Golden Gate University Law Review

Volume 29
Issue 1 *Ninth Circuit Survey*

Article 10

January 1999

Employment Law - Norman-Bloodsaw v. Lawrence Berkeley Laboratory

Cristina E. Echevarria

EMPLOYMENT LAW

NORMAN-BLOODSAW v. LAWRENCE BERKELEY LABORATORY

135 F.3d 1260 (9th Cir. 1998)

I. INTRODUCTION

In *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*,[1] the United States Court of Appeals for the Ninth Circuit held that employers who conduct nonconsensual medical testing may be liable for invasion of privacy under the United States and California Constitutions.[2] In addition, the court held that Title VII of the Civil Rights Act of 1964 (Title VII)[3] protects employees from nonconsensual medical testing that has a disparate impact on a protected group.[4] The Ninth Circuit held, however, that the American's with Disabilities Act of 1990 (ADA), does not limit the scope of the employee testing when the tests are

---

1. 135 F.3d 1260 (9th Cir. 1998). The appeal from United States District Court for the Northern District of California, was argued and submitted on June 10, 1997 before Circuit Judge Reinhart, Judge T.G. Nelson, and Judge Hawkins. The decision was filed February 3, 1998. Judge Reinhardt authored the opinion.

2. *See* U.S. CONST. amend. §§ 4, 5, 14.; *See also* Cal. CONST. art. I, § 1. Issues of material fact existed as to whether Lawrence had sufficient interest in obtaining the sensitive medical information and whether the employees had a reasonable expectation of privacy, precluding summary judgment in employees' claims alleging violation of state and federal constitutional rights to privacy. *See* Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1275 (9th Cir. 1998).

3. *See* 42 U.S.C.A. §2000e-2(a) (West 1988), which states in relevant part: "it is unlawful for any employer ... to discriminate [against] any individual with respect to his ... terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

4. *See Norman-Bloodsaw*, 135 F.3d at 1260. The employees contended that Lawrence singled out black employees and female employees generally for specific nonconsensual medical testing. *See id.* at 1265.

administered after a job is offered and prior to actual employment.[5]

II. FACTS AND PROCEDURAL HISTORY

In *Norman-Bloodsaw*, the plaintiffs[6] had applied for employment at Lawrence Berkeley Laboratory ("Lawrence"), a research facility operated by the Regents of California under contract with the United States Department of Energy.[7] The employees filed suit against Lawrence, alleging a variety of claims including invasion of privacy and violations of Title VII and the ADA.[8] They were notified in writing that employment was conditioned upon a medical examination.[9]

During the employment entrance examinations, the potential employees completed medical history questionnaires[10] and provided blood and urine samples.[11] Lawrence selectively tested the employees' blood and urine for syphilis, sickle cell trait, and pregnancy without their knowledge or consent.[12]

The district court granted Lawrence's motions for dismissal, judgment on the pleadings and summary judgment on all

---

5. *See* 42 U.S.C. § 12112(d); *See also Norman-Bloodsaw*, 135 F.3d at 1273.

6. The seven named plaintiffs included present and former clerical and administrative employees of Lawrence Berkeley Laboratory. In September of 1995, these employees brought suit on behalf of all past and present Lawrence employees who had ever been subjected to the medical tests at issue. *See* Norman-Bloodsaw v. Lawrence Berkeley Laboratory,135 F.3d 1260, 1264 – 1265 (9th Cir. 1998).

7. *See id.* at 1264. The Defendant-Appellees included Lawrence, Lawrence's Laboratory's Director, four physicians in the medical department, the Secretary of the Department of Energy, and the Regents of the University of California. *See id.* at 1265.

8. *See id* at 1264.

9. *See id.* at 1264, 1265. Lawrence notified all employees of the health exams, with the exception of one, indicating they needed "medical examinations," "medical approval," or "health evaluations." The one exception was an employee hired years before the others, who underwent an examination after commencing employment. Two of the employees underwent examinations on subsequent occasions as well as at hire. *See Norman-Bloodsaw*, 135 F.3d at 1264, 1265.

10. *See id.* at 1265. The questionnaires inquired about whether the employees had ever had any of sixty-one medical conditions including sickle cell anemia, venereal disease and menstrual disorders. *See id.*

11. *See id.*

12. *See id.* at 1264.

claims.[13] Although the Ninth Circuit affirmed the district court's dismissal of the ADA claims, the Ninth Circuit held that summary judgment was inappropriate on the privacy claims under the United States[14] and California Constitutions.[15] Moreover, the Ninth Circuit held the employees stated a cause of action for violation of Title VII.[16] The Ninth Circuit also found that fact issues precluded summary judgment as to statutes of limitation.[17]

---

13. *See Norman-Bloodsaw*, 135 F.3d at 1266. The district court concluded that all of the ADA claims were time-barred. The district court also concluded the privacy claims were time-barred and, in the alternative, the testing did not violate the employees' right to privacy. The court further concluded the employees failed to state a viable Title VII claim. *See id.*

14. U.S. CONST. amend. §§ 4, 5, 14. The Ninth Circuit generally analyzes medical tests and examinations, which evoke due process and Fourth Amendment protections, as it would a person's Fourth Amendment right to be free from illegal searches and seizures. Accordingly, a court must balance the government's interest in conducting the tests in question with the public employees right to privacy. *See Norman-Bloodsaw*, 135 F.3d at 1269 (citing Yin v. California 95 F.3d 864, 870 (9th Cir. 1996) cert denied, ___U.S.___, 117 S.Ct 955, 136 L.Ed.2d 842 (1997).

15. *See* CAL. CONST. art. I, § 1. A plaintiff must establish three threshold elements for a cause of action under the California Constitution right to privacy: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy given the circumstances; and (3) defendant's serious invasion of the protected privacy interest. The court must then balance the defendant's countervailing interests against the intrusion on the privacy interest at stake. Less intrusive alternatives to defendant's conduct may rebut defendant's countervailing interests. *See Norman-Bloodsaw*, 135 F.3d at 1271 (citing Loder v. City of Glendale, 927 P.2d 1200, 1228 (1997) (quoting Hill v. National Collegiate Athletic Ass'n, 7 Cal.4th 1, 26 Cal.Rptr.2d 633, 657 (1994), *cert. denied*, __U.S.__, 118 S.Ct. 44, 139 L.Ed.2d 11 (1997)).

16. *See also* FED. R. CIV. P. 56(c). Questions of material fact existed as to when the employees knew or had reason to know that Lawrence was testing for the medical and genetic information. Therefore the district court's granting of summary judgment was reversed with respect to the statutes of limitation for causes of action under Title VII and the U.S. and California Constitutional privacy rights. *See Norman-Bloodsaw*, 135 F.3d at 1266.

17. *See Norman-Bloodsaw*, 135 F.3d at 1266. The Ninth Circuit disposed of Lawrence's contention that the employees' claims were untimely. Citing Trotter v. International Longshoremen's & Warehousemen's Union, 704 F.2d 1141, 1143 (9th Cir. 1983), the court held that the statute of limitations begins to run when "the plaintiff knows or has reason to know of the injury which is the basis of the action." *Norman-Bloodsaw*, 135 F.3d. at 1266. The record strongly suggested that the employees had no knowledge of the particular testing involved at the time of the examinations. Therefore, the Ninth Circuit concluded that the factual issue as to when the employees had reason to know Lawrence was testing for sensitive medical information should have gone to trial. *See id.* at 1266, 1267.

III. THE COURT'S ANALYSIS

A. FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF PRIVACY

1. Federal Constitutional Claim

The Ninth Circuit first noted that one of the most basic violation of one's constitutional right to privacy is performing unauthorized medical tests.[18] Further, according to the court, when the test involves intimate matters relating to one's sexual and genetic history, the Constitution offers even greater protection.[19] The court stated that Lawrence's unauthorized acquisition of previously unrevealed medical information could be characterized as a search in violation of the Fourth Amendment.[20] In addition, the non-consensual testing violated the employees' rights under the Due Process Clause[21] of the Fifth or Fourteenth Amendments of the United States Constitution.[22]

In balancing the government's interest against the employees' privacy expectations, the court considered three factors.[23] The court weighed (1) the degree of intrusiveness of the tests; (2) Lawrence's justifications for the tests; (3) and the "efficacy of the state's means for meeting its needs." The Ninth Circuit found that the testing significantly invaded the employees' pri-

---

18. Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1269 (9th Cir. 1998).

19. *See id.* at 1269. The Constitution protects employees from an employer's "unrestrained inquiries" into personal sexual matters unrelated to job performance. *See id.*, (citing Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1336 (9th Cir. 1987), citing, Thorne v. City of El Segundo, 726 F.2d 459, 470 (9th Cir. 1983)).

20. 135 F.3d at 1269 (citing Yin v. California, 95 F.3d 864, 870 (9th Cir. 1996), *cert. denied*, ___U.S.___, 117 S.Ct 955, 136 L.Ed.2d 842 (1997)).

21. The Due Process Clause states, "No person shall ... be deprived of life, liberty, or property, without due process of law...." *See* U.S. CONST. amend. V. "Nor shall any State deprive any person of life, liberty, or property, without due process of law." *See* U.S. CONST. amend. XIV § 1 ..

22. *See Norman-Bloodsaw*, 135 F.3d at 1269 (citing *Yin*, 95 F.3d at 870).

23. Lawrence is considered a public entity since it operates under state and federal agencies, thereby making the Fourth Amendment analysis applicable. *See id.* at 1266. In accordance with general Ninth Circuit practice the court chose a Fourth Amendment analysis of the medical testing at issue. *See Norman-Bloodsaw*, 135 F.3d at 1269 (citing *Yin*, 95 F.3d at 873, quoting Veronica School District 47J v. Acton, 515 U.S. 646, 660, (1995)).

vacy rights even though the employees agreed to the examinations, filled out questionnaires relating to similarly sensitive information and furnished blood and urine samples to the examiners.[24] In accordance with the United States Supreme Court decision, in *Skinner v. Railway Labor Executives' Association*, the Ninth Circuit separated an employee's relinquishment of blood and urine samples from the further intrusion of actually testing the bodily fluids.[25] Thus, agreeing to a general medical examination or filling out a questionnaire did not equate to unlimited authorization for testing of intimate, personal health matters.

2. *California Constitutional Claim*

Unlike a federal privacy claim, which does not require a showing that the defendant's invasion was serious,[26] the Ninth Circuit concluded that the requirements of a privacy claim under Article I § 1 of the California Constitution are more rigorous.[27] The Ninth Circuit found three threshold requirements for a cause of action under Article I § 1: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy given the circumstances; and (3) defendant's serious invasion of the protected privacy interest. The court found a privacy interest arose under the California Constitution due to the sort of information Lawrence's tests revealed.[28] Therefore, consonant with the federal privacy claim, summary judgment on the state claim was inappropriate because a factual dispute existed re-

---

24. *See Norman-Bloodsaw*, 135 F.3d at 1268, 1270. The court reasoned that acquiescence to a lesser intrusion of privacy such as filling in a questionnaire does not authorize further intrusions even if they are tangentially related. *See id.*

25. *See id.*, at 1270. Taking a person's bodily fluid implicates one's privacy interests. The medical analysis of the sample, however, is a *further* intrusion of the employee's privacy interests. *See id.*, note 13 (*citing* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).)

26. Under the federal standard, the application of the balancing test requires an evaluation of three elements. *See* discussion *supra*. The Ninth Circuit cited Yin v. California, 95 F.3d 864, 873, quoting Veronica School District 47J v. Acton, 515 U.S. 646, 660 (1995)). *See Norman-Bloodsaw*, 135 F.3d at 1269, 1271.

27. *See Norman-Bloodsaw*, 135 F.3d at 1271.

28. The court cited Loder v. City of Glendale, 927 P.2d at 1232 (finding procedure that, *inter alia*, "authorizes testing in order to acquire information concerning the internal state of the tested individual's body" to clearly intrude upon state privacy interests). *See Norman-Bloodsaw*, 135 F.3d at 1271, n. 17.

garding Lawrence's interest in obtaining the information and the employees reasonable expectation of privacy. [29]

B. TITLE VII CLAIMS

Relying on *Griggs v. Duke Power Co.*,[30] the Ninth Circuit determined that the employees' claims fell within the framework of a Title VII cause of action.[31] The employees alleged that Lawrence performed additional tests based on their sex and race, namely pregnancy tests for women and sickle cell trait testing for African Americans.[32] Even if this nonconsensual testing did not rise to the level of unconstitutionality, the court noted that it was still an appropriate basis for a Title VII claim since the tests qualified as a "term or condition" based on a statutorily protected category.[33] Lastly, the court explained that the Title VII action would stand whether or not the discriminatory testing caused any employees not to be hired.[34]

---

29. *See id.* at 1271. *See supra* note 8 for complete discussion of threshold requirements.

30. 401 U.S. 424, 432-36 (1971) (holding that facially neutral testing requirements that are not reasonable measures of job performance and have a disparate impact on hiring of minorities violate Title VII).

31. *See Norman-Bloodsaw*, 135 F.3d at 1271. Title VII of the Civil Rights Act of 1964 prohibits employment practices which have an adverse impact on a protected group. Title VII §703(a) provides "it is unlawful for any employer to fail or refuse to hire...or otherwise to discriminate any individual with respect to his...terms, conditions, or privileges of employment, because of such individual's race, color religion sex or national origin." 42 U.S.C. §2000e-2(a).

32. *See Norman-Bloodsaw*, 135 F.3d at 1272. The Ninth Circuit noted that whether or not a person carries sickle cell trait relates to sensitive information about family history and reproductive decision making. *See id.* at 1270.

33. *Id.*

34. *Id.*, n. 18, citing Hashimoto v. Dalton, 118 F.3d 671,676 (9th Cir. 1997) (holding that unlawful personnel action that "turn[s] out to be inconsequential goes to the issue of damages, not liability"); *see also* EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir.1989).

C. ADA CLAIMS

Two employees had standing to challenge the medical testing under the Americans with Disabilities Act.[35] These two employees alleged that Lawrence violated the ADA by requiring medical examinations that were neither job related, nor consistent with business necessity.[36]

The Ninth Circuit first noted that the ADA divides medical exams into three distinct categories: (1) "pre-employment inquiries and examinations"; (2) "employment entrance examinations"; and (3) examinations conducted anytime thereafter.[37] The Ninth Circuit concluded that Lawrence's medical testing fell within the ADA's second category because the tests were administered after the employees received written offers of employment and prior to the commencement of their job duties.[38] Consequently, the court held that Lawrence did not violate the ADA because "employment entrance examinations" need not be justified by job related functions nor consistent with business necessity. [39]

The Ninth Circuit confirmed that the ADA only guarantees that the information gathered by an employer will be kept confidential and limits an employer's actual use of the information.[40] Under the ADA, employers are completely unrestricted with respect to the scope of an employee entrance exam, as long as it is conducted after an offer of employment has been made

---

35. The ADA protections became effective in regards to public entities on January 26, 1992. Only two Lawrence employees underwent medical testing on or after that date. *See Norman-Bloodsaw*, 135 F.3d at 1273, n. 21.

36. *See id.* at 1273. "A covered entity shall not require a medical examination ... unless such examination or inquiry is shown to be job related and consistent with business necessity." 42 U.S.C. § 12112 (c)(4).

37. *See Norman-Bloodsaw*, 135 F.3d at 1273; *see also* 42 U.S.C. § 12112(d). Pre-employment examinations are those conducted prior to an offer of employment. Employment entrance examinations are those conducted after an applicant is offered a job, yet actual employment is typically conditioned upon the testing results.

38. *See Norman-Bloodsaw*, 135 F.3d at 1273.

39. *See Norman-Bloodsaw*, 135 F.3d at 1273. Employment entrance examinations are those conducted "after an offer of employment has been made" but "prior to the commencement of ... employment duties." *See* 42 U.S.C. § 12112(d)(3).

40. *See Norman-Bloodsaw*, 135 F.3d at 1273. *See also* 42 U.S.C.A. § 12112(d)(3)(B) & (C).

but before the employee begins their duties.[41] Thus, the court concluded that ADA did not apply to the medical and genetic testing performed by Lawrence.[42]

IV. IMPLICATIONS OF DECISION

The Ninth Circuit, in *Norman-Bloodsaw*, placed limits upon an employer's ability to perform medical inquiries into their employees' background. Employers can be found liable for invasion of privacy claims. Moreover, employees can assert Title VII claims if the medical testing creates an adverse impact on a statutorily protected group.[43]

Even though the Ninth Circuit held that under the ADA a business justification was not required for the particular type of testing at issue in *Norman-Bloodsaw*, employers should follow recommended policies to avoid general exposure to other claims such as, privacy claims, Title VII claims, and ADA claims in other categories.[44]

---

41. *See* 42 U.S.C. § 12112(d)(3)(B).

42. The employees also alleged that Lawrence violated the ADA by not providing or adequately describing how sensitive information was safeguarded. *See Norman-Bloodsaw*, 135 F.3d at 1274. The Ninth Circuit concluded that the employees failed to state a violation of the ADA record keeping requirements because they merely alleged that Lawrence did not adequately describe safegurds to prevent dissemination of sensitive medical information. *See id.* Furthermore, the ADA does not restrict records that may be kept to matters that are "job related and consistent with business necessity." *See id.* at 1273; *see also* 42 U.S.C. § 12112(d)(3)(B).

43. Liability can be minimized if (1) the employer obtains an employee's written consent for the specific medical testing; (2) the employee is provided advanced notice of the testing; (3) the disclosure of results is limited to a very specific category of persons; and (4) the testing procedures are the least intrusive possible. *See* U.S. Congress, Office of Technology Assessment, *Medical Testing and Health Insurance*, OTA-H-384 (Washington, D.C.: U.S. Government Printing Office) August 1988 at 101, as cited in BNA special report, *Workplace Privacy*, 2nd edition by Ira Michael Shepard, Robert L. Duston and Karen S. Russell, (1989).

44. When determining whether an employer's screening practices comply with federal and state laws, the following inquiry is recommended. First, an employer should consider whether it has a business justification for requiring a particular applicant or employee to complete a questionnaire or take an examination. Further, an employer should have a business justification for each medical inquiry, each question asked or procedure performed. Employers should assess whether their justification applies to all jobs or only to certain positions. In addition, employers should examine who will have access to the results of the medical exams. Lastly, employers must ascertain what will be done with testing results. An employer must be able to

Looking forward, a careful balance must be struck between an employer's need to screen employees and employees' desires to be free from unwanted involvement in their private lives.

Cristina E. Echevarria[*]

---

articulate under what circumstances will they refuse to hire or transfer an applicant based on test results. *See* BNA Special Report, *Workplace Privacy*, 2nd edition by Ira Michael Shepard, Robert L. Duston and Karen S. Russell, at 191, (1989).

* Golden Gate University School of Law, Class of 1999.