

Positive Drug Test Does Not Give Free Rein To Pre-Employment Medical Inquiries

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A recent decision sends a reminder that employers cannot make pre-employment disability related inquiries, even when such inquiries are related to a positive drug test. Prohibited questions are those “likely to elicit information about a disability.”

In *Harrison v. Benchmark Electronics Huntsville, Inc.*, an applicant tested positive for barbiturates, which were prescribed to treat his epilepsy. The Medical Review Officer (MRO), in the presence of the hiring supervisor, asked how long the applicant had been disabled, what specific medication he took and for how long. The applicant reported that he had had epilepsy since he was two years old and took barbiturates to control it. The MRO reported that the applicant had cleared the drug test, but the company, nevertheless, did not hire him. The applicant sued claiming that even though he was not actually disabled the employer’s questions violated the Americans With Disabilities Act.

The court recognized that while a drug test to determine the illegal use of drugs is not a medical exam, employers may still violate the ADA by asking questions about current or prior lawful drug use, if the questions are likely to elicit information about a disability. The court noted that lawful questions include: “What medications have you taken that might have resulted in this positive test result?” and “Are you taking this medication under a lawful prescription?” However, the court concluded that the questions asked in the *Harrison* case may be seen by a jury as “an intentional attempt likely to elicit information about a disability.” The court stated the employer’s right to conduct drug tests “should not conflict with the right of individuals who take drugs under medical supervision not to disclose their medical condition before a conditional offer of employment has been given.” Importantly, *Harrison* involved questions asked *before* a conditional offer of employment was made.

In the pre-employment stage employers may only make inquiries into the ability of an applicant to perform job-related functions and/or how, with or without a reasonable accommodation, the applicant will be able to perform the job-related functions. Employers who use pre-employment drug screens must be careful how they elicit further information about a positive drug test. Questions asked by a Medical Review Officer or agent of the employer may result in claims under the ADA, even if the applicant is not actually disabled.

No matter what stage of the employment relationship, drug tests create potential legal issues for employers.

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