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Pre-Employment Inquiries: Drug Testing, Alcohol Screening, Physical Exams, Honesty Testing, Genetics Screening - Do They Discriminate? An Empirical Study

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**PRE-EMPLOYMENT INQUIRIES: DRUG TESTING,
ALCOHOL SCREENING, PHYSICAL EXAMS,
HONESTY TESTING, GENETICS SCREENING -
DO THEY DISCRIMINATE?
AN EMPIRICAL STUDY**

by

DONALD H. STONE*

INTRODUCTION

How do employers decide who to hire for their workplace? Are there tests that are administered to screen out those job applicants that do not fit the employer's profile for good, honest, hard-working, never-complaining workers? Do employers use screening devices to discriminate against persons with disabilities? What kinds of screening tests do employers use to assist in hiring workers for their company? Fifty-four of the Fortune 500 companies from across the country were surveyed to elicit their opinions on these and other questions relating to pre-employment inquiries. The responses of these companies are tabulated and discussed and serve as a backdrop in this Article which analyzes pre-employment screening practices. Also, a look into the not too distant future where honesty and integrity testing are on the rise and genetics testing of job applicants is heading into the employment arena. Court cases in the area of pre-employment inquiries are analyzed and federal statutes are reviewed and discussed to demonstrate the prevalence of certain forms of employment tests being administered.

The U.S. Census Bureau reported in 1988 that 13,415,000 people had a work disability, comprising 8.6% of the 16 to 64 year old population.¹ The number of disabled persons participating in the labor force was 31.6%, however, only 18.2% of the 13.4 million people with a work disability were employed full time.² The unemployment rate for those persons with a work disability was

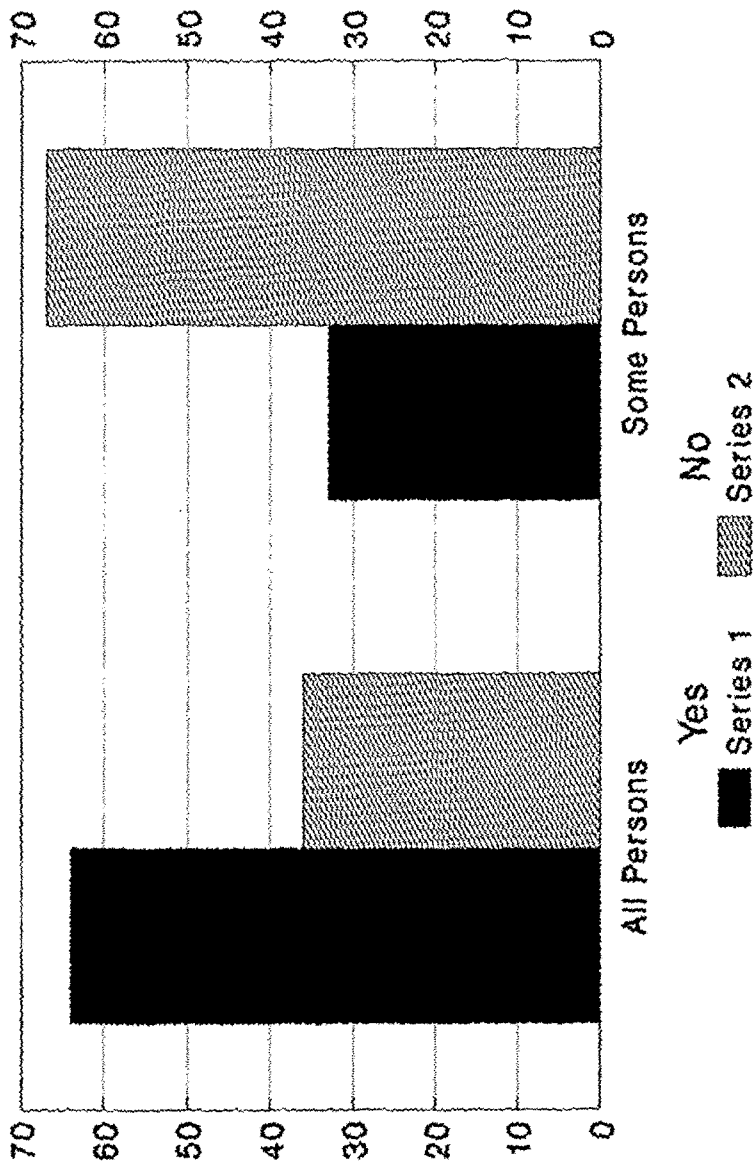
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¹ Reported by the President's Committee on Employment of People With Disabilities, September 5, 1989. See also Kraus, 2 *WORKLIFE* 3, 37 (Fall 1989).

² President's Committee on Employment of People with Disabilities, September 5, 1989. During the period between 1981 and 1988, there has been a decline in labor force participation by disabled males by 6%. *Id.*

Pre-Employment Physical Exam For Those Offered Employment

GRAPH #1



much greater than for those with no work disability, 14.2% as compared to 5.8%.³ Persons with a work disability earned less than half the income of those persons with no disability, \$6,319 median annual income as compared to \$14,354 of those persons with no work disability.⁴

These statistics serve as a reminder that many disabled people continue to face obstacles in gaining access into the employment arena. This Article will reveal how disabled persons are at greater risk when employers increase their screening and testing arsenal in the job selection area.

STATISTICAL REVIEW OF PRE-EMPLOYMENT SURVEY

The empirical data provided in this Article is submitted to serve as a backdrop for purposes of elaboration and comparison. 54 Personnel Directors from select companies that comprise the Fortune 500 largest companies from across the country were surveyed to elicit their opinions on the use of screening devices and tests in the pre-employment interview and selection process.⁵ Data was collected on the use of the pre-employment physical exam, the physical exertion test, HIV screening for AIDS, drug screening, alcohol screening, genetics screening, and honesty testing as it is used in the job hiring process.⁶

At the time a job offer is extended, employers require the new employee to undergo a physical exam in a majority of cases. According to the survey,⁷ employers require all persons offered employment to receive a physical exam prior to the start of their employment 64% of the time, with 33% of employers requiring some of the new employees to have a physical exam.⁸ Employers appear most interested in determining whether the new employees are capable of performing the job for which they are hired, thus a medical exam is mandated. Employers are also on the lookout for employees with a propensity for medical problems in the future. The pre-employment medical exam should be limited in scope to examine and determine whether or not the new employee is medically capable of performing the primary tasks of the job for which they are employed. For the exam to be used to predict future medical problems or future injury to the employee or fellow workers is both unreliable and unhelpful. The standards by

³ *Id.*

⁴ *Id.* The earnings of men and women with disabilities has declined. In 1980, people with disabilities who worked earned 88% of the average for all workers; in 1987 they earned only 84%. *Id.*

⁵ D. Stone, PRE-EMPLOYMENT SURVEY (June 1991), (reproduced at Appendix A). The empirical study included a six-page questionnaire sent to Personnel Directors of select Fortune 500 companies. 54 Personnel Directors responded to the survey. D. Stone, RESPONSES TO PRE-EMPLOYMENT SURVEY (1991).

⁶ *Id.* The companies responding to the Pre-Employment Surveys conducted business in all 50 states.

⁷ *Id.* (See graph No. 1).

⁸ *Id.* Only 15% of the time do employers require a pre-employment physical exam of all persons applying for employment, this not being cost efficient for all job applicants. *Id.*

which employers may evaluate the issue of future risk are not settled.⁹ For the medical exam to be used to uncover a prior medical condition that no longer poses a medical risk to the person is beyond the scope of the pre-employment physical exam.

In 82% of the cases, employers that use a pre-employment physical exam administer it by using a company doctor that the employer selects (See Graph II).¹⁰ The selection by the company of the doctor that administers the physical exam casts some doubt on the reliability and accuracy of the test results. Employees will question the independence of the company doctor who will offer an opinion as to the medical well-being of the prospective employee. One should look closely at the board certification of the company doctor conducting the physical exam. For example, is a general practitioner asked to offer an opinion in the area of neurology or orthopedics? Companies should permit an employee to engage their family physician to provide the physical exam, who will be more familiar with the patient's medical history and current state of health.

In 98% of the cases, employers that select the doctor who conducts the physical exam will also pay for the physical exam. It would be an unfair hardship on the job applicant to be forced to pay for the physical exam, although if an applicant chooses to use his own doctor, the company should agree to also pick up this cost as a normal expense they incur in hiring new workers.

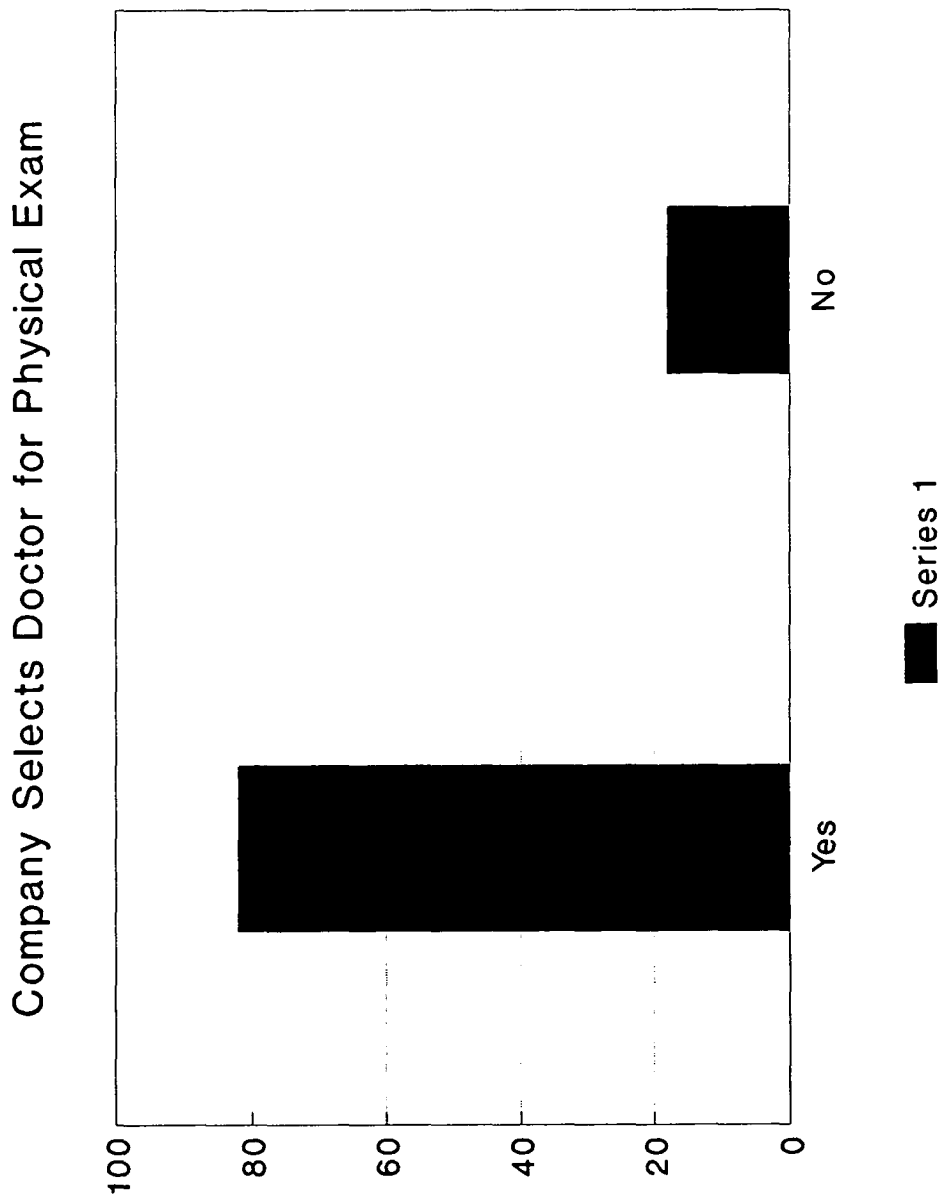
A physical exertion test, designed to determine whether a new employee is capable of performing the primary job tasks of the new job are administered by companies less frequently than the pre-employment physical exam. According to the survey, 15.6% of companies require some persons offered employment with their company to undergo a physical exertion test (See Graph III).¹¹ Interestingly, this smaller percentage as compared with the greater use of the physical exam may reveal that employers are really looking at more than an employee's present ability to perform the job in question. A physical exam, as compared to a physical exertion test, will often reveal a person's prior medical history, prior psychological treatment and hospitalizations, family history revealing a particular genetic makeup and other vital medical data that employers gain from such a physical exam. One should argue that it is a private matter and not relevant to one's ability to perform the job in question. A person's family medical history is irrelevant unless there is a direct correlation between the medical history and

⁹ Perras and Hunter, *Handicap Discrimination In Employment: The Employer Defense of Future Safety Risk*, 6 J. L. & COMM. 377 (1986).

¹⁰ D. Stone, Responses to Pre-Employment Survey (1991) (See graph No. 2).

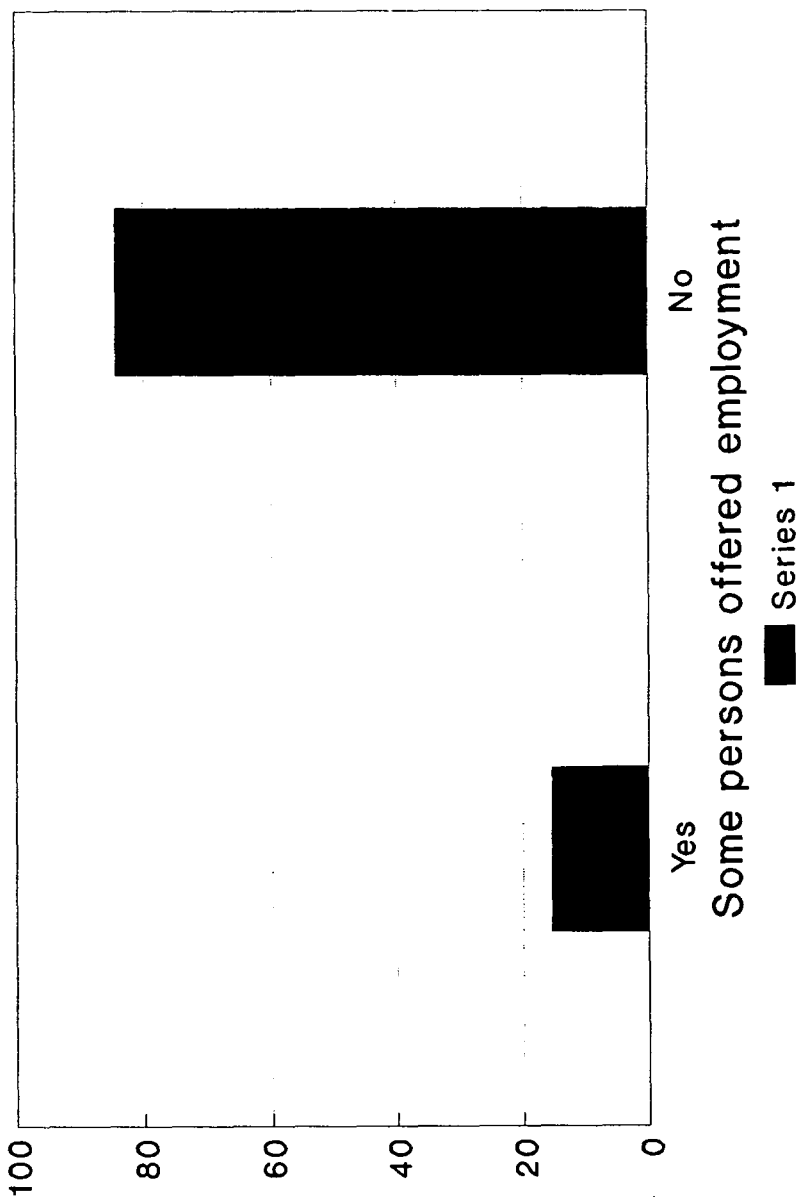
¹¹ *Id.* According to the survey response, in only 2% of the companies surveyed does a physical exertion test get used for job applicants who apply for employment with the company. *Id.* (See graph No. 3).⁴

GRAPH #2



Physical Exertion Test

GRAPH #3



the job task in question. Employers should be prohibited from requiring job applicants to divulge their medical history and background unless there is a showing that there is significant relevance to the particular medical information sought.

In increasing frequency, employers are administering drug and alcohol screening for its employees. Once a person is offered employment, the survey responses reveal that drug screening is administered in 91% of the cases (See Graph IV).¹² The results of the screening are used as a pre-requisite for employment. A positive drug test results in non-employment according to a beverage company¹³, while a manufacturing and mining company that would also withdraw an offer of employment following a positive drug screening, would, however, permit the applicant to reapply for employment in six months.¹⁴ Government agencies responsible for regulating businesses must closely scrutinize the type of drug screening used, the accuracy of the tests, the reliability of the tests, and the privacy protection surrounding the test results. As one can see, a significant majority of companies administer drug screening for persons offered employment. Closer monitoring of the drug screening regiment is necessary to protect the rights of American workers. With the implications of a positive test result being significant to the future career plans of the individual workers, the accuracy, reliability, and privacy protection should be closely monitored.

While drug screening is prevalent in the vast majority of the companies surveyed, alcohol screening is at a much lower level. According to the survey, in 27% of employers do they require alcohol screening for persons offered employment (See Graph V).¹⁵ It is extremely rare for employers to administer alcohol screening for all applicants who apply for employment, the 27% of employers that require it for person offered employment still represents a significant number in the work force.¹⁶ Why the contrast between drug and alcohol screening, since both substances can have devastating effects on the safety of workers on the job? Alcohol is legal and illegal drugs are not may be one reason. Society is more willing to accept an employee who consumes alcohol than one who engages in drug use. Whatever motivates employers to screen for illegal drugs in far greater numbers than for alcohol consumption, one thing is

¹² *Id.* According to the survey, in 17% of the companies responding, drug screening is administered to all applicants who apply for work with the company. *Id.*

¹³ *Id.*

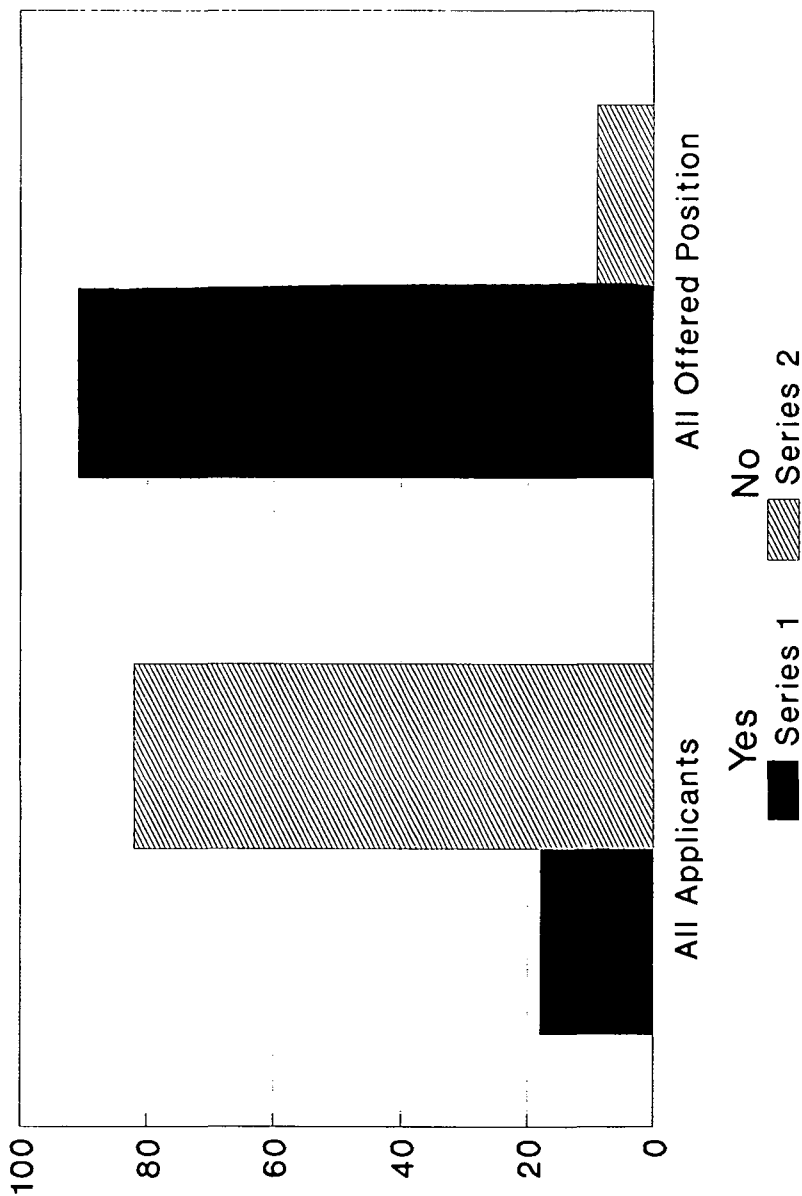
¹⁴ *Id.*

¹⁵ *Id.* (See graph No. 5).

¹⁶ *Id.* Only 4% of the employers surveyed use alcohol screening for all applicants who seek employment with their company. *Id.* @UAKron, 1992

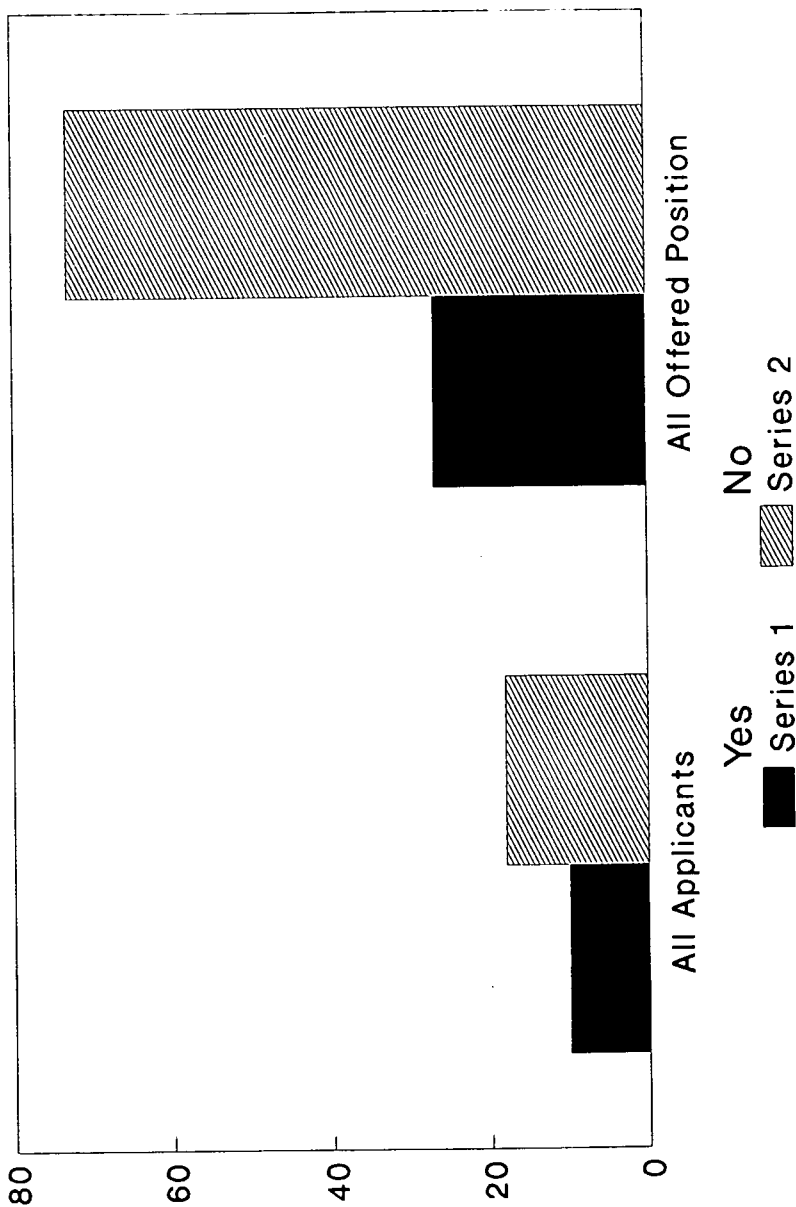
GRAPH #4

Drug Screening



Alcohol Screening

GRAPH #5



clear - drug screening is becoming a common occurrence in America's workplace.¹⁷

Prior to companies administering drug and alcohol screening, advance notice is provided by companies to its employees in 80% of the cases (See Graph VI).¹⁸ Some companies such as one manufacturing and mining company, provides notice to its job applicants that there will be random tests, with the notice being posted in the Personnel Office.¹⁹

The use of HIV screening for AIDS is utilized by only 4% of employers for persons offered employment according to the survey.²⁰ Genetics testing is not used by any employer responding to the survey, although one may wonder if it may be a test incorporated into a pre-employment physical exam and used in the near future.

Another test we may see gaining popularity is the honesty or integrity tests. Currently, however, only 2% of Fortune 500 companies surveyed uses such a test for persons offered employment, although it is gaining greater acceptance by many other employers. Those companies currently using this pen and pencil test are usually in retail and fast food businesses, not a company on the Fortune 500 list. The future, however, may see a rise of the use of honesty and integrity tests into many American companies.

STATUTORY LAW

The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (the "Rehabilitation Act")²¹ was the first federal law addressing discrimination against the disabled. Congress' declaration of purpose was to extend "the guarantee of equal opportunity. . . for individuals with handicaps in order to maximize their employability, independence, and integration into the workplace and the community".²² Sections 503²³ and

¹⁷ The ready availability of relatively inexpensive screening tests makes drug screening popular. Schroeder, *On Beyond Drug Testing: Employer Monitoring and the Quest for the Perfect Worker*, 36 U. KAN. L. REV. 869 (1988). Author notes employment drug tests rarely screen for alcohol use. *Id.* at 875.

¹⁸ D. Stone, PRE-EMPLOYMENT SURVEY (June 1991). (See graph No. 6). While one oil and gas company provides the notice in writing to all applicants who apply for work with the company, one food processing company advises its new hires that employment is contingent on passing the drug screening. D. Stone, Responses to PRE-EMPLOYMENT SURVEY (1991).

¹⁹ *Id.*

²⁰ *Id.*

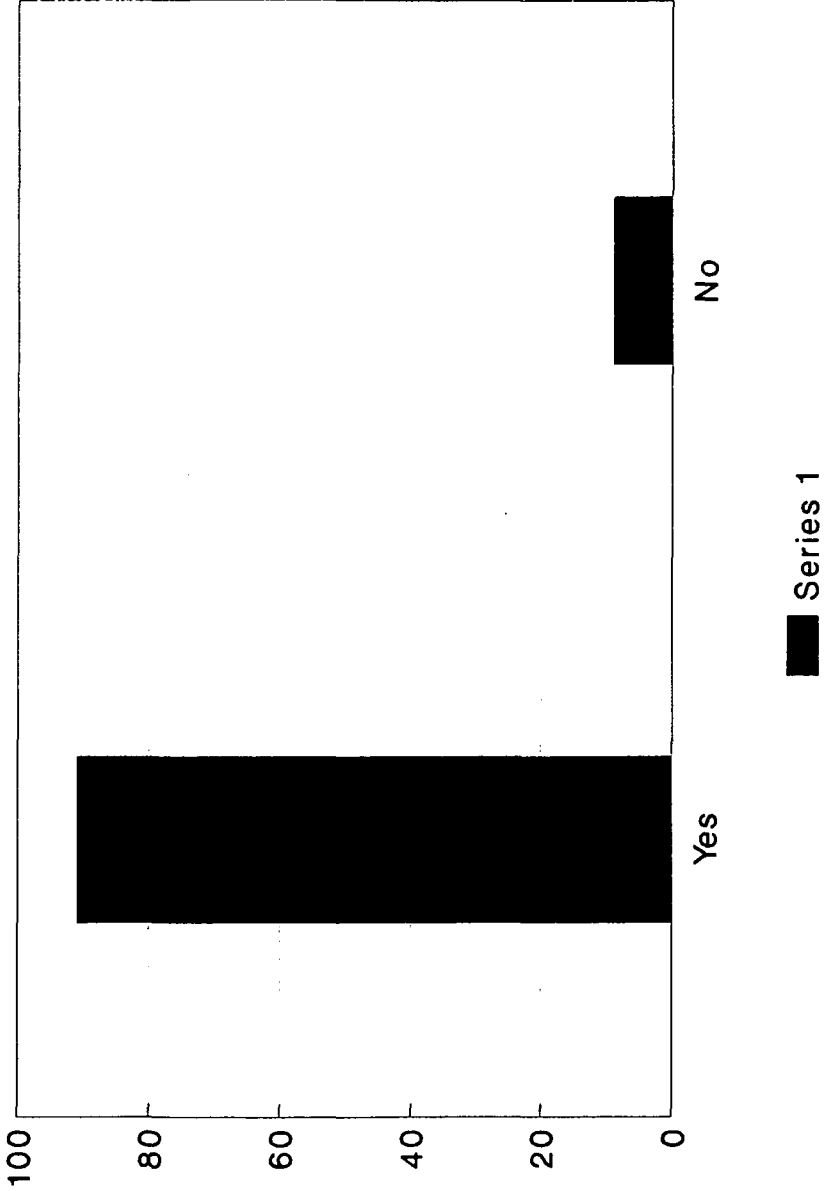
²¹ 29 U.S.C. §§ 701-796 (1990).

²² 29 U.S.C. §§ 701 (1986).

²³ 29 U.S.C. §§ 793 (1988).

GRAPH #6

Advance Notice Prior to Screening Test



504²⁴ of the Rehabilitation Act focus on the employment rights of the disabled.

Section 503 addresses employment with private employers who have contracts with the federal government. It provides that any contract in excess of \$2500 entered into by any federal department or agency shall contain a provision requiring that the employer take affirmative action to employ and promote qualified individuals with handicaps.²⁵ The term handicapped individual is defined in the Rehabilitation Act to include "any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such impairment."²⁶

Although this federal definition includes a broad array of physical disabilities, a handicapped individual must be "otherwise qualified" to do the "essential functions" of her job.²⁷ The term "otherwise qualified" involves the determination as to whether an employer must make "reasonable accommodations" to assist the disabled worker²⁸. "Reasonable accommodation" is balanced against the burden it imposes on the employer; thus, "undue hardship" may excuse an employer from making certain accommodations.²⁹ The Department of Labor's Office of Federal Contract Compliance Program (OFCCP) is responsible for enforcing compliance with the requirements and regulations promulgated under Section 503.³⁰ Individuals who claim to be discriminated may only pursue their administrative remedies through the OFCCP, courts have held that Section 503 does not create a private right of action,³¹ the sole recourse is through the OFCCP. An aggrieved party challenging a violation of Section 503 has 180 days from the date of the alleged infraction in which to file a complaint with the OFCCP.³²

²⁴ 29 U.S.C. § 794 (1988).

²⁵ 29 U.S.C. § 793(a) (1988).

²⁶ 29 U.S.C. § 706(b)(b) (1988). Such term does not include an individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job or whose employment would constitute a direct threat to property or safety of others. *Id.*

²⁷ 45 C.F.R. § 84.3(k)(1) (1987).

²⁸ *Id.* at § 84.12 (1987); 29 C.F.R. § 1613.704(a) (1987); 41 C.F.R. § 60-741.5(d) (1987).

²⁹ *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979). The court expressed concern over imposing "undue financial and administrative burdens upon the State. The case was brought by a deaf individual seeking admission to a nursing program. The Court determined that reasonable accommodations to provide for deaf students required major adjustments in the program and would impose an undue hardship on the school. *Id.*

³⁰ 29 U.S.C. § 793. *See also* 41 C.F.R. §§ 60-741.1 to 741.30 (1987).

³¹ *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980); *Davis v. United Airlines, Inc.*, 662 F.2d 120 (2nd Cir. 1981), *cert. denied*, 456 U.S. 965 (1982); *California Paralyzed Veterans Ass'n. v. F.C.C.*, 496 F. Supp 125 (C.D. Cal. 1980), *aff'd*, 721 F.2d 667 (9th Cir. 1983), *cert. denied*, 469 U.S. 832 (1984).

³² 29 U.S.C. § 793 (1988); 41 C.F.R. § 60-741.23(a) (1987).

Section 504 provides that no otherwise qualified handicapped individual in the United States, shall, solely by reason of handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.³³ Section 504 applies to all federal programs and is regulated by each federal agency that issues federal grants.³⁴ The remedies, procedures and rights provided by Section 504 include termination of federal financial assistance, injunctive relief and compensatory damages. Unlike Section 503, Section 504 permits an aggrieved person a private right of action in court.³⁵

TITLE VII of Civil Rights Act

Title VII of the Civil Rights Act of 1964, as amended,³⁶ prohibits discrimination in employment, applicable to areas of hiring, discharge, compensation or other terms, conditions, or privileges of employment because of an individual's race, color, religion, sex or national origin. The courts have applied Title VII of the Civil Rights Act to cases involving the requirement that a prospective employee take and pass a physical examination. Allegations of discrimination are based generally on one of two grounds. First, the physical examination administered by the employer was a mere pretext, used to further discriminating hiring actions. Secondly, the physical exam itself discriminated against certain persons because it disclosed physical disabilities that are more prevalent in one race or sex than another, which physical infirmities, when used as a bases for excluding workers, resulted in race or sex discrimination.³⁷

Americans With Disabilities Act of 1990

The Americans With Disabilities Act of 1990 (ADA)³⁸, which was signed by President George Bush on July 26, 1990, created the most sweeping change on the face of employment discrimination law as it protects the rights of disabled people. The effect of the ADA's employment provisions is to extend the

³³ 29 U.S.C. § 794 (1988).

³⁴ 29 U.S.C. § 794 (1988).

³⁵ *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978) *cert. granted*, 439 U.S. 1065 (1979); *Pushkin v. Regents of Univ. of Colo.* 658 F.2d 1372 (10th Cir. 1981).

³⁶ 42 U.S.C. § 2000e (1978).

³⁷ 36 A.L.R. FED. 721 (1978). *See also*, *Harless v. Duck*, 619 F.2d 611 (6th Cir. 1980), in which physical ability test given by police department requiring 15 push-ups, 25 sit-ups, 6-foot broad jump and 25 second obstacle course violated Title VII, court noted the physical exertion test had never been validated and secondly, employer failed to prove specific amount of physical strength necessary to perform job. *Id.* at 616.

³⁸ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12102-12213 (1990)).

protection of the Rehabilitation Act of 1973³⁹ to private employees and to governmental entities other than the federal government, effective July 26, 1992.⁴⁰ All employers who have 25 or more employees are covered by the ADA, with a provision that will lower the threshold to 15 employees on July 26, 1994.⁴¹ Employers are prohibited from discriminating against an employee because she has a disability. For example, discrimination is forbidden in job application procedures, hiring, advancement, discharge, compensation, job training and other terms, conditions, and privileges of employment.⁴²

Congress recognized that discrimination against persons with disabilities continues to be a serious and pervasive social problem⁴³, and individuals experiencing such discrimination have often had no legal recourse to redress such discrimination.⁴⁴ The purpose of the Act is to provide a clear national mandate for the elimination of discrimination against individuals with disabilities⁴⁵ as well as enforceable standards⁴⁶ and enforcement powers.⁴⁷

EMPLOYEE SELECTION PROCEDURES

The Pre-Employment Medical Exam

Should job applicants be required to undergo a general medical examination? Should employers be entitled to use the results of the medical exam to exclude qualified disabled job applicants? When, if ever, can an employer use the results of the medical exam to refuse to hire an applicant?

The Office of Federal Contract Compliance has considered the issues surrounding the pre-employment medical exam in several of its cases. In 1981, the OFCCP confronted the issue in *OFCCP v. Texas Industries, Inc.*⁴⁸ when it ruled that safety concerns justify an employers' refusal to hire a cement truck driver with congenital back problems. The company policy requiring pre-employment physical examinations was viewed as "obviously job-related and

³⁹ 29 U.S.C. § 701 (1986).

⁴⁰ Pub. L. No. 101-336, § 102 (codified as amended at 42 U.S.C. § 12112 (1990)).

⁴¹ *Id.* at § 101(s) & (a) (current version at 42 U.S.C. § 121111 (1990)). The definition of "disability" is adapted from the Rehabilitation Act of 1973. *Id.*

⁴² *Id.* at § 102(a) (codified as amended at 42 U.S. § 12112(a) (1990)).

⁴³ *Id.* at § 2(a)(2) (codified as amended at 42 U.S.C. § 12101(a) (1990)).

⁴⁴ *Id.* at § 2(a)(4) (codified as amended at 42 U.S.C. § 12101(a) (1990)).

⁴⁵ *Id.* at § 2(b)(1) (codified as amended at 42 U.S.C. § 12101(a) (1990)).

⁴⁶ *Id.* at § 2(b)(2) (codified as amended at 42 U.S.C. § 12101(a) (1990)).

⁴⁷ *Id.* at § 2(b)(3) (codified as amended at 42 U.S.C. § 12101(a) (1990)).

consistent with business necessity and job safety."⁴⁹ The applicant, born with a congenital deformity in the lower back, could not be reasonably accommodated by the prospective employer because the accommodation necessary would involve a substantial modification of the nature of the duties of the job and would impose a significant financial cost.⁵⁰

Employers have been known to rely on the results of x-ray tests to refuse to hire job applicants. In one such case, *OFCCP v. Southern Pacific Transportation Co.*⁵¹, the employer was charged with a violation of Section 503 of the Rehabilitation Act denying employment to eleven job applicants on the basis of spinal defects revealed primarily by x-ray tests. The spinal abnormalities as revealed by the x-ray films were used as the rationale for the employer's refusal to hire applicants for work in a variety of positions with the railroad, including trainman, fireman, brakeman, machinist, painter's helper, sheet metal worker, carman, and unskilled labor.⁵² The x-rays of the various applicants revealed transitional vertebrae spondylosis, and spondylolisthesis, degenerative disc disease. The court, after reviewing prior work history and medical reports of seven of the complaining individuals, recognized that although the jobs sought involved stresses to the spine with risks of indefinite future limitations, the applications were qualified to perform the work for which they applied. The court rejected the employer's claim that the x-ray tests were predictive of spinal injuries and indicative of current paraspinal difficulties. The court prohibited the employer from rejecting job applicants when x-ray tests are used as the sole basis for its decision. The results of the x-ray tests were not sufficient grounds to exclude the job applicants, who were capable of performing the job for which they were hired.

In a study of the use of x-ray examinations in the railroad industry, the *American Journal of Law and Medicine*⁵³ reported that the screening program erroneously labels many applicants as handicapped, then denies them employment. The study examines the use, by employers, of a low-back x-ray exam, in an effort to determine the propensity that the applicant will sustain future work-related low-back pain or injury. The railroads, it was noted, view the x-ray screening program as a cost-effective means of (1) decreasing the incidents of compensation claims for work-related injuries brought against the railroads under the Federal

⁴⁹ *Id.* at 21098.

⁵⁰ *Id.* at 21099.

⁵¹ 79 OFC-10A, 10B, 17, 19, 80-OFC-17, 11/9/82. See also Lockheed Shipbuilding and Construction Company et al., NLRB Cases 19-CA-15003 and 19-CA-15044, 1/16/86 - The employer violated the National Labor Relation Act by implementing a pulmonary function and audiometric medical screening program for the purpose of denying employment to new employees.

⁵² *Id.* at 3063.

⁵³ See Rockey, Fantel and Ormenn, *Discriminatory Aspects of Pre-Employment Screening: Low-Back X-Ray Examinations in the Railroad Industry*, 5 AM. J. L. & MED. 197 (1979).

Employers' Liability Act, (2) reducing the number of lost workdays resulting from low-back pain or injury, and (3) protecting particularly susceptible workers from job-related hazards.⁵⁴

The authors of the study conclude that low-back x-ray examinations serve as poor predictors of future low-back pain or injury. Their findings lead to other important results for employers to take note of, including, the misclassifications of a significant number of job applicants as high-risk candidates for such pain or injury, resulting in unfair denial of employment. In addition, the authors declare that those applicants denied employment as a result of the x-ray tests may have difficulty finding jobs in other industries. Not only are many of these rejected applicants stigmatized as they continue applying for other jobs, but, according to the authors, there is a potential radiation hazard to examinees. There is a false sense of security in the minds of both the employer and the applicant accepted for employment which places faith in the results of the x-ray examination.

The x-ray tests that reveal physical abnormalities cause the greatest hardship to disabled workers. For example, a disabled person applying for work as an attorney for a government agency might be required to undergo an x-ray. Although this person is physically capable of performing the job responsibilities of a government lawyer, the x-ray would reveal a spinal abnormality, such as spina bifida occulta. This is a condition in which the vertebrae on the spine did not fuse properly, limiting the person's ability to lift packages in excess of twenty-five pounds, but in all other ways, the person is free of restrictions. The fear of many disabled people is that the results of the x-ray tests could be used to discriminate against qualified disabled people who suffer from a hidden physical disability such as spina bifida occulta. X-ray tests like in this example should only be permitted if the job for which the person applies requires heavy lifting. As in the position of government lawyers, which does not involve heavy lifting, x-rays should be prohibited from being administered. The x-ray tests, if used, could result in unfairly labeling and discrimination against disabled people.

The legality of the use of back x-rays to screen applicants was tested in *OFCCP v Texas Utilities Generating Co.*⁵⁵ The employer unlawfully disqualified several qualified job applicants on the basis of x-rays alone, without investigating the individuals' actual work histories, specifically their physical capabilities. The court found the employers reliance on x-rays was not a reasonable indication that the employee will be unable to perform the work adequately.

Pre-employment physicals often screen out applicants who suffer from

⁵⁴ *Id.*

⁵⁵ 85 OFC 13, 3/2/88
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epilepsy, as was the case in *OFCCP v. PPG Industries*.⁵⁶ The employer, PPG Industries, refused to hire James W. Thompson for a production laborer as a result of his epilepsy. As part of his pre-employment physical, Thompson provided his medical history whereby he revealed that he had epilepsy. Thompson was examined by a neurologist who found him fit for work, although prohibited from riding, climbing or operating dangerous machinery. The court found Thompson demonstrated the physical skills necessary to perform the production laborer job. His epilepsy was controlled by medication, he was experiencing no seizures in the past few years and he was capable of performing the job to which he applied.

The OFCCP, according to the court, met its burden of showing that Thompson was capable of working safely as a production laborer and would not have posed a significant risk to himself or others.⁵⁷ The burden then was shifted to the employer to show that the physical job requirements which screened out Thompson was job related and consistent with business necessity and job safety. The court discussed the employer's policy of excluding all persons with epilepsy from employment, not withstanding the severity of the condition or whether the condition was under control. Such a policy, according to the court, was not based on reasoned and sound medical judgment, thus failing to establish a business necessity for excluding all persons with epilepsy from the production laborer job.⁵⁸ The employer's blanket prohibition of hiring any person with epilepsy was unlawful. Thompson was granted retroactive seniority, back wages and fringe benefits with interest.

Medical examinations should be limited to those persons who are offered employment. Medical exams of all job applicants, for example, is a waste of employers' resources. A job offer may be extended, subject to a satisfactory medical exam. The problems arise when employers use medical exams as a pretext for refusing to hire disabled people. Limiting the medical exam to only those persons extended job offers, and requiring that all persons offered a particular job must be treated the same with respect to medical exams, will curtail discriminatory practices in this area. In addition, the medical exam's goal should be to determine whether a person is capable of currently performing the job for which she was hired. The medical exam should not be used for uncovering a medical condition which existed in the past, was treated, and no longer poses a problem to the person. In addition, the exam should not be used to identify those people who may have medical problems in the distant future. The medical exam should be used to determine if the person hired is presently capable of performing

⁵⁶ Case No. 86-OFC-9, 5/17/88.

⁵⁷ *Id.* at 157.

⁵⁸ *Id.* at 158. See *Mantolite v. Bolger*, 767 F.2d 1416 (9th Cir. 1985). The court held that a job requirement that screens out qualified handicapped individuals on the basis of possible future injury, must be based on a reasonable probability of substantial harm. *Id.* at 1418.

the job.

The examining physician should be provided with a job description of the position and should be independent of the employer. The cost of the exam should be born by the employer as a reasonable and necessary part of the conduct of a job search. The results of the examination should only be revealed to those persons selected by the employer. The challenge that remains is for the medical exam to be utilized as a screening device for protecting employees from injury at work and not as a predictor of future events.

The Bona Fide Occupational Qualification

On occasion, employers claim that certain persons are ineligible for employment on the basis of a handicap if the decision is based on a bona fide occupational qualification. In the case of *Rose v Hanna Mining Co.*,⁵⁹ the Supreme Court of Washington faced the issue of the bona fide occupational qualification (BFOQ) involving a person diagnosed with epilepsy. The court examined the question, starting with the premise that employment can be refused on the basis of the presence of a sensory, mental or physical handicap if the decision is based on a BFOQ. A valid BFOQ applies to all persons with the handicap, even though the particular applicant could perform the job. A BFOQ differs from the statutory requirement, according to the court, that the handicapped individual be able to properly perform the job. The determination of ability to do the job is made on an individual basis, for each person for each job. A BFOQ is a requirement that must be met by all persons whether or not they can do the job. Ability to do the job is part of the definition of handicap discrimination; a BFOQ is an exception to the rule of non-discrimination because of handicap.⁶⁰

The court recognizes that the purpose behind a BFOQ is to inform potential applicants of the minimum physical capabilities required for the job whereby relieving the employer of testing the capabilities of each and every applicant. This process of summary screening saves time and effort to both the employer and applicant. The court acknowledges that the BFOQ must be narrowly drafted to avoid discriminating against applicants who could properly perform the work despite a handicap.⁶¹ The court concluded that the employer failed to prove that all or substantially all persons with epilepsy could not perform the work, thus remanding the case for further proceedings.

⁵⁹ *Rose v. Hanna Mining Co.*, 94 Wash. 2d 307, 616 P.2d 1229 (1980).

⁶⁰ *Id.* at 311, 616 P.2d at 1231.

⁶¹ *Id.* at 312, 616 P.2d at 1232. The employer must show that all or substantially all persons who do not possess the qualifications would be unable to perform the job safely within the limits of reasonable accommodations. *Id.*

Both the Rehabilitation Act and the ADA address pre-employment inquiries.

The Rehabilitation Act provides:

- (c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, Provided, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.
- (d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:
 - (1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;
 - (2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and
 - (3) Government officials investigating compliance with the Act shall be provided relevant information upon request.⁶²

The ADA prohibits an employer from requiring a job applicant to answer inquiries regarding the existence, nature or severity of the job applicant's abilities,⁶³ with the exception that such inquiries are permissible if related to the applicant's ability to perform specific job-related tasks.⁶⁴ The ADA also prevents a company from requiring a job applicant to undergo a general medical exam. However, once a job offer is extended, the ADA permits a medical exam for the purpose of confirming the newly hired employee's ability to do the work. If this is required by the employer, then all new employees must be ordered to take the same exam and the results are to remain confidential.⁶⁵ By permitting the medical exam to be compelled only after an applicant has been offered employment will put out in the open the reason why an applicant is rejected for employment. The results of the test, if accurately administered and the results protected, will assure a greater chance of persons with disabilities being employed in the labor force. No longer will job applicants be refused employment under the guise of legitimate business policy. Now the applicant is offered the job first,

⁶² 45 C.F.R. 84.14 (1987).

⁶³ Americans With Disabilities Act, Pub. L. No. 101-336, § 102(c)(a)(B) (codified as amended at 42 U.S.C. § 12101 (1990)).

⁶⁴ Americans With Disabilities Act § 102(c)(2)(B).

⁶⁵ Americans With Disabilities Act § 102(c)(3).

then the medical exam is administered. To later withdraw the offer of employment on grounds other than on the person's ability to perform the job, will smack of employment discrimination.

The Job Application Employment Form

Can an employer insist that a job applicant disclose her complete medical history? What limits are placed on employers' right to know? Do applicants have a right to disclose only such medical history that has a direct bearing on the person's ability to perform the job in question? What if the applicant does not know the full job tasks involved, how much medical history must be disclosed? Does an employer have the right to know about an applicant's medical history, if the medical condition was treated and the condition is no longer present? Does an employer have the right to know that an applicant has asthma, diabetes, heart condition, cancer or other medical conditions? What are the implications and repercussions if an applicant fails to disclose a medical condition? These issues continue to surface as persons with disabilities continue to enter the work force.

The ADA prohibits pre-employment inquiries regarding the existence, nature or severity of a job applicant's disabilities.⁶⁶ However, an employer is permitted to make such pre-employment inquiries about the ability of a job applicant to perform job-related functions.⁶⁷ Thus, a laundry list of medical conditions, asking the applicant to check off the applicable ones that apply, is in clear violation of the ADA. An applicant confronted with the laundry list should interpret the question to read: Do you have one the listed medical conditions that adversely affects your ability to perform the job-related functions of the job to which you apply? This interpretation will require the applicant to more fully learn the actual job tasks of the position applied for in order to complete the medical history questions on the job application.

In *National Labor Relations Board v. Florida Steel Corporation*⁶⁸, the court heard an employer's claim that an employee was lawfully terminated for failure to disclose a medical condition, specifically a back injury. The employer maintained that the employee's falsification was in direct violation of a statement signed by the employee, which provided that any false answers or statement made by the employee on the job application will be sufficient grounds for immediate discharge. Unfortunately for the employee, the facts revealed that many false statements were given, ranging from a failure to disclose a back injury, ulcer, prior employment terminations due to firings, education history, 7-year gaps in employment history, failure to disclose 16 former employers for whom he had

⁶⁶ Americans With Disabilities Act § 102(c)(2)(A).

⁶⁷ Americans With Disabilities Act § 102(c)(2)(B).

⁶⁸ *N.L.R.B. v. Florida Steel Corp.*, 536 F.2d 436 (5th Cir. 1978).

worked, to admitting he falsified his application because he was afraid he would not get the job if he answered truthfully. The court ruled, to no one's surprise, that the employee was properly discharged.⁶⁹ One is only to wonder how this court would rule if the only falsification alleged was the back injury and the back injury was healed and did not interfere with his performing his job duties.

The issue of falsification on the job application is often confronted when an employee is injured on the job and applies for Workers Compensation. In *DeVores v. Ford Motor Company*⁷⁰, the Court addressed the issue of disqualifying an employee from compensation benefits because of false statements in an employment application. In order to disqualify an applicant from benefits, the false statement in the employment application must be willful and false representation, in writing, and the claimant has not suffered from the disabling disease which constitutes the basis of his claim.⁷¹ The court found no evidence to support the conclusion that the employee willfully or falsely misrepresented a prior disabling condition; thus, compensation was awarded.⁷²

Federal legislation protecting the rights of the disabled has caused confusion in the minds of employers who are encouraged to hire the disabled. Those companies eager to employ the disabled must inquire as to an applicant's medical condition and medical history in order to identify persons with disabilities. For a business to affirmatively take steps to hire disabled people, it must be advised who is disabled, especially as it concerns one of the many "invisible handicaps," such as epilepsy, diabetes and cancer.

An applicant is at the crossroads and must make some tough decisions when asked to disclose her handicap. On the one hand, an applicant fears that such disclosure of one's handicap to a prospective employer may discourage the employer from offering a job, partly out of fear that the handicap will lead to job absenteeism, job injuries, less productivity and the like. On the other hand, if the employer is truly guided by affirmative hiring more persons with disabilities, what does a job applicant with a disability have to fear?

An applicant with a disability faces prejudice and ignorance at every step

⁶⁹ *Id.*

⁷⁰ 171 Mich. App. 354, 429 N.W.2d 900 (1988).

⁷¹ *Id.* at 361, 429 N.W.2d at 904. See also *Kalbes v. Armour Industrial Security and Claims Center*, 483 So. 2d 124 (Fla. Dist. Ct. App. 1986). Applicant denied workers compensation benefits for failing to disclose back injury. *Id.* at 126.

⁷² See also *Stovall v. Sally Salmon Seafood and EBI*, 84 Or. App. 612, 735 P.2d 18 (1987). Employee who failed to disclose previous hand, wrist or arm trouble was not precluded from receiving workers compensation benefits as a result of developing carpal tunnel syndrome. The court found the employee had not sought medical treatment for her condition or lost any work as a result of it. *Id.* at 614, 735 P.2d at 18.

in the employment hunt. Many people are uninformed regarding the abilities of persons with disabilities. With unemployment on the rise, many disabled people are afraid to take the chance by divulging their handicap to a prospective employer. Many job applicants claim that questions concerning an applicant's handicap will have no bearing on the chances of being employed with a particular company. Realistically, however, how can a disabled person trust such a statement that is contained on the job application, often the only information an employer uses to decide who gets through the front door for a job interview?

The job application which asks whether or not one has a particular medical condition, such as a bad back, epilepsy, or diabetes, should be read by applicants as do you have a particular medical condition which, if present, would adversely affect your ability to perform the job to which you are applying? This reading will protect applicants from some forms of discrimination and provide employers with the necessary medical information to make an informed decision before extending job offers to its applicants. However, missing from this interpretation is enabling employers to not hire persons with disabilities that have no bearing on their ability to perform the job. A strong argument could be made that if persons with disabilities are placed on the same level playing field as with persons without a disability, employment opportunities for persons with disabilities will improve. For those persons with "invisible handicaps," equal treatment will result in equal opportunity. A person with a history of a disability that has been medically treated and which is not currently affecting the person should not be required to be revealed to a prospective employer.

Government agencies that investigate allegations of employment discrimination and state statutes that attempt to alleviate employment discrimination should be of one voice in speaking about the implications of answering job application questions relating to one's medical history. It should be clear to both employers and job applicants that questions about medical history and medical condition should be read to only inquire about the job applicant's present belief as to her ability to perform the job to which she applies. An applicant should be permitted to interpret the question regarding one's medical history or current medical condition as whether the applicant's medical history or condition would currently affect her ability to perform the job to which she applies. Future ability to perform the job is an impermissible question. However, employees shall have the ongoing responsibility to advise the employer whenever a medical condition of theirs results in a present inability to perform the current demands of the job. At such time, job transfer or job restructuring should occur, with the employer mandated to make all necessary efforts to transfer the employee to a job within the company that she can currently perform or restructure the employee's job to delete those portions of the job that can not currently be performed.

For those persons with a disability that are readily visible to employers, such

as persons confined to wheelchairs, deaf and blind people, and persons who are mentally retarded, to name a few, affirmative steps are necessary to address discrimination in the employment arena. Employers should be rewarded financially, by way of tax credits, government loans, government grants, to employ disabled people in larger numbers. Employers must be educated about the ability of persons with disabilities. In addition, employers should be permitted to inquire on job applications about those disabilities which are readily visible, such as persons who are blind, deaf, or mentally retarded. Employers should keep statistics as to the percentage of handicapped employees they employ. The federal government should reward those employers who employ a significant number of persons with "visible disabilities" with government contracts, government loans, tax credits and other benefits to send out the message to the private sector that employing disabled workers pays financially. These affirmative steps on the part of government will increase significantly the ranks of employed disabled people.

Employers should be rewarded through financial incentives for hiring handicapped workers that would not be hired in large numbers without government intervention. For those handicapped workers who have "invisible handicaps," government intervention is less essential. What those persons with "invisible handicaps" really need is to be given an equal opportunity to compete for work. A high school teacher suffering from epilepsy, a truck driver recovering from Hodgkin's disease and a salesperson with diabetes all have the same needs; that all persons competing for a particular job be provided with the same chance to obtain it, and to let a person's job-related qualifications be the deciding factor.

Drug Testing

Can an employer administer drug testing to determine whether its employees are drug users? If so, is an employer authorized to terminate an employee who uses drugs? What can an employer do with the results of the drug tests and what are the privacy issues associated with drug screening? Can applicants for employment be screened for drug use? Does it depend if the job is high risk? These and other issues surface when the controversial question of drug screening is raised in the context of the workplace.

The federal government entered the drug screening debate with the enactment of Executive Order 12564,⁷³ signed into law by President Ronald Reagan in 1986, in which governmental agencies in the executive branch were required to conduct drug tests of employees in "sensitive positions." The Executive Order attempts to restrict on and off duty illegal drug use by federal

employees, concerned about the reliability, stability, and good judgment of government employees with access to sensitive information who may be coerced, influenced or act irresponsibly under pressure.⁷⁴

The components of a drug testing program vary among employers.⁷⁵ The selection of the particular laboratory is crucial to ensure a high level of accuracy in the drug testing. The type of testing used, blood or urine, will effect the reliability of the testing. Lawrence Miike and Maria Hewitt, who studied the accuracy and reliability of urine drug tests, raise questions concerning mass testing programs; that human or technical equipment errors occur in performing the test and in the predictive value of a positive screening test.⁷⁶

The American Medical Association conducted a survey of 1,090 private employers and found that 21% administer some kind of drug screening. Of these companies, 92% conduct pre-employment testing and 77% screen current employees.⁷⁷ Employers that require applicants and prospective employees to undergo drug screening should disclose to prospective employees that submission to a drug test is a condition to employment and advise them of the consequences of an adverse test result.⁷⁸

A line of cases addresses the question of drug testing for "high risk" occupations such as the railroad industry. In a leading case, the U.S. Supreme Court in *Skinner v. Railway Labor Executives Association*⁷⁹ upheld regulations permitting random drug screening through urinalysis for railroad employees engaged in safety-sensitive positions.⁸⁰ The Court's decision rested on the notion of the government's compelling need to protect the traveling public within the railroad industry. The lack of a warrant to search railroad employees through

⁷⁴ Congress' concern about illegal drug use among workers caused the enactment of the Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-707 (1988), imposing obligations on federal contractors and federal grant recipients.

⁷⁵ For a discussion on the important components of a drug testing program, see DeCresce et al, *Drug Testing In the Workplace*, The Bureau of National Affairs, Inc., Washington, D.C., 1989.

⁷⁶ Miike & Hewitt, *Accuracy and Reliability of Urine Drug Tests*, 36 U. KAN. L. REV., 641, 649 (1988) (describes how urine drug screening tests work and discussion on accuracy and reliability of drug testing by employers).

⁷⁷ Masi, *Company Responses to Drug Abuse From AMA's Nationwide Survey*, 64 PERSONNEL 40, 40-45 (1987).

⁷⁸ For a discussion on drug testing in the private sector, see Hebert, *Private Sector Drug Testing: Employer Rights, Risks and Responsibilities*, 36 U. KAN. L. REV. 823 (1988).

⁷⁹ 109 S. Ct. 1402 (1989). However, see *Amalgamated Transit Union v. Skinner* 894 F.2d 1362, 1368-69 (D.C. Cir. 1990) (court ruled the Urban Mass Transportation Administration lacked statutory authority to impose uniform solutions on local transit authorities).

⁸⁰ 109 S. Ct. at 1421-22. See *Transport Workers Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transportation Authority*, 863 F.2d 1110, 1118-19 (3rd Cir. 1988) (court notes safety problems caused by drug and alcohol use by employees outweighed intrusion on employees' privacy cause by testing).

administration of blood, breath or urine tests did not render the intrusions unreasonable under the Fourth Amendment.⁸¹

The United States Supreme Court, on the same day it decided *Skinner v. Railway Labor Executives Association*, ruled that United States Customs agents who carry firearms or are directly involved in drug interdiction may be required to submit to drug screening without individualized suspicion.⁸² The Court in *Von Rabb* recognized that where a Fourth Amendment intrusion serves special governmental needs, as here the compelling interest in safeguarding borders and public safety, it is unnecessary to balance individuals' privacy expectations against government's interests in order to justify a departure from the ordinary warrant and probable cause standards.⁸³

The court in *Jevic V. Coca Cola Bottling Company*⁸⁴ heard the claims by private employers to combat drug use through a policy of mandatory pre-employment drug tests. The court recognized a catch-22 situation for job applicants. If an applicant declined to participate in the drug test he would not be hired. Conversely, if he participated he ran the risk of detection and again, not being hired. The court noted the catch-22 was merely persuasive, not coercive.

Other courts have examined employers' efforts to curtail drug use in the private sector, in *Wilkinson V. Times Mirror*⁸⁵, the employer adopted a policy of pre-employment physical examinations including drug testing for all applicants. A significant issue raised before the court was whether the non-governmental conduct impermissibly infringed on the job applicant's constitutionally protected right of privacy. The court focused its analysis on the fact that the plaintiffs were job applicants and not employees. Relying on the U.S. Supreme Court decisions in *Skinner* and *Von Rabb*, the court declared that the drug test did not substantially burden plaintiff's right of privacy.⁸⁶ The court noted that California state law permits private employers to condition offers of employment on the results of

⁸¹ 109 S. Ct. at 1416. See *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454, 1460-61 (9th Cir. 1990) (drug testing of employees in hazardous liquid pipeline operations does not abridge 4th Amendment proscription against unreasonable searches and seizures).

⁸² *N.T.E.U. v. Von Raab*, 109 S. Ct. 1384 (1989).

⁸³ *Id.* at 1390. See dissenting Justice Scalia's characterization of the search as particularly destructive of privacy and offensive to personal dignity. See also *American Postal Workers Union v. Frank*, 734 F. Supp. 40 (D. Mass. 1990) (government seeking a drug free workplace).

⁸⁴ W.L. No. 109851 (D.N.J. 1990).

⁸⁵ 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (Cal. Ct. App. 1989). But see *Johnson v. Carpester Technology Corp.*, 723 F. Supp. 180 (D. Conn. 1989). Connecticut statute requires employee drug testing by private employer be predicated on reasonable suspicion that the employee is under the influence of drugs which adversely affect such employee's job performance. CONN. GEN. STAT. § 31-51x(A) (1987). The exception to this general rule permit random testing for high risk or sensitive occupations.

⁸⁶ 215 Cal. App. 3d at 1036, 264 Cal. Rptr. at 197. See Note, *Urine Testing, Testing-Based Employment Decisions and the Rehabilitation Act of 1973* 22 COLUM. J. L. & SOC. PROBS. 219 (1989).

medical examinations.⁸⁷ Although the court may be stretching the definition of a medical exam to include drug screening, the court did acknowledge that all entering employees in similar positions must be given the examination.⁸⁸

There are, however, courts that do restrict drug screening in the workplace, as was seen in *Patchogue-Medford Congress of Teachers v. Board of Education*.⁸⁹ The Court of Appeals of New York refused to permit drug screening of all probationary teachers in the school system. The court took a bold step, countering public sentiment against drug use, by recognizing a significant intrusion on individual privacy and dignity by requiring teachers to urinate into a bottle. The court acknowledged the prevalence of drugs in the schools among students, but recognized there is no evidence to indicate a drug problem among teachers.⁹⁰ The court, relying on criminal law and public policy, restricted the government to reasonable searches, balancing such an intrusion with the public's interest in maintaining the privacy, dignity and security of its members.⁹¹

Subsequent to *Patchogue-Medford Congress of Teachers*, the New York Supreme Court heard the case of *Phil Caruso v. Ward*, involving drug screening of police officers.⁹² The petitioners objected to random drug screening without reasonable suspicion, a position that the court accepted.⁹³ Furthermore, the court recognized an absence of safeguards and protection for privacy as a result of the drug screening.

The Americans with Disabilities Act permits employers covered by the Act to adopt or administer reasonable policies or procedures, including drug testing, designed to ensure that individuals previously engaged in the illegal use of drugs are no longer engaged in such use.⁹⁴ The Act's definition of the term "qualified individuals with a disability" does not include any employee or job applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on

⁸⁷ 215 Cal. App. 3d at 1036, 264 Cal. Rptr. at 197. See other state statutes permitting drug screening of job applicants. MONT. CODE ANN. § 39-2-304 (1987); IOWA CODE ANN. § 7305 (West 1987); MINN. STAT ANN. § 181.950-181.957 (West 1987); UTAH CODE ANN. § 34-38-1 (1987); VT. STAT ANN. tit. 21, §§ 511-20 (1987).

⁸⁸ 215 Cal. App. 3d at 1037, 264 Cal. Rptr. at 198. See *Fowler v. New York City Dept. of Sanitation*, 704 F. Supp. 1264 (S.D.N.Y. 1989) (probationary employee did not have property interest in continued employment, thus due process not violated).

⁸⁹ 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987).

⁹⁰ *Id.* at 462, 510 N.E.2d at 331.

⁹¹ *Id.*

⁹² 520 N.Y.S.2d 551 (N.Y. App. Div. 1987). See also *Willner v. Thornburgh*, 748 F. Supp. 1 (D.D.C. 1990) (the requirement compelling all attorneys hired in the Department of Justice's Antitrust Division to submit to drug screening in absence of any basis for individualized suspicion of drug use offended the Fourth Amendment).

⁹³ 520 N.Y.S.2d at 553.

the basis of such use.⁹⁵ The Act does, however, prevent employment discrimination against a qualified individual with a disability who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs.⁹⁶

The provisions of the Act are not intended to conflict with the right of the an individual legally taking drugs under medical supervision for a disability who chose not to disclose her medical condition before a conditional offer of employment has been made to her. An applicant for employment may be required to undergo a drug screening test, but not a test for prescription drugs taken for a disability, before a conditional offer of employment has been made as long as there is a showing that the test is job-related and consistent with business necessity.⁹⁷ Such testing must comply with applicable federal, state or local laws or regulations regarding quality control, confidentiality, and rehabilitation.⁹⁸

The ADA authorizes the U.S. Department of Defense, Nuclear Regulatory Commission and U.S. Department of Transportation to require employees engaged in sensitive positions of the industry to comply with the standards established regarding alcohol and illegal drug use.⁹⁹

Several courts have used the Rehabilitation Act of 1973 as a basis for resolving drug testing disputes. In *Burka v. New York City Transit Authority*¹⁰⁰, city transit authority employees who tested positive for illegal drug use, were claiming to be "handicapped individuals" within the meaning of the Rehabilitation Act, prohibiting them from being terminated from employment. The court distinguished drug abusers who had been rehabilitated or currently being rehabilitated from those who were not, conveying protection only to the former group.

⁹⁵ Americans With Disabilities Act § 104(a).

⁹⁶ Americans With Disabilities Act § 104(b) (definition includes individuals who are erroneously regarded as engaging in illegal use of drugs).

⁹⁷ H.R. REP. NO. 185, 101st Cong., 2nd Sess., pt. 2, 79-80 (1989).

⁹⁸ S. REP. No. 1, 101st Cong., 1st Sess., pt. 41 (1989). See also Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-07 (1988). The ADA provides that employers covered by the Act may required employees to behave in compliance with the requirements established under the Drug-Free Workplace Act of 1988. Americans With Disabilities Act § 104(c)(3).

⁹⁹ Americans With Disabilities Act § 104(c)(3).

¹⁰⁰ 680 F. Supp. 590 (S.D.N.Y. 1988). See also *McCleod v. City of Detroit*, 39 FEP Cases 227 (employee jailed to establish that their ability to perform a major life activity had been impaired). For a discussion of the handicap of alcoholism, see *Crewe v. U.S. Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987).

Later that same year, in *Wallace v. Veterans Administration*¹⁰¹, a registered nurse who was a recovering chemically dependent person, filed a handicap employment discrimination suit against the Veterans Administration after she was refused employment due to her chemical addiction. The court's careful analysis of the Rehabilitation Act found Dorothy Wallace, a handicapped individual, was discriminated against in violation of the Rehabilitation Act. The court determined: (1) that Dorothy Wallace was qualified to perform the job as an RN staff position in ICU; (2) that Dorothy Wallace suffers a handicap - a drug addiction - which prevents her from meeting a "physical" requirement for employment (restricted from administering narcotics to patients, a required duty of an RN in the ICU); (3) that the requirement has an adverse impact on recovering drug addicts whose access to narcotics must be restricted, thus the sole reason for Ms. Wallace's nonselection was the existence of her handicap; and (4) that Dorothy Wallace presented plausible factual evidence that the requirement was not "job related" or could be accommodated (evidence presented revealed that less than 2% of the ICU nurse's time is spent administering narcotics).¹⁰² The *Wallace* court demanded that the employer prove this requirement was job related, an essential function of the nurse's job.¹⁰³ The employer failed to prove that patient safety would be jeopardized or that accommodating Ms. Wallace would be unreasonable.¹⁰⁴

Several unanswered questions still remain, including the accuracy of drug screening¹⁰⁵, the relevance of drug testing results¹⁰⁶ and the financial cost¹⁰⁷, often estimated in the billions of dollars annually to test the work force.

Aids Screening

Can an employer require an applicant for employment to submit to mandatory testing of the HIV virus for AIDS? If so, what protections are afforded the applicant that tests positive for the disease? When can the results be used to screen out applicants for employment? The U.S. Court of Appeals in

¹⁰¹ 683 F. Supp. 758 (D. Kan. 1988). See also *Doe v. Roe, Inc.*, 143 Misc.2d 156, 539 N.Y.S.2d 876 (N.Y. Sup. Ct. 1989) (employer rejecting applicant as a result of failed drug test without a determination as to whether the applicant can perform the job in question).

¹⁰² *Wallace* at 765. See also *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. 1981).

¹⁰³ *Wallace* at 765. See *Bentivegna v. United States Dept. of Labor*, 694 F.2d at 622 (if job qualification is to be permitted to exclude handicapped individuals, it must be directly connected with, and must substantially promote business necessity and safe performance).

¹⁰⁴ *Wallace* at 766. The V.A. failed to present a strong factual foundation to establish the restriction.

¹⁰⁵ See Hoyt, Finnigan, Nee, Shults and Butler, *Drug Testing in the Workplace - Are Methods Legally Defensible?* 258 J. A.M.A. 504, 508 (1987).

¹⁰⁶ BNA, *ALCOHOL AND DRUGS IN THE WORKPLACE: COSTS, CONTROLS, AND CONTROVERSIES* 9 (1986).

*Glover v. Eastern Nebraska Community Office of Retardation*¹⁰⁸ was asked to rule on the legality of AIDS testing of employees in a health services agency serving mentally retarded persons. The court found that the AIDS testing was not justified and constituted an unreasonable search and seizure in violation of the employee's Fourth Amendment rights where the risk of AIDS transmission from employees to the mentally retarded clients was minuscule and thus not justified.¹⁰⁹

Polygraph Lie Detection

Employers interested in testing the honesty of applicants resorted to the use of lie detectors as an inexpensive and simple method of preventing financial losses from employee theft. It has been reported that twenty percent of major United States corporations and fifty percent of its retail establishments have used polygraph tests to screen and control employee theft.¹¹⁰

Congress, in response to the vast use and abuse of lie detectors in the employment arena, enacted the Employee Polygraph Protection Act of 1988.¹¹¹ The Act places strict controls on the use of polygraph lie detectors and prohibits the use of all other lie detectors in the private sector. Criticisms of the Act include Congress' passage of the Act as a blunt club-like prohibition, ignoring the issue of what to do with the lie detector of high reliability.¹¹² The pre-employment polygraph was eliminated for two primary reasons. First, there was limited evidence that the test was scientifically valid and reliable in the employment arena. Second, the test was perceived by the majority of job applicants to be highly offensive.¹¹³

In a recent class action law suit challenging the City of Houston's use of pre-employment polygraph examinations, the United States District Court in *Woodland v. City of Houston*¹¹⁴ awarded individual damages to applicants for

¹⁰⁸ 867 F.2d 461 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 321 (1989).

¹⁰⁹ *Id.* at 464.

¹¹⁰ Call, *Polygraph Regulations: A Trend Toward Tougher Standards*, 11 EMPLOYEE REL. L.J. 585, 586 (1986).

¹¹¹ 29 U.S.C. § 2001-2009 (1990). See *Anderson v. City of Philadelphia*, 845 F.2d 1216 (3rd Cir. 1988). Court found use of polygraph test for pre-employment screening by city police and corrections department did not violate constitutional rights of applicants to equal protection and substantive due process. *Id.* at 1221-22.

¹¹² Note, *Protecting Employees and Neglecting Technology Assessment: The Employee Polygraph Protection Act of 1988*, 55 BROOKLYN L. REV. 1315 (1990).

¹¹³ Jones, Ash & Soto, *Employment Privacy Rights and Pre-Employment Honesty Tests*, 15 EMPLOYEE RELATIONS L.J. 561 (1990). Authors note exception to the ban apply to prospective employees of security services, prospective employees of manufacturers of controlled substances; also governmental agencies are exempt from the provisions of the Act. *Id.*

employment in security-sensitive positions, concluding the polygraph tests were unreasonably intrusive. In granting a permanent injunction, the City of Houston was prohibited from using a polygraph test or pretest interview; and prohibited from asking of an array of questions.¹¹⁵

Physical Ability Tests

Can an employer require a job applicant to undergo a physical ability test as a prerequisite for employment? What are the implications of physical exertion tests on women applicants? Can a police department require its applicants to pass an agility test? Can employers refuse to hire women in jobs that may expose women of child bearing age to hazards to the fetus?

The court in *Harless v. Duck*¹¹⁶ faced the issue of the legality of a physical ability test for job applicants of the Toledo Police Department. Although the court recognized that police officers must meet certain physical standards in order to be capable of performing their jobs safely and effectively, the police department failed to prove that the test was valid and job-related.¹¹⁷ The court acknowledged that employment examinations are permissible, however, they must be validated based on criteria, construct or content.¹¹⁸ The court concluded that the physical ability test was not job related and violated the Civil Rights Act.¹¹⁹

Shortly after the *Harless* case was decided, the U.S. Court of Appeals in *Cohen v. West Haven Board of Police Commissioners* heard the claim of female police applicants who alleged sex discrimination by the police department. The court reached a similar result, finding a violation of the Civil Rights Act of 1964

¹¹⁵ *Id.* at 1306. Court prohibited asking questions that: (1) intrude into the applicant's privacy beyond matters related to actual requirements for the job, (2) have not been narrowly tailored to applicant's potential for capable performance of the job, (3) inquire into matter the city has other reasonable alternative methods for acquiring the information and to which it is legally entitled, (4) inquire about applicant's (a) religion, (b) consensual sexual activity, (c) extramarital sex, (d) juvenile crimes (except for felonies, physical injury, sexual abuse), (e) use of marijuana (except if used unlawfully in last 6 months), (f) adult criminal behavior (except felonies, sexual assault, theft, Class A misdemeanor, or serious injury crimes), (g) theft (unless at least \$25 and occurred within 12 months), (k) membership in organizations, (i) drug use, with exceptions for certain drugs, (j) criminal behavior of family member, (k) confidential medical information. *Id.*

¹¹⁶ 619 F.2d 611 (6th Cir. 1980).

¹¹⁷ *Id.* at 616. See also *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹¹⁸ 619 F.2d at 616. Criterion validity compares employee job performance with test scores, construct validity determines the degree to which the applicant possess traits important for the job, and content validity assesses the ability of the applicants to perform specific tasks which must be performed on the job. *Id.*

and awarding back pay as a remedial tool.¹²⁰

Subsequent to Cohen, the case of *Eison v. City of Knoxville*¹²¹ reached an opposite result. Finding the physical test of sit-ups, push-ups, leg lifts, squat thrusts, pull-ups, and a 2-mile run was neutral on its face, the court analyzed the test under the doctrine of disparate impact. The disparate impact theory requires a plaintiff to produce evidence demonstrating that the employment practice selects applicants for employment in a racial or gender basis pattern significantly different from the general pool of applicants. Once the plaintiff has met such a burden, an employer must demonstrate that the employment practice is job related.¹²² The test, the court noted, "is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."¹²³ If the employer carries this burden, the plaintiff must be permitted an opportunity to prove another practice would serve the employer's business needs equally as well without the undesirable racial or gender impact.¹²⁴

The Equal Employment Opportunity Commission has established guidelines for quantifying the disparate impact of physical tests. The "four-fifth rule" is used, comparing whether the selection rate of women is less than four-fifths the selection rate of men. A rate lower than 80% is regarded as evidence of adverse impact. The court in *Eison* concluded that the plaintiff failed to establish her prima-facie case of disparate impact, thus entering judgment in favor of the police department.¹²⁵

The U.S. Supreme Court recently handed down the sweeping decision of *International Union et al v. Johnson Controls*,¹²⁶ in which the court backed the right of women to employment in jobs in which exposure to toxic substances could harm a developing fetus.¹²⁷ The challenged employment policy applied to all women, regardless of age or plans for childbearing, unless the woman could prove she was sterile.¹²⁸ The unanimous ruling was a major victory for labor unions and women's rights groups that challenged the fetal protection policy. The

¹²⁰ 638 F.2d 496, 501-02 (2d Cir. 1980). Once it is established that an employment practice is unlawful, class members victimized by the discrimination become presumptively entitled to back pay.

¹²¹ 570 F. Supp. 11 (E.D. Tenn. 1983).

¹²² *Id.* at 13. See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

¹²³ 570 F. Supp. at 13 (quoting *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973).

¹²⁴ *Albemarle Paper Co.*, 422 U.S. at 425.

¹²⁵ 570 F. Supp. at 14. The *Eison* court also found that the Police Department demonstrated that its physical tests were job related. *Id.* at 13.

¹²⁶ 111 S. Ct. 1196 (1991).

¹²⁷ *Id.* at 1203.

court took the bold step by recognizing that the Civil Rights Act prohibited all fetal protection policies. The decision about the welfare of future children, the court noted, must be left to the parents who conceive, bear, support and raise them rather than to the employers who hire those parents.¹²⁹

Honesty Testing

Do employers have the right to test prospective employees to determine if they are honest people? Can an employer administer honesty tests of job applicants to determine how honest and law-abiding that person is before they are offered a job? How reliable are honesty tests in predicting dishonest behavior? Do honesty tests unfairly interfere with the rights of a person's privacy? With the decline of polygraph tests by employers, the business of honesty testing has exploded onto the field of job hiring.¹³⁰ Due in large part to the hue and cry of employers who lose billions of dollars per year from employee theft and dishonest practice, honesty tests have been developed and administered in order to predict the risk factor in hiring a particular person.¹³¹

Employer use of honesty testing is on the increase, estimates range from 5,000 to 6,000 business establishments in the United States use honesty and integrity tests for the purpose of screening and selecting job applicants for employment.¹³² The use of honesty testing is concentrated in the area of non-management, less skilled jobs, such as convenience store employees and retail clerks.¹³³

What is meant by honesty testing? According to the Office of Technology Assessment (OTA), the OTA has defined honesty and integrity tests as written tests designed to identify individuals applying for work in such jobs who have relatively high propensities to steal money or property on the job or are likely to engage in counterproductive behavior.¹³⁴

¹²⁹ *Id.* at 1207.

¹³⁰ See *Minnesota v. Century Camera Inc.*, 309 N.W.2d 735 (Minn. 1981) (case filed under the state's anti-polygraph law challenging honest test, court excluded honesty and psychological testing from the ban on polygraph testing). See also Jones, Ash & Soto, *supra* note 113 at 565.

¹³¹ In 1982, it was reported by the Commerce Department that companies are losing \$40 billion to \$50 billion a year from employee stealing and embezzlement. Quade, *Law Scope*, 68 A.B.A. J. 671 (June 1982) [hereinafter *Use of Integrity Tests for Pre-Employment Screening*].

¹³² U.S. Congress, Office of Technology Assessment, *The Use of Integrity Tests for Pre-Employment Screening*, OTA-SET-442 (Washington, D.C.: U.S. Government Printing Office, September, 1990).

¹³³ But banks and police and fire departments have used the practice of conducting background investigations of job applicants to determine a person's character or fitness for a particular job sought. Such a procedure may require seeking information on the job application or an independent investigation by the employer of the applicant's past. 40 A.L.R. FED. 473, 476 (1978).

¹³⁴ *Id.* Such counterproductive behavior might include tardiness, sick leave abuse and absenteeism.

Honesty tests have grown in popularity as a result of several key factors. First, employers have recognized that employee theft has escalated to such a degree that they are grasping at straws to stem this tide. Second, the paper and pencil honesty tests are viewed by employers as accurate, dependable, reliable and relatively inexpensive screening devices at the pre-employment stage. Third, as a result of the federal government's ban on polygraph tests in most private industry, the business community turned to a replacement of the lie-detector tests, and the honesty test industry was quick to step in and answer the call.

Are honesty tests reliable in identifying those job applicants who are likely to steal from their employer? The debate rages on as to the effectiveness of honesty tests. Businesses that use the tests claim they are useful in reducing employee theft. On the other hand, others claim that the tests are ineffective and unreliable in identifying people who are likely to commit employee theft.¹³⁵

It is estimated that each year as many as 5,000,000 people may undergo honesty testing, placing many individual's employment status in jeopardy as a result of the paper-and-pencil honesty test.¹³⁶ Employers recognize the need for cost effective screening devices to identify job applicants who are likely to be dishonest and untrustworthy. The common job interview, unstructured and conducted by persons often lacking the skills to identify problem employees, is neither accurate nor infallible. Even reference checks of job applicants, whereby a prospective employer contacts an applicant's former employer, has proven to be useless. Due in part to the former employer's fear of litigation, the reasons for the employee's termination and details about the person's work habits are rarely revealed.

The use of honesty testing may be on the rise as a result of the doctrine of negligent hiring, whereby at the time an employee is hired, an employer knew or should have known of the employee's unfitness and the issue of liability focuses upon the adequacy of the employer's pre-employment investigation into the employee's background.¹³⁷ The test applied by the court is: When the employee was hired, did the employer conduct a reasonable investigation into the employee's background vis à vis the job for which the employee was hired and the possible risk of harm or injury to fellow workers or third parties that could

¹³⁵ *Id.* at 4. One social psychologist argues that the real problem is that "...the construct actually measured [by integrity tests] is either attitudes toward theft or self-reported illicit activities [and that it requires] a substantial leap of faith to label such responses as probative or their future honesty or dishonesty." Leonard Saxe, "The Social Significance of Lying," paper presented to the American Psychological Association, Boston, MA, Aug., 1990. *Id.* at 4-5.

¹³⁶ American Psychological Association, Questionnaires Used In The Predication Of Trustworthiness In Pre-Employment Selection Decisions: AN A.P.A. Task Force Report, Washington, D.C. March, 1991 (hereinafter referred to as Task Force).

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García V. Duffy, 492 So. 2d 435, 438-39 (Fla. Dist. Ct. App. 1986).

result from the conduct of an unfit employee. The court must determine whether the employer should have reasonably foreseen the risk caused by hiring an unfit person.¹³⁸ Employers are delving into an applicant's background, beyond the person's ability to perform the job, to identify those persons who are likely to endanger others.¹³⁹

The test to determine whether an employer owes a duty to the plaintiff to exercise reasonable care in hiring and retaining employees is outlined in *DiCosala v. Kay*.¹⁴⁰ In *DiCosala*, the plaintiff was accidentally shot in the neck while a guest in the living quarters of a camp ranger. The gun was fired by a camp counselor who had playfully pointed the .22 pistol at six-year-old Dennis DiCosala.¹⁴¹ It has been recommended that a simple method for ensuring that employers hire only trustworthy and competent employees would be to suggest that an employer obtain as much information as possible about a potential employee.¹⁴² Thus, another incentive for honesty testing has been born.

Employers are confronted with the increased pressure of screening out potentially disruptive applicants. Courts have addressed the issue of the employer's obligation to inquire into an applicant's prior criminal record. In *Cramer v. Housing Opportunities Commission*, a Maryland court acknowledged the government policy of promoting rehabilitation and reentry into employment of persons convicted of crimes, consequently prohibiting employers from compelling the disclosure of criminal records. The court, however, noted that once an applicant volunteers some information, an affirmative duty on the part of the employer exists to investigate further. If the applicant's current criminal record is relevant to the specific job, is recent in time and the job involves safety, health and welfare concerns, the employer may be negligent if it

¹³⁸ Shattuck, *The Tort of Negligent Hiring and the Use of Selection Devices: The Employee's Right of Privacy and the Employer's Need to Know*, 11 INDUS. REL. L.J. 2 (1989).

¹³⁹ See *Pruit v. Pavelin*, 141 Ariz. 195, 685 P.2d 1347 (Ariz. Ct. App. 1984). Knowledge of the previous dishonest acts of a real estate agent made the employer liable for her subsequent conduct, \$158,698 compensatory damages and \$25,000 punitive damages. *Id.* at 207, 685 P.2d at 1359.

¹⁴⁰ 91 N.J. 159, 450 A.2d 508 (1982).

¹⁴¹ *Id.* at 165, 450 A.2d at 511. The court recognized the tort of negligent hiring, identifying two requirements: A) knowledge of employer and foreseeability of harm to third persons and B) through negligence of employer in hiring employee, latter's incompetence, unfitness or dangerous characteristics proximately caused the injury. *Id.*

¹⁴² Note, *Employer Liability Under The Doctrine Of Negligent Hiring: Suggested Methods For Avoiding The Hiring Of Dangerous Employees*, 13 DEL. J. CORP. L. 501, 523 (1988).

¹⁴³ *Cramer v. Housing Opportunities Commission*, 304 Md. 705, 501 A.2d 35 (1985). Cramer was raped in her rented home by the housing inspector of the landlord. Her assailant had prior criminal convictions for violent behavior. The court found the employer to be negligent. *Id.* at 720, 501 A.2d at 43.

fails to investigate the applicant's background.¹⁴⁴

It has been suggested that honesty and integrity testing which include inquiries concerning a job applicant's violent tendencies may reduce employer liability for negligent hiring claims.¹⁴⁵ However, an issue running through the negligent hiring claims is that of the privacy rights of the applicant. In *Cort v. Bristol Myers Company*¹⁴⁶, former employees of the company alleged Bristol-Myers invaded their privacy by seeking information they considered confidential. The employer required its employees to complete a questionnaire about family and home ownership. The court reasoned that public policy considerations do not justify the imposition of liability on the employer.¹⁴⁷ An employee's right of privacy should continue to be a major factor in weighing the benefits of inquiries into a person's background. A constant watch must continue in order to determine when an employer crosses the line and delves into an applicant's background that has no bearing on that person's ability to perform the job.¹⁴⁸

The federal government entered the field of protecting the privacy rights of federal employees when it enacted the Privacy Act of 1974.¹⁴⁹ The Act provides that employee records may not be disclosed to a third party without the consent of the employee, but provides that an employee has the right to obtain his own records. The federal employee has the right to correct or amend such records and if such request to amend is denied, a review procedure is put into play. Several states have also enacted privacy protection laws that extend this protection to private employees.¹⁵⁰ This state involvement has proven to be a helpful worthwhile government action to protect the rights of workers.

Several criticisms have been heard surrounding honesty testing, ranging from

¹⁴⁴ Gregory, *Reducing the Risk of Negligence in Hiring*, 14 *EMPLOYEE RELATIONS L.J.* 31 (1989). The author suggests the employer should obtain the applicant's written consent to a background investigation, pay especially close attention to gaps in the applicant's work history. *Id.* at 40.

¹⁴⁵ Jones, Ash & Soto, *supra* note 113.

¹⁴⁶ 385 Mass. 300, 431 N.E. 2d 908 (1982). See also *D.R.R. v. English Enterprises*, 356 N.W.2d 580 (Iowa Ct. App. 1984) (customer of cable televisions company brought suit for negligent hiring due to employee of company raping customer).

¹⁴⁷ 385 Mass. at 305, 431 N.E.2d at 914. The court noted that most of the unanswered questions were relevant to the employers' job qualifications and did not constitute an invasion of the employees' rights of privacy. *Id.*

¹⁴⁸ See *Gill v. Snow* 644 S.W.2d 222 (Tex. Ct. App. 1982). The court points out the "elements of invasion of privacy for intrusion upon the plaintiff's seclusion, solitude, and into his private affairs or requires an intentional intrusion upon the solitude or seclusion of another or his private affairs or concerns that is highly offensive to a reasonable person". *Id.* at 224. See also *K-Mart v. Trotti*, 677 S.W.2d 632 (Tex. Ct. App. 1984), court held that the elements of a highly offensive intrusion is a fundamental part of the definition of an invasion of privacy).

¹⁴⁹ 5. U.S.C. § 552 (1986).

¹⁵⁰ Jones, Ash & Soto, *supra* note 113 at 566 nn. 15-17.

a lack of testing standards, to questions involving test validity and concerns over tests having an adverse impact on women and minorities. The A.P.A. Task Force has recommended that the *Standards for Educational and Psychological Testing* (1985) prepared by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education should apply to honesty testing.¹⁵¹ Unfortunately, individual test publishers lack any linkage to these parent organizations and are therefore beyond the regulatory scheme to enforce the standards. The Task Force was most disturbed with the guideline of the *Standards* mandating that test developers, publishers and users collect and make available sufficient information to enable a qualified reviewer to determine whether applicable standards were met.¹⁵² Without compliance of accepted standards, there will always be a shadow of doubt surrounding the accuracy and predictability of honesty testing.

In reviewing honesty testing for test validity, R.M. O'Bannon and his colleagues conducted an exhaustive review of the field, describing predictive-validity findings for six separate honesty tests and concluded that few predictive studies are free of methodological difficulties and most tests have not been used in predictive studies.¹⁵³

The Task Force examined predictive validity studies using theft as a criterion and found that from under 1 percent to 6 percent of those individuals passing the tests (i.e. identified as honest) were later found to have stolen from their employers, concluding that upwards of 94 percent of those identified by the test as honest were not subsequently discovered committing theft. However, the Task Force report found that from 73 percent to 97 percent of those failing the tests (i.e. identified as potentially dishonest) apparently did not steal from their employers either and were incorrectly identified by the test. The overall misclassification rate - defined as the number incorrectly identified as honest or dishonest as a percentage of the total sample- was in the range from 18 to 63 percent.¹⁵⁴ For employers to continue to utilize honesty testing, they must be prepared to deny employment opportunities to a large percentage of applicants, many of whom are honest.

Of utmost concern is whether or not honesty tests adversely impact on members of various ethnic, racial or gender groups. According to the available

¹⁵¹ American Psychological Association, *Questionnaires Used In The Predication Of Trustworthiness In Pre-Employment Selection Decisions: AN A.P.A. Task Force Report*, Washington, D.C. March, 1991, at page 9.

¹⁵² *Id.* at 9.

¹⁵³ O'Bannon, R.M., Goldinger, L.A., and Appleby, G.S. (1989). *Honesty and Integrity Testing: A Practical Guide*, Atlanta, Ga: Applied Information Resources. The American Psychological Association concurs with these findings.

research, the Office of Technology Assessment found that members of ethnic, racial or gender groups are not discriminated in hiring as a result of the honesty test results.¹⁵⁵ However, additional research is recommended because of the existence of some confusion over the appropriate standards by which discrimination is assessed.¹⁵⁶ Continued vigilance is recommended on the part of individual employers to assure that an adverse impact on ethnic, racial or minority lines does not surface in the job selection arena.¹⁵⁷

One has the right to question whether honesty tests are successful in identifying dishonest employees. It is only fair to wonder whether job applicants would reveal embarrassing information or divulge inappropriate behavior that would jeopardize their likelihood of obtaining employment. The Task Force addressed the problem of faking, or lying, to guarantee a successful outcome to the test. Faking was not seen by the Task Force as great a problem as many observers feared.¹⁵⁸ It recognized that some job applicants may not regard the tests as very important, therefore, not motivated to lie, while other applicants may think they can outsmart the tests by admitting to various transgressions.¹⁵⁹ Further empirical data is necessary in order to better understand and interpret the significance of the test results.

One must never lose sight of the detrimental effect of being labeled as "failing" the honesty test. The stigma associated with being an individual at high risk to commit dishonest acts is devastating to job seekers. To compound this, there does not exist a protection to prevent the disclosure of this highly confidential information to others.¹⁶⁰ The right of a job applicant to keep the test results private and confidential are crucial to insuring that the tests will be answered truthfully by job applicants. The need to protect third-party access to test results has led to the Standards for Educational and Psychological Testing, which state:

Test results identified by the names of individual test takers should not be released to any person or institution without the informed consent of the test

¹⁵⁵ *Id.* at 14 (relying on the "4/5th rule, which provides that a hiring rate for a minority group that is less than 80 percent of the rate for the majority will be regarded as evidence of adverse impact of the hiring system. However, the study recognizes the possibility of smaller difference in selection rates many constitute adverse impact).

¹⁵⁶ *Id.* at 15. Also, research conducted by test publishers themselves without independent replication raises credibility issues.

¹⁵⁷ American Psychological Association, *Questionnaires Used In The Predication Of Trustworthiness In Pre-Employment Selection Decisions: AN A.P.A. Task Force Report*, Washington, D.C. March, 1991, at page 14.

¹⁵⁸ *Id.* at 13.

¹⁵⁹ *Id.*

taker or an authorized representative unless other required by law. Scores of individuals identified by name should be made available only to those with a legitimate, professional interest in particular cases.¹⁶¹

This policy must be communicated to those individuals responsible for administering the tests, those persons relying on the results of the tests. A full and complete explanation regarding confidentiality and privacy must be explained to the test taker before the test is administered. Without such added protection, there will continue to be questions raised about the validity of honesty tests.

The predictability of dishonest behavior continues to be a major obstacle to acceptance of the concept of honesty testing. The Office of Technology Assessment reports in its findings that the research on honesty tests has not yet produced data that clearly supports or dismisses the assertion that these tests can predict dishonest behavior.¹⁶² Basing this finding on a lack of independent confirmation of research results, the problems identified in published reviews and a review of a sample of validity studies, the Office of Technology Assessment concludes that existing research is insufficient as a basis for supporting the claim that honest tests can reliably predict dishonest behavior in the workplace.¹⁶³

According to the National Commission on Testing and Public Policy, all tests share a basic characteristic; they are imperfect and therefore potentially misleading as measures of individual performance in education and employment.¹⁶⁴ Employers, confronted with mounting employee theft and dishonesty on one hand and fear of litigation for negligent hiring on the other, are turning to honesty testing as an inexpensive quick fix to a serious problem. Employers should look closely and carefully at any employee decision that is based on the results of one test alone. A more acceptable approach should take into consideration the job interview, conducted by a group of individuals within the company, reference checks from former employers, and honesty tests that meet the standards set out by the Standards for Educational and Psychological Testing.

Genetic Testing

Genetic testing has been recognized as a legitimate tool for the early detection of certain types of heart and kidney disease, cancer, Alzheimer's disease, manic-depressive illness, Huntington's disease, Duchene's muscular

¹⁶¹ *Id.* at 75.

¹⁶² *Id.* at 8.

¹⁶³ *Id.* at 10. See also the Task Force which calls for increased openness in sharing information regarding development and scoring of the test along with other basic psychometric information.

¹⁶⁴ The National Commission on Testing and Public Policy, *From Gatekeeper to Gateway: Transforming Testing in America* (Chestnut Hill, Ma. 1990), p.6.

dystrophy, cystic fibrosis and sickle cell anemia.¹⁶⁵ Employers are beginning to administer genetic testing to their applicants for employment to hire the most able-bodied and healthy workers, thus preventing industrial accidents.

In an effort to reduce job-related injuries, abate medical care costs and minimize time lost from work, genetic testing is on the rise. By using such screening tests, a number of job applicants predisposed to specific types of occupational illness can be identified.¹⁶⁶ Early recognition of those employees posing a high risk of occupational illness or injury may lead to a reduction in employee injury but claims of the test results being used to unfairly exclude applicants from employment¹⁶⁷ have begun to be heard.

Should employers be encouraged to screen job applicants for hyper-susceptibility to particular illnesses, where injuries may be prevented and lives saved? Will this form of job screening lead to actions by employers who refuse to hire those individuals who might in the future become expensive liabilities under worker's compensation, retirement or other employer benefit programs?¹⁶⁸ The debate rages on as to the validity of identifying applicants possessing hyper-susceptibility to occupational diseases.¹⁶⁹

A potential negative effect of genetic testing is the potential to use the test results as a means of discriminating against persons on the basis of race, sex and national origin.¹⁷⁰ Certain genetic screening devices test for deficiencies which overwhelmingly affect protected groups.¹⁷¹ There have not been any court cases challenging the use of genetic testing, so only time will tell whether this new form of pre-employment testing will become a mainstay in employment decisions

¹⁶⁵ Rowe et al, *New Issues in Testing the Work Force: Genetic Diseases*, 38 LAB. L.J. 518 (1987). It is also recognized that hereditary factors are relevant in such conditions as metabolic disorders, including diabetes, alcoholism, panic disorder, and some types of schizophrenia.

¹⁶⁶ Williams, *A Regulatory Model For Genetic Testing In Employment*, 40 OKLA. L. REV., 18 (1987). See also OFFICE OF TECHNOLOGICAL ASSESSMENT, U.S. CONGRESS, *THE ROLE OF GENETIC TESTING IN THE PREVENTION OF OCCUPATIONAL DISEASES* (1983).

¹⁶⁷ Williams, *supra* note 166, at 188. To the employer, genetic testing raises a double-edged sword. On the one hand, the use of genetic testing may lead to discrimination suits, but on the other hand, negligent hiring claims will result if a hyper-susceptible employee is assigned to a high risk job.

¹⁶⁸ Matthewman, *Title VII and Genetic Testing: Can Your Genes Screen You Out of a Job?*, 27 HOW. L.J. 1185, 1187 (1984). See also Note, *Genetic Testing In Employment: Employee Protection or Threat?*, 15 SUFFOLK U.L. REV. 1187 (1981) (an employer may escape future worker compensation claims for occupational disease that an employee suffers in the future).

¹⁶⁹ See generally Williams, *supra* note 166.

¹⁷⁰ Sanchez, *Genetic Testing: The Genesis Of A New Era In Employee Protection*, 11 W. ST. U.L. REV. 199 (1984). The genetics test that screens for anemia resulting from 6-6-PD deficiency is found in 16 percent of American Black males, 12 percent of the Filipino population and 11 percent of Mediterranean Jews, compared to 0.1 percent of American Anglos and British populations. *Id.* at 200-02.

¹⁷¹ Matthewman, *supra* note 168, at 1206. The sickle cell trait occurs in 7-9 % of American Blacks. *Id.*

in the future.

The Rehabilitation Act of 1973 and Americans With Disabilities Act are again drawn to the forefront in the debate over genetics testing. Both acts define handicapped individuals¹⁷² as persons with a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment or regarded as having an impairment. A person who is hyper-susceptible to injury who presently is healthy but the chances of future impairment are elevated, may come within the coverage of the federal law as being regarded as having an impairment.¹⁷³ Therefore, a healthy job applicant who is denied employment opportunities as a result of a genetic test predicting future injury or disability should argue that the employer is discriminating on the basis of handicap. The applicant is capable of presently performing the job and the future likelihood of injury is too remote to prevent the person from performing the job.

The fear espoused by employers of the future risk of injury to the employee or the public at large has been raised as sufficient business necessity to permit the exclusion of the person prone to future illness. In *E.E. Black Ltd. v. Marshall*, the court clearly articulated its position that risk of future injury shall never be a permissible defense of an employer for rejecting a qualified handicapped person, regardless of the likelihood of injury, the seriousness of the possible injury or the imminence of the injury.¹⁷⁴ In order for an employer to succeed in claiming a business necessity for excluding a person susceptible to illness, the employer must persuade the court that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.¹⁷⁵ The mere purpose of avoiding potential liability and future economic loss is insufficient grounds to establish a business necessity defense.¹⁷⁶

The reliability of genetics screening as a predictor of future injury continues to be major obstacle to its use. Perhaps when the work environment is made safer for all employees, there will be less of a demand on pre-employment

¹⁷² Rehabilitation Act, 29 U.S.C. § 706(6) (1988); Americans With Disabilities Act § 3(2).

¹⁷³ See Sanches, *supra* note 170. The author discusses at length the legal implications of the Rehabilitation Act to genetics testing.

¹⁷⁴ *E.E. Black Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980). See also Perras & Hunter, *Handicap Discrimination In Employment: The Employer's Defense of Future Safety Risk*, 6 J. L. & COMM. 377 (1986). See also Mantoletto v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (court discusses the "elevated risk of injury" theory). *Wilks v. Taylor School District*, 174 Mich. App. 232, 435 N.W.2d 436 (1988).

¹⁷⁵ *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971). See also *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

¹⁷⁶ *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 716-717 (1978). See also a detailed discussion in Note, *Genetic Testing in Employment: Employee Protection or Treat?*, 20 SUFFOLK U.L.

screening devices to identify and blacklist employees who posses potentially high risk conditions.

APPENDIX A
PRE-EMPLOYMENT QUESTIONNAIRE

Preliminary Questions

1. What type of business is your company engaged in: _____

2. Place an "X" by the number of full-time employees currently employed by your company:

- 1 - 15 _____
- 15 - 50 _____
- 50 - 100 _____
- 100 - 500 _____
- 500 or greater _____

3. Please list the states in which your company conducts business:

4. Does your company use a pre-employment physical exam for:

- All applicants Yes _____ No _____
- Some applicants Yes _____ No _____
- All persons offered employment Yes _____ No _____
- Some persons offered employment Yes _____ No _____

5. If your company requires a pre-employment physical exam of some, but not all persons *applying* for employment with your company, please explain why you require a physical exam for some persons:

6. If your company requires a pre-employment physical exam of some, but not all persons offered employment with your company, please explain why you require a physical exam for some persons:

7. If you answered yes to any part of question 4, does your company select the doctor who conducts the physical exam?

Yes _____ No _____. Explain: _____

8. If you answered yes to question 4, does your company pay for the physical exam? Yes _____ No _____. Explain: _____

9. Does your company use a "physical exertion test" for:

All applicants Yes _____ No _____

Some applicants Yes _____ No _____

All persons offered employment Yes _____ No _____

Some persons offered employment Yes _____ No _____

10. If your company requires a "physical exertion test" of some, but not all persons *applying* for employment with your company, please explain why you require a physical exam for some persons:

11. If your company requires a "physical exertion test" of some, but not all persons *offered* employment with your company, please explain why you require a 'physical exertion test'" for some persons:

12. Does your company use any of the following screening tests for all applicants who *apply* for work with your company?

- A) HIV Screening (AIDS) Yes _____ No _____
 B) Drug Screening Yes _____ No _____
 C) Alcohol Screening Yes _____ No _____
 D) Genetic Screening Yes _____ No _____

Please explain: _____

13. Does your company use any of the following screening tests for those persons *offered* employment with your company?

- A) HIV Screening (AIDS) Yes _____ No _____
 B) Drug Screening Yes _____ No _____
 C) Alcohol Screening Yes _____ No _____
 D) Genetic Screening Yes _____ No _____

Please explain: _____

14. If your company uses HIV, drug, alcohol, or genetic screening of some, but not all persons *applying* for employment with your company, please explain which screening test you use and why you use the screening test for some persons: _____

15. If your company uses HIV, drug, alcohol, or genetic screening of some, but not all persons *offered* for employment with your company, please explain which screening test you use and why you use the screening test for some employees: _____

16. If you responded "yes" to any of the choices in Questions 12-15, what action, if any, does your company take if the test conducted leads to a positive result?

Explain: _____

17. If your company uses any of the screening tests (HIV, drugs, alcohol, genetic), do you give advance notice to the person prior to administering the test?

Yes _____ No _____. Please explain: _____

18. Does your company use paper and pencil honesty or integrity tests for:

All applicants Yes _____ No _____

Some applicants Yes _____ No _____

All persons offered employment Yes _____ No _____

Some persons offered employment Yes _____ No _____

19. If your company uses paper and pencil honesty or integrity tests for some, but not all persons applying for employment with your company, please explain why you require a paper and pencil honesty or integrity test for some persons:

20. If your company uses paper and pencil honesty or integrity tests for some, but not all persons *offered* employment with your company, please explain why you require a paper and pencil honesty or integrity test for some persons:

21. Please list the name of the paper and pencil honesty or integrity test your company uses:

22. Additional information that would be helpful to this research:

If I can use direct quotations from this questionnaire, please sign authorization below.

AUTHORIZATION

I understand that this questionnaire which I am completing for Professor Donald H. Stone will be used as data for his research and scholarly writing. I give Mr. Stone permission to use direct quotations from this questionnaire at his discretion. I understand that my employer and I will retain anonymity in the writing of the article.

Date	Name (Please print)
Telephone	Signature
	Address

Please return in the self-addressed stamped envelope by August 2, 1991, to Professor Donald Stone, University of Baltimore Clinical Law Office, 1420 N. Charles Street, Baltimore, Maryland 21201.