had performed the Minnesota Multiphasic Personality Inventory, The Inwald Personality Inventory, the Otis Lennon School Ability Test, the Hilson Profile/Success Quotient Test, and the California Psychological Inventory. *Id.* The fact that five of these tests were performed was considered by the court to be so extensive as to constitute a pre-employment medical exam that violated the ADA. *Id.*

applicant has the abilities needed to perform the “essential functions of a job,” the kind of extensive psychological testing that took place in this particular case was not permitted.<sup>79</sup>

However, the court ended up granting the defendant’s motion for summary judgment after concluding that the plaintiff had failed to present enough evidence to prove that the defendant had a discriminatory intent in not hiring him.<sup>80</sup> The court found that no damage was caused by the defendant’s violation of the ADA and that the defendant would have reached the same result if the medical exam had been conducted after an offer of employment had been given.<sup>81</sup> The court further found that the defendant had presented enough non-discriminatory reasons for not hiring the plaintiff and that those reasons would have been sufficient if the defendant had made an offer to the plaintiff and then withdrawn it.<sup>82</sup>

This case illustrates the difficulty faced by plaintiffs in trying to win claims under the ADA on the basis of a prohibited pre-employment medical exam. Despite the fact that the defendant in *Barnes* had violated the ADA by administering a medical exam during the hiring process, the defendant did not incur any liability because the plaintiff was not able to prove that the medical exam was used with the intended purpose of discriminating against the mentally disabled.

The case of *Varnagis v. City of Chicago*<sup>83</sup> demonstrates the difficulty plaintiffs confront in proving that they qualify as disabled under the ADA. In *Varnagis*, the plaintiffs applied to become police officers with the Chicago Police Department.<sup>84</sup> Part of the application process included psychological and medical examinations.<sup>85</sup> The psychological part of the application required the plaintiffs to take four tests.<sup>86</sup> These tests included the Minnesota Multiphasic Personality Inventory-2 (“MMPI-2”) and the Inwald Personality Inventory.<sup>87</sup> The plaintiffs sued the City of Chicago, claiming that the MMPI-2 tested for mental disability, and thus violated the ADA.<sup>88</sup> The court found that the plaintiffs had made a sufficient showing of a violation of § 12112(d)<sup>89</sup> of the ADA in order to survive the

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79. *Id.*

80. *Id.*

81. *Id.* at 905-06.

82. *Cochran*, 944 F. Supp. at 906.

83. No. 96 C 6304, 1997 U.S. Dist. LEXIS 9031 (N.D. Ill. June 20, 1997).

84. *Id.* at \*1-2.

85. *Id.* at \*2-3.

86. *Id.* at \*3.

87. *Id.*

88. *Id.*

89. See 42 U.S.C. § 12112(d) (2006) (stating that the prohibition against discrimination includes medical examinations and listing when the use of such exams are prohibited by the ADA, such as before an offer of employment has been made to a job applicant).

defendant's motion to dismiss.<sup>90</sup>

However, the court then went on to find that the plaintiffs had failed to show that they had standing to sue under the ADA.<sup>91</sup> After examining the ADA in its entirety, the court held that "the pre-offer medical examination prohibition applies only to a 'qualified individual with a disability'"<sup>92</sup> and there was no evidence that Congress meant for the ADA to protect individuals who are not disabled.<sup>93</sup> As a result, the plaintiffs could not maintain an action under the ADA because they did not prove that they had a disability as defined by the Act.<sup>94</sup>

To prove the existence of a disability under the ADA, the plaintiff must show that he or she "is substantially limited in [his or] her major life activities even after taking treatment, yet is able to perform the tasks required for the job."<sup>95</sup> This burden is much higher for people with mental or psychiatric disabilities because there is a stronger stigma attached to such disorders, which are often viewed as being the result of voluntary behavior.<sup>96</sup> Another problem these individuals face is that they often may not even be aware of their own disabilities.<sup>97</sup>

### III. A TURNING POINT FOR PERSONALITY TESTS: THE SEVENTH CIRCUIT'S HOLDING IN *KARRAKER V. RENT-A-CENTER*

#### A. *The District Court's Decision*

The Central District of Illinois' holding in *Karraker v. Rent-A-Center*<sup>98</sup> falls in line with the holdings of the prior cases mentioned, because it similarly held in favor of the defendant. The defendant, Rent-A-Center ("RAC"), had a chain of rent-to-own stores, offering furniture, appliances, and other household items.<sup>99</sup> If an employee or an applicant wanted to apply for a managerial position at RAC, they were required to take nine different written tests that included the Minnesota Multiphasic Personality Inventory I ("MMPI").<sup>100</sup> The plaintiff, Karraker, filed suit against RAC, claiming that its use of the MMPI and the treatment of the

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90. *Varnagis*, 1997 U.S. Dist. LEXIS 9031, at \*17.

91. *Id.*

92. *Id.* at \*18.

93. *Id.*

94. *Id.* at \*20.

95. Menjoge, *supra* note 25, at 362.

96. *Id.* (citing Randal I. Goldstein, Note, *Mental Illness in the Workplace After Sutton v. United Air Lines*, 86 CORNELL L. REV. 927, 944-45 (2001)).

97. *Id.* (citing Goldstein, *supra* note 96).

98. 316 F.Supp.2d 675 (C.D. Ill. 2004).

99. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 833 (7th Cir. 2005).

100. *Karraker*, 316 F.Supp.2d at 677.

results were a violation of the ADA.<sup>101</sup> The plaintiff's arguments were premised on a position that the MMPI is a medical exam as defined by the ADA. The defendant countered the plaintiff's argument by claiming that the MMPI was not a medical exam and therefore the ADA did not apply.<sup>102</sup>

The court made reference to the EEOC guidelines for determining when a test was a medical exam and decided that only one factor was really at issue in this case: "whether the test is designed to reveal mental health impairments."<sup>103</sup> Given the examples and guidelines that are provided by the EEOC, the court found that it was necessary to determine the purpose and use of the MMPI by RAC.<sup>104</sup> In its defense, RAC argued that the MMPI was not a medical exam on its face because the scores were not psychological diagnoses, but rather personality traits found in practically everyone to a certain extent.<sup>105</sup>

The district court decided to grant RAC's motion for summary judgment.<sup>106</sup> While the court found that the MMPI could be used to identify mental disorders and impairments, the court in this case determined that RAC used the MMPI solely for evaluating the personality traits of employees and applicants seeking managerial positions.<sup>107</sup> The court based its decision on the fact that the "test was not interpreted by psychologists with the intent of diagnosing impairments."<sup>108</sup> As a result, it held that the MMPI in this case was not a medical examination under the ADA.<sup>109</sup>

### *B. The Circuit Court's Decision*

The Seventh Circuit took a different direction in its review of *Karraker*. It contrasted with both the district court's decision and with the holdings of other courts. The circuit court agreed with the district court to the extent that it found that this case turned on the question of whether the MMPI was designed to identify mental disorders.<sup>110</sup> It, however, disagreed

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101. *Id.*

102. *Id.* at 679

103. *Id.* at 680.

104. *Id.*

105. In illustrating this point the court discussed the testimony of clinical psychologist, Dr. Koransky, who stated that the scores of the MMPI in this case measure the extent to which a person has particular personality traits and do not determine whether someone has a mental disorder. *Karraker*, 316 F.Supp. 2d. at 680-81.

106. *Id.* at 681

107. *Id.*

108. *Id.*

109. *Id.*

110. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 835. The court took notice of the fact that the parties agreed that although *Karraker* was already employed by RAC, the tests were given pre-employment for the purposes of the ADA because they were required when applying for a new position within the company. *Id.*

with the district court's analysis, and found the fact that a psychologist did not interpret the MMPI as not being dispositive on the issue of whether the test was a medical exam.<sup>111</sup>

In making its decision, the Seventh Circuit did not rely on any prior case law from its own or any other jurisdiction. Rather, the court relied almost exclusively on the factors provided in the EEOC guidelines.<sup>112</sup> The court also looked at the three examples of pre-employment tests that are given by the guidelines. The first was most significant to its decision:

Example: A psychological test is designed to reveal mental illness, but a particular employer says it does not give the test to disclose mental illness (for example, the employer says it uses the test to disclose just tastes and habits). But, the test also is interpreted by a psychologist, and is routinely used in a clinical setting to provide evidence that would lead to a diagnosis of a mental disorder or impairment (for example, whether an applicant has paranoid tendencies, or is depressed). Under these facts, this test is a medical examination.<sup>113</sup>

The circuit court found that the RAC's use of the MMPI almost fit the above example perfectly except for the fact that a psychologist did not evaluate the results, a distinction that the district court relied on to conclude that the test was not a medical exam.<sup>114</sup> But the difference was not enough to sway the circuit court to affirm the district court's holding.

The problem with the district court's decision, according to the circuit court, was that even if the RAC did not use the test to remove applicants with mental disorders from consideration, the use of the test likely had that effect.<sup>115</sup> The court recognized that a bad score on a test did not necessarily mean that a person had a mental disorder, but a person who does have a mental disorder is likely to score badly on the test and lose the opportunity to get the management position.<sup>116</sup> The court held that because the MMPI was "designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of one with a mental disability . . . the MMPI is best categorized as a medical examination."<sup>117</sup> As such, the court concluded that the MMPI violated the ADA, making this judgment even though the MMPI was just one of several tests that RAC administered to its

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111. *Id.* at 836.

112. *See Id.* at 835 (describing the factors to consider when determining whether a test constitutes a medical examination and applying them to the case at hand; these factors were previously discussed in Part II.B of this comment).

113. *Id.* at 836.

114. *Id.*

115. *Rent-A-Center, Inc.*, 411 F.3d. at 836-37.

116. *Id.* at 837.

117. *Id.*

employees and applicants seeking management positions.<sup>118</sup>

The Seventh Circuit's decision differed not only with that of the district court, but also with the holdings of the other cases discussed in Part II.C of this Comment. To still view the MMPI as a medical exam, even though the test was not administered by a physician or a psychologist and was not used to evaluate whether subjects had mental disorders, results in a stricter interpretation of the ADA. The court's holding is a sharp contrast to the rulings made in prior cases regarding personality tests in the pre-employment context, and, as a result, it has become very controversial. Despite that controversy, employers should view the decision as a warning sign that future use of tests such as the MMPI is likely to lead to trouble. It is a clear message to employers to begin looking for other forms of evaluation for their hiring processes.

#### IV. PERSONALITY TESTS AND THE FUTURE: THE IMPACT OF THE SEVENTH CIRCUIT'S HOLDING IN *KARRAKER V. RENT-A-CENTER*

##### A. *The Effect on the Parties in Karraker*

The suit and the resulting decision by the Seventh Circuit had a profound impact on the parties. Obviously, the plaintiffs had won their case, and the MMPI could not be used as a determining factor in their promotion requests. The effect of the holding was likely more profound for the defendant. The defendant, Rent-A-Center, is a national retail chain that is based in Plano, Texas.<sup>119</sup> This national chain used the MMPI to help evaluate candidates for managerial positions.<sup>120</sup> As a result of this decision by the court, RAC cannot use the MMPI to determine promotions for its stores located in the Seventh Circuit's jurisdiction. In addition, RAC probably cannot use the MMPI in any of its stores outside the Seventh Circuit's jurisdiction because it may be considered discriminatory or unfair to impose the test on some, and not all, employees seeking a promotion.

RAC no longer uses the MMPI or any other similar test on its employees.<sup>121</sup> After the decision was given, RAC released a statement, stating that "it never used the MMPI to measure applicant's mental health but only personality traits, and that it discontinued use of the test in 2000."<sup>122</sup> It began using a new management test in 2000 – a test that the company claims is better at measuring the skills it is looking for in their

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118. *Id.*

119. Whitehouse, *supra* note 4.

120. *Id.*

121. Work & Family Connection, Inc., *supra* note 14.

122. Cummins, *supra* note 4.

supervisors and managers.<sup>123</sup> Thus, the MMPI is no longer part of RAC's pre-employment screening process in any of its nation-wide locations.

*B. The Effect on Employers within the Seventh Circuit*

The rulings of the Seventh Circuit are authoritative over Illinois, Indiana, and Wisconsin.<sup>124</sup> As a result, the holding of the Seventh Circuit that the MMPI is a medical exam that violates the ADA means that the use of the test by employers will no longer be allowed in these three states for pre-employment screening purposes. Additionally, national corporations that are prohibited from using the test on applicants for positions within these states likely could or should restrict their use of the test in other states given the risk that applicants in those states may bring suits based on the holding of the Seventh Circuit. The likelihood of success of such claims will be analyzed further in the next section of this comment, but even if not all claims succeed, litigating such suits could prove costly. Such corporations may also face criticism and bad press if they choose to use the MMPI or similar tests in certain states to determine employment.

*C. The National Implications of the Decision*

While the Seventh Circuit's holding is not binding or authoritative in other circuits, it is likely to have profound implications for how other circuit courts will treat the matter. The court's decision was unanimous; there were no concurrences or dissents.<sup>125</sup> It is also the first time that any court has struck down a screening test since the passing of the ADA in 1990.<sup>126</sup> More importantly, it "is the first case in which a federal circuit court addressed the permissible uses of MMPI as a pre-employment test."<sup>127</sup> Thus, the Seventh Circuit is the highest court in the country that has decided the issue; as such, it will hold strong persuasive authority over how courts in other jurisdictions decide to handle similar cases.

Many legal experts believe that employers should reevaluate what tests they use in the pre-employment screening process, including situations where current employees are seeking and competing for promotions.<sup>128</sup> Some employers may even consider not having testing at all in that context.<sup>129</sup> Legal experts seem to be in agreement regarding the

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123. Lane, *supra* note 19.

124. Cummins, *supra* note 4.

125. Work & Family Connection, Inc., *supra* note 14.

126. HR News Staff, *supra* note 14.

127. Finerty, *supra* note 2.

128. E.g., HR News Staff, *supra* note 14 (suggesting that employers change their hiring practices that include personality testing).

129. *Id.*

impact of this decision on the nation. One expert has stated that “[t]he decision’s reach ‘is going to be broader than just its own circuit’ . . . because it deals with a new or undecided question . . . [i.e.,] ‘a case of first impression.’”<sup>130</sup> The Seventh Circuit’s decision is also likely to be very persuasive in other jurisdictions because it even questions the capability of the test to help companies assess the success of future managers, having noted that the test can only assess the mood of an applicant on one particular day. Such a holding is likely to increase the possibility that other courts will rule similarly.<sup>131</sup>

The holding may not only have influence in other jurisdictions, but it may also affect tests other than the MMPI. The *Karraker* case

has a limited holding—but potentially broad consequences . . . . Although the court ruled only that the MMPI is to be considered a medical examination, there are various other psychological tests used by employers to determine personality traits. Employers should be aware of the wider ramification of this decision—that *any test that may diagnose psychological disorders can lead to unintended violations of the ADA.*<sup>132</sup>

Indeed, the decision is a real “wake-up call” to employers because “[i]t opens the door to a wider interpretation of what constitutes a medical test under the ADA.”<sup>133</sup> Given the uncertain impact of the *Karraker* decision, employers everywhere should be cautious about using personality tests for their pre-employment screening process.<sup>134</sup>

Many attorneys in different regions of the country have already begun to consider the repercussions of the decision and how employers should react nationwide.<sup>135</sup> This concern has reached as far as Hawaii where some employers use personality tests in their pre-employment screening.<sup>136</sup> Jeffrey Harris, a partner at Torkildson, Katz, Fonseca, Moore & Hetherington in Hawaii who specializes in labor and employment law, points out that, although the Seventh Circuit’s decision is not binding

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130. *Id.* (quoting Steve Bernstein, an attorney for Fisher & Phillips LLP in Atlanta, Ga.).

131. *Id.* (citing Steve Bernstein).

132. *Id.* at 31 (quoting Maria Greco Danaher, an attorney for Dickie, McCamey & Chilcote in Pittsburgh, Pa.) (emphasis added).

133. HR News Staff, *supra* note 14 at 31. (quoting Marshall Tanick, an attorney for Mansfield, Tanick & Cohen in Minneapolis, Minn., representing employers and employees).

134. Lane, *supra* note 19 (quoting David M. DeMaio, an employer lawyer in Miami, Fla.).

135. Support for this statement can be found in the many lawyers from different states that have expressed concern over the possible consequences of the *Karraker* decision, their concern being focused on the impact the decision will have on their own jurisdictions and not just that of the Seventh Circuit. See *infra* notes 135-38 and accompanying text (illustrating widespread concern of practicing lawyers over the consequences of the *Karraker* decision).

136. Harris, *supra* note 19.



authority in Hawaii, the ADA and the corresponding state law still apply.<sup>137</sup> As a result, federal and state courts and agencies in Hawaii may find the reasoning of *Karraker* persuasive.<sup>138</sup> Harris also explains that “[e]ven if the ADA does not prohibit a particular personality test, the law against discrimination on another protected basis may apply, if the test asks questions related to religion, sex or age.”<sup>139</sup> He therefore warns that Hawaii employers should be extremely cautious about using the MMPI or similar tests for any employment purpose.<sup>140</sup>

Even for those who do not believe that the Seventh Circuit’s decision will be persuasive in other jurisdictions, they do recognize that the use of personality tests in pre-employment screening has led to a number of problems. First, the growing trend of using personality tests in hiring decisions has led to an outbreak of lawsuits across the country based on claims of discrimination and violation of privacy.<sup>141</sup> Second, “there’s no one trend in the law.”<sup>142</sup> The permissibility of personality tests is an issue that is unresolved in the law, and at the very least, the holding of the Seventh Circuit illustrates this point.<sup>143</sup> Regardless of the jurisdiction, employers “that use [personality] tests are likely to face more challenges.”<sup>144</sup>

Even the owners of the MMPI are concerned over the controversy of their test. The University of Minnesota Press, owner of the intellectual property rights to the exam, has long recognized that it is a clinical test and is, thus, inappropriate for use in pre-employment screening.<sup>145</sup> The company has been aware of this fact since the inception of the ADA in 1990.<sup>146</sup> It warns employers about the limitations of the MMPI in literature that it includes with the test.<sup>147</sup> However, given the decision in *Karraker*, the company “may consider ‘clarifying the issue for some customers.’”<sup>148</sup>

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137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Cummins, *supra* note 4.

142. *Id.* (quoting Marshall Tanick, an employment lawyer in Minneapolis, Minnesota).

143. *See id.* (“It’s still a very divisive, unresolved area of the law, and the Illinois case shows just how mixed up it is.”) (quoting Marshall Tanick).

144. *Id.* (quoting John Canoni, an employment lawyer in New York).

145. Whitehouse, *supra* note 4 (quoting Beverly Kaemmer, the associate director of the University of Minnesota Press).

146. *Id.* (quoting Beverly Kaemmer).

147. *Id.*

148. *Id.* (quoting Beverly Kaemmer).

## V. POSSIBLE SOLUTIONS AND ALTERNATIVE METHODS TO PERSONALITY TESTS IN PRE-EMPLOYMENT SCREENING

### A. *What Employers Should Consider Prior to Using a Personality Test in Pre-Employment Screening*

In order to stay within the confines of the law and reduce the risk of litigation, there are certain steps that employers should take prior to making the decision to implement a particular personality test for employment purposes. First, at the very least, employers should review their pre-employment tests and determine if there is “a psychological diagnostic component that might be prohibited under the ADA.”<sup>149</sup> A good indicator of this is if the test can be used for both medical diagnosis and employment screening.<sup>150</sup> Second, employers should evaluate whether the personality test really assists in determining who will be the best person for a position.<sup>151</sup> In making this evaluation, employers should “ask themselves whether the test is merely being used as a crutch to support an otherwise difficult decision.”<sup>152</sup> In addition, employers should pick tests that have job-related questions.<sup>153</sup> If the questions are not job-related, the employer should determine whether the test is actually of any worth to the company.<sup>154</sup> Finally, employers should look at other options besides testing to evaluate applicants.<sup>155</sup> Given the recent holding in *Karraker*, it is “not advisable to use the test unless you have a legitimate reason.”<sup>156</sup>

### B. *An Alternative to Personality Tests: Role-Based Assessment*

The Role-Based Assessment provides an alternative method of pre-employment screening that does not carry the same risk of violating the ADA. The Gabriel Institute (TGI), a professional services company that is considered an “innovative source for workforce management and assessment, training, and strategic planning,” created the concept of the

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149. HR News Staff, *supra* note 14 (citing Maria Greco Danaher, an attorney in Pittsburgh, Pennsylvania.).

150. Cummins, *supra* note 4 (citing Warren Bobrow, an industrial psychologist for All About Performance, an employment screening company in Los Angeles, California).

151. Mazura & Gidron, *supra* note 1.

152. *Id.*

153. HR News Staff, *supra* note 14 (quoting Steve Bernstein, an attorney in Atlanta, Georgia).

154. *Id.* (quoting Steven Bernstein).

155. *Id.*

156. Whitehouse, *supra* note 4 (quoting Marc Katz, an employment lawyer for Jenkins & Gilchrist in Dallas, Texas).

Role-Based Assessment.<sup>157</sup> Role-Based Assessment is an entirely new concept in employment testing that is the result of decades of behavioral research.<sup>158</sup> TGI's team of psychologists has spent over five years validating the effectiveness of the concept in the field.<sup>159</sup> Dr. Janice Presser, CEO and founder of TGI, argues that personality tests are not effective at predicting how well people will fit in a particular business team but Role-Based Assessment is, and it does not include the same risks of ADA violations that are found with personality and psychological tests.<sup>160</sup> Dr. Presser states that Role-Based Assessment "accurately predicts an individual's workplace behavior and gives insight into how to get the strategic edge."<sup>161</sup>

Role-Based Assessment is a form of testing that is currently delivered to client organizations in an online format and consists of questions structured in an unbiased form that focuses on job requirements.<sup>162</sup> According to Dr. Presser, Role-Based Assessment is a new class of assessment that is not based on personality traits.<sup>163</sup> The ability of the assessment to match applicants with the appropriate job positions has been extensively validated.<sup>164</sup>

The assessment works by looking at what is appropriate for a particular job, which is described by the TGI research team as a role.<sup>165</sup> A role does not consist of separate slices of a person, i.e., a role is not equal to a collection of different personality traits that a person may have.<sup>166</sup> Rather, a role is a coherent style that a person tends to favor.<sup>167</sup> Very often people have more than one role that they are comfortable with but every kind of person can play a wonderful role on a team.<sup>168</sup> The best team, in fact, is one where there are people who are very dissimilar in style or role

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157. Business Wire, *supra* note 20. TGI is located in Philadelphia, Pennsylvania; for further contact and product information, see the official TGI website at <http://www.thegabrielinstitute.com>.

158. See, e.g., Onlypunjab.com, Experts Available to Discuss Survey Predicting More Job Changes in 2005, <http://www.onlypunjab.com/fullstory1104-insight-Experts+Available+To+Discuss+Survey-status-25-newsID-9755.html> (last visited Dec. 2, 2004) (discussing how Role Based Assessment can predict an individual's behavior and help a business team achieve its strategic edge).

159. Business Wire, *supra* note 20. Role-Based Assessment is useful not only in the hiring process but also with current employees. *Id.*

160. *Id.*

161. *Id.*

162. Telephone interview with Dr. Janice Presser, CEO and Founder, The Gabriel Institute, in Phila., Pa. (Mar. 8, 2006) [hereinafter Presser Interview].

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Presser Interview, *supra* note 162.

168. *Id.*

and therefore complement each other. This is the key to success rather than gender, color, or personality traits.<sup>169</sup> People are drawn together on a highly functional team. There is room for each one on the team as a result of the fact that they each are filling a necessary role and the role they are filling is the one for which they are best suited.<sup>170</sup>

Essentially, the theory is that when people go into an organization, they need a place. They can either make their own place or one is made for them, but it needs to fit who they really are. TGI developed its testing in this fashion because, according to Dr. Presser, looking at people as a collection of traits does not tell you what their role will be and how they will interact with other people or on a team.<sup>171</sup> Measuring people by what amount of a trait they encompass does not tell you much about who they are and how they work.<sup>172</sup> The Role-Based Assessment is successful because it tries to connect people with certain roles that best fit them. Everyone has something that they are good at; the goal of the assessment is to find out what people bring to a job and ignore other things that are not important to the position.<sup>173</sup>

The problem with other assessments and tests is that they focus on what a subject does not have rather than on what a subject does have.<sup>174</sup> Dr. Presser argues that, when it comes to employment, the MMPI and other diagnostic tests have as little validity as those tests found in Cosmopolitan or Redbook: they are useful only to screen out people who do not know how to beat them.<sup>175</sup> In short, the Role-Based Assessment works to get people into jobs and not into litigation.<sup>176</sup>

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169. *Id.*

170. *Id.*

171. *Id.* Dr. Presser illustrated this point by recalling a case where she was contacted by an employer who was hiring for bill collectors. *Id.* The employer's usual process was to immediately remove from consideration all resumes that had typos or other errors. *Id.* Dr. Presser informed her that this was a big mistake because by eliminating those applicants that were not word-focused, she was eliminating the best candidates for the job. *Id.* Dr. Presser explained that the job takes place over the phone and the employee is often confronted with hostile or angry people who are not happy about the call, and by eliminating those applicants who are not word-focused, the employer was excluding those people with shorter attention spans who are least likely to be fazed by the fact that they were just berated over the phone by an angry customer. *Id.* They will most likely get over the incident very quickly and move on to the next call. *Id.* The employer had never thought of the situation in this manner and admitted that she picked the more word-focused applicants who never lasted very long in the position. *Id.*

172. Presser Interview, *supra* note 162.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* Dr. Presser also advises that the Role-Based Assessment is not only an employee screening tool but is also for individuals who are trying to figure out what they want to do in their own career. *Id.* The assessment is successful in both these situations

## VI. CONCLUSION

Personality tests are widely used in pre-employment screening by employers throughout the country, the MMPI being one of the most popular. However, the use of such tests may prove very costly, and the benefit of such a tool in the employment process does not appear to outweigh the cost of violating the ADA and other rights. The holding of the Seventh Circuit in *Karraker* may prove to be even more detrimental to employers that use the MMPI and other personality tests. While the decision is only binding precedent in that jurisdiction, it may end up being persuasive in other circuits, which have yet to review the issue. The case is also illustrative of how unresolved the issue is in the law, creating a huge litigation risk for employers that use these tests, which have not been proven to be at all effective in hiring the best employees. Employers throughout the country should be wary of using personality tests and should evaluate them carefully to confirm that they are used in compliance with the law. Given how unsettled the issue is in the courts, the negative precedent that now stands, and the lack of evidence of the effectiveness of the tests, employers should consider other methods of pre-employment screening. The Role-Based Assessment proves to be a viable alternative. Its technique has not only proven to be successful in the employment process but also in being in compliance with the ADA.

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because it gives feedback on what you are strong at, so that you may then focus on those strengths and find a role that best fits those strengths. *Id.*